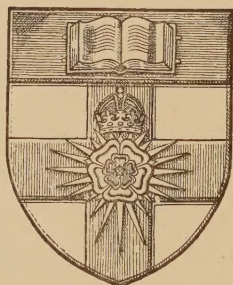


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1958
VOLUME 2

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LONDON
BUTTERWORTH & CO. (PUBLISHERS) LTD.



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HALSBURY'S LAWS OF ENGLAND, HAILSHAM EDITION

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HALSBURY'S STATUTES OF ENGLAND, SECOND EDITION

The reference 26 HALSBURY'S STATUTES (2nd Edn.) 138, refers to page 138 of Volume 26 of the second edition of Halsbury's Statutes.

ENGLISH AND EMPIRE DIGEST

The reference 24 DIGEST 602, 6028, refers to case No. 6028 on page 602 of Volume 24 of the Digest.

There are three cumulative supplements to the Digest, described as Digest Supp., 2nd Digest Supp. and 3rd Digest Supp.; of these the first two include cases up to December 31, 1939, and December 31, 1951, respectively.

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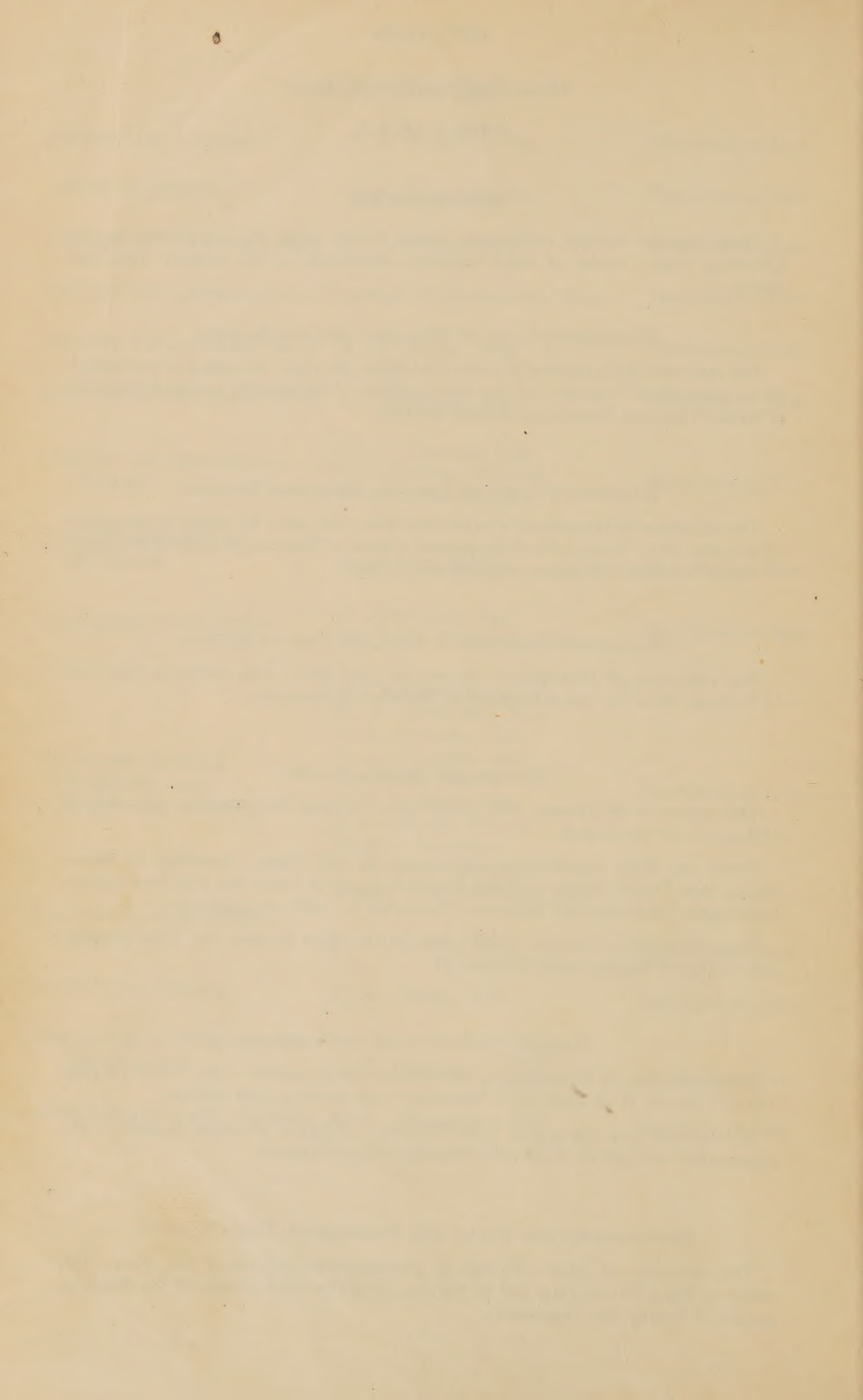
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CASES REPORTED IN VOLUME 2

	PAGE		PAGE
ADAIR, R. v. [C.C.A.]	629	CITY & WESTMINSTER PROPERTIES (1934), LTD. v. MUDD [CH.D.]	733
ADAMS v. NATIONAL BANK OF GREECE AND ATHENS, S.A. [Q.B.D.]	3	CLAYCARRIER, THE [ADM.]	659
ADDIS v. ODHAMS PRESS, LTD. [C.A.]	462	CLEAR v. CLEAR [C.A.]	353
AGRIMPEX HUNGARIAN TRADING COMPANY FOR AGRICULTURAL PRODUCTS v. SOCIEDAD FIN- ANCIERA DE BIENES RAICES S.A. [C.A.]	695	COLMAN (<i>decd.</i>), <i>In the Estate of</i> [PROB.]	35
AIREY v. AIREY [Q.B.D.]	59	COMMISSIONER OF STAMP DUTIES, CHICK v. [P.C.]	623
—, [C.A.]	571	COMMISSIONER OF TAXATION OF THE COMMON- WEALTH OF AUSTRALIA, NEWTON v. [P.C.]	759
ALLIANCE BUILDING SOCIETY v. PINWILL [CH.D.]	408	COMPANIA CRYSTAL DE VAPORES OF PANAMA v. HERMAN & MOHATTA (INDIA), LTD. [Q.B.D.]	508
ALLSOPP'S MARRIAGE SETTLEMENT TRUSTS, Re [CH.D.]	393	COOPER, WELLS v. [C.A.]	527
AMERICAN JURIST, THE [ADM.]	659	CUSACK-SMITH v. GOLD [Q.B.D.]	361
AMERICAN JURIST (OWNERS) v. FERRANTI (OWNERS) & CLAYCARRIER (OWNERS) [ADM.]	659	DAVIES, BEER v. [Q.B.D. DIVL. CT.]	255
ANDREWS (INFANTS), Re [CH.D.]	308	DEACOCK v. DEACOCK [C.A.]	633
ANDREWS v. ANDREWS & SULLIVAN [DIV.]	305	DENNING (<i>decd.</i>), Re [PROB.]	1
ATTORNEY-GENERAL (AT THE RELATION OF EGHAM URBAN DISTRICT COUNCIL) v. SMITH [Q.B.D.]	557	DENTAL MANUFACTURING CO., LTD., NOLAN v. [MANCHESTER ASSIZES]	449
AUSTRALIAN MUTUAL PROVIDENT SOCIETY, OSTIME (INSPECTOR OF TAXES) v. [C.A.]	665	DONALDSON v. DONALDSON [DIV.]	660
AYR ENGINEERING AND CONSTRUCTIONAL CO., LTD., BAILEY v. [C.A.]	222	DURAIMAY, TENNEKON (COMMISSIONER FOR REGISTRATION OF INDIAN AND PAKISTANI RESIDENTS) v. [P.C.]	479
B. (OTHERWISE S.) v. B. [DIV.]	76	EASTBOURNE CORPN. v. FORTES ICE CREAM PARLOUR (1955), LTD. [Q.B.D. DIVL. CT.]	276
BAILEY v. AYR ENGINEERING & CONSTRUCTIONal CO., LTD. [C.A.]	222	EDGAR, R. v. [C.C.A.]	494
BAKER (G. L.), LTD. v. MEDWAY BUILDING AND SUPPLIES, LTD. [CH.D.]	532	EDWARDS v. EDWARDS [DIV.]	179
BALDWIN & FRANCIS, LTD. v. PATENTS APPEAL TRIBUNAL [C.A.]	368	ESPRESSO COFFEE MACHINE CO., LTD. v. GUARDIAN ASSURANCE CO. [CH.D.]	692
BAUME & CO., LTD. v. MOORE (A. H.), LTD. [C.A.]	113	FERRANTI (OWNERS) v. AMERICAN JURIST (OWNERS) & CLAYCARRIER (OWNERS) [ADM.]	659
BAXTER v. STOCKTON-ON-TEES CORPN. [C.A.]	675	FIBREGLASS, LTD., GREEN v. [NEWCASTLE ASSIZES]	521
BAYLIS BAXTER, LTD. v. SABATH [C.A.]	209	FIELD, R. v. [C.C.A.]	567
BEAVERBROOK NEWSPAPERS, LTD., SILKIN v. [Q.B.D.]	516	FILBY BROS. (PROVENDER), LTD., Re [CH.D.]	458
BEER v. DAVIES [Q.B.D. DIVL. CT.]	255	FITZPATRICK, R. v. [C.C.A.]	567
BETTS (VALUATION OFFICER), LONDON TRANS- PORT EXECUTIVE v. [H.L.]	636	FORTES ICE CREAM PARLOUR (1955), LTD., EASTBOURNE CORPN. v. [Q.B.D. DIVL. CT.]	276
BIRMINGHAM (<i>decd.</i>), Re [CH.D.]	397	FREEHOLD INVESTMENT (LEYTONSTONE), LTD., GRANADA THEATRES, LTD. v. [CH.D.]	551
BOREHAM, STONE v. [Q.B.D. DIVL. CT.]	715	FYSON v. BUCKINGHAMSHIRE COUNTY COUNCIL [Q.B.D. DIVL. CT.]	286
BOSLEY v. BOSLEY [C.A.]	167	GALE, SIMONS (TRADING AS ACME CREDIT SER- VICES) v. [P.C.]	504
BOYCE (INSPECTOR OF TAXES), WRIGHT v. [C.A.]	703	GEORGE (TRADING AS YARNS & FIBRES CO.) FOURTH PARTY, TURKIE THIRD PARTY, CATTAN (L. E.), LTD. v. MICHAELIDES (A.) & CO. (A FIRM) [Q.B.D.]	125
BRANCEPETH COAL CO., LTD. (IN LIQUIDATION), INLAND REVENUE COMRS. v. [C.A.]	91	GILLINGHAM BUS DISASTER FUND, Re [C.A.]	749
BRITISH BOXING BOARD OF CONTROL (1929), WILLIAMSON v. [Q.B.D.]	228	GOLD, CUSACK-SMITH v. [Q.B.D.]	361
BRITISH TRANSPORT COMMISSION, CADE v. [H.L.]	615	GOLD v. PATMAN AND FOTHERINGHAM, LTD. [C.A.]	497
BRITISH TRANSPORT COMMISSION, HICKS v. [C.A.]	39	GOODYEAR TYRE & RUBBER CO. (GREAT BRITAIN), LTD. v. LANCASHIRE BATTERIES, LTD. [CH.D.]	324
BROWN v. RAPHAEL [C.A.]	79	GRACE RYMER INVESTMENTS, LTD. v. WAITE [C.A.]	777
BUCKINGHAMSHIRE COUNTY COUNCIL, FYSON v. [Q.B.D. DIVL. CT.]	286	GRANADA THEATRES, LTD. v. FREEHOLD IN- VESTMENT (LEYTONSTONE), LTD. [CH.D.]	551
BUCKINGHAMSHIRE COUNTY COUNCIL, METAL RECOVERY AND STORAGE CO., LTD. v. [Q.B.D. DIVL. CT.]	286	GRECH v. ODHAMS PRESS, LTD. [C.A.]	462
BURGESS v. BURGESS [DIV.]	63	GREEN (A BANKRUPT), Re, <i>Ex parte</i> THE TRUSTEE [C.A.]	57
BYRNE v. KINEMATOGRAPH RENTERS SOCIETY, LTD. [CH.D.]	579	GREEN v. FIBREGLASS, LTD. [NEWCASTLE ASSIZES]	521
C. (AN INFANT), Re [CH.D.]	658	GREEN, HANAK v. [C.A.]	141
CADE v. BRITISH TRANSPORT COMMISSION [H.L.]	615	GREY v. INLAND REVENUE COMRS. [C.A.]	428
CASTIGLIONE, ERSKINE & CO., LTD., Re [CH.D.]	455	GRIFFITHS, <i>Ex parte</i> , R. v. MEDICAL APPEAL TRIBUNAL FOR SOUTH WALES DISTRICT [Q.B.D. DIVL. CT.]	227
CATTAN (L. E.), LTD. v. MICHAELIDES (A.) & CO. (A FIRM) (TURKIE THIRD PARTY, GEORGE (TRADING AS YARNS & FIBRES CO.) FOURTH PARTY) [Q.B.D.]	125	GUARDIAN ASSURANCE CO., ESPRESSO COFFEE MACHINE CO., LTD. v. [CH.D.]	692
CENTRAL COMMERCIAL PROPERTIES, LTD., LYONS v. [C.A.]	767	GUINNESS TRUST (LONDON FUND) FOUNDED 1890 REGISTERED 1902 v. WEST HAM CORPN. [Q.B.D. DIVL. CT.]	237
CHAPPELL & CO., LTD. v. NESTLÉ CO., LTD. [C.A.]	155	HAMILTON v. WEST SUSSEX COUNTY COUNCIL [Q.B.D.]	174
CHICK v. COMMISSIONER OF STAMP DUTIES [P.C.]	623	HAMILTON-SNOWBALL'S CONVEYANCE, Re [CH.D.]	319
CITATI, UNIVERSAL CARGO CARRIERS CORPN. v. (No. 2) [C.A.]	563	HANAK v. GREEN [C.A.]	141

	PAGE
HANDS, RAYFIELD <i>v.</i> [CH.D.]	194
HARLOW URBAN DISTRICT COUNCIL, SAYERS <i>v.</i> [C.A.]	342
HASLIP (<i>decd.</i>), <i>Re</i> [PROB.]	275
HAVANT AND WATERLOO URBAN DISTRICT COUNCIL <i>v.</i> NORUM [C.A.]	423
HERMAN & MOHATTA (INDIA), LTD., COMPANIA CRYSTAL DE VAPORES OF PANAMA <i>v.</i> [Q.B.D.]	508
HICKS <i>v.</i> BRITISH TRANSPORT COMMISSION [C.A.]	39
HILLIER <i>v.</i> HILLIER AND LATHAM [C.A.]	261
HOLMES <i>v.</i> KEYES (LORD) [C.A.]	129
HOLMES ROAD (NOS. 55 AND 57), KENTISH TOWN, <i>Re</i> [CH.D.]	311
HUBBLE, <i>Ex parte</i> , <i>R. v.</i> MEDICAL APPEAL TRIBUNAL (NORTH MIDLAND REGION) [Q.B.D. DIVL. CT.]	374
HUGHES <i>v.</i> HUGHES [DIV.]	366
HUMPHRIES, PRICE <i>v.</i> [Q.B.D. DIVL. CT.]	725
INGRAM, WIGGINS (OTHERWISE BROOKS) AND, <i>v.</i> WIGGINS (BIRMINGHAM DISTRICT REGISTRY) INLAND REVENUE COMRS. <i>v.</i> BRANCEPETH COAL CO., LTD. (IN LIQUIDATION) [C.A.]	91
INLAND REVENUE COMRS., GREY <i>v.</i> [C.A.]	428
INLAND REVENUE COMRS., LONDON INVESTMENT AND MORTGAGE CO., LTD. <i>v.</i> [H.L.]	230
INLAND REVENUE COMRS., OUGHTRED <i>v.</i> [C.A.]	443
INLAND REVENUE COMRS., PUBLIC TRUSTEE <i>v.</i> [C.A.]	720
INLAND REVENUE COMRS., PYE-SMITH <i>v.</i> [CH.D.]	785
INLAND REVENUE COMRS., RACECOURSE BETTING CONTROL BOARD <i>v.</i> [C.A.]	385
INLAND REVENUE COMRS. <i>v.</i> RAMSHAW COAL CO., LTD. (IN LIQUIDATION) [C.A.]	91
INLAND REVENUE COMRS. <i>v.</i> WHITWORTH PARK COAL CO., LTD. (IN LIQUIDATION) [C.A.]	91
JARVIS (<i>decd.</i>), <i>Re</i> [CH.D.]	336
JUBILEE COFFEE ROASTING CO., LTD., LONDON EXPORT CORPN., LTD. <i>v.</i> [C.A.]	411
KELLSHER <i>v.</i> WALL (T.) & SONS, LTD. [Q.B.D.]	686
KEYES (LORD), HOLMES <i>v.</i> [C.A.]	129
KINEMATOGRAPH RENTERS SOCIETY, LTD., BYRNE <i>v.</i> [CH.D.]	579
KITCHEN <i>v.</i> ROYAL AIR FORCES ASSOCIATION [C.A.]	241
KNIGHT, R. <i>v.</i> [C.C.A.]	567
KOLOK MANUFACTURING CO., LTD., KORES MANUFACTURING CO., LTD. <i>v.</i> [C.A.]	65
KORES MANUFACTURING CO., LTD. <i>v.</i> KOLOK MANUFACTURING CO., LTD. [C.A.]	65
KRUHLAK <i>v.</i> KRUHLAK (NO. 2) [Q.B.D. DIVL. CT.]	294
LANCASHIRE BATTERIES, LTD., GOODYEAR TYRE & RUBBER CO. (GREAT BRITAIN), LTD. <i>v.</i> [CH.D.]	324
LATHAM, HILLIER AND, HILLIER <i>v.</i> [C.A.]	261
LITHERLAND URBAN DISTRICT COUNCIL <i>v.</i> LIVERPOOL CORPN. [CH.D.]	489
LITTLER, LOEW'S INCORPORATED <i>v.</i> [C.A.]	200
LIVERPOOL CORPN., LITHERLAND URBAN DISTRICT COUNCIL <i>v.</i> [CH.D.]	489
LOYD LONG <i>v.</i> [C.A.]	402
LOEW'S INCORPORATED <i>v.</i> LITTLER [C.A.]	200
LONDON EXPORT CORPN., LTD. <i>v.</i> JUBILEE COFFEE ROASTING CO., LTD. [C.A.]	411
LONDON INVESTMENT AND MORTGAGE CO., LTD. <i>v.</i> INLAND REVENUE COMRS. [H.L.]	230
LONDON INVESTMENT AND MORTGAGE CO., LTD. <i>v.</i> WORTHINGTON (INSPECTOR OF TAXES) [H.L.]	230
LONDON TRANSPORT EXECUTIVE <i>v.</i> BETTS (VALUATION OFFICER) [H.L.]	636
LONG <i>v.</i> LLOYD [C.A.]	402
LYONS <i>v.</i> CENTRAL COMMERCIAL PROPERTIES, LTD. [C.A.]	767
MARLEY, R. <i>v.</i> [C.C.A.]	359
MATHESON, R. <i>v.</i> [C.C.A.]	87
MEDCALF <i>v.</i> MEDCALF [C.A.]	11
MEDICAL APPEAL TRIBUNAL (NORTH MIDLAND REGION), <i>R. v.</i> <i>Ex parte</i> HUBBLE [Q.B.D. DIVL. CT.]	374
MEDICAL APPEAL TRIBUNAL FOR SOUTH WALES DISTRICT, <i>R. v.</i> <i>Ex parte</i> GRIFFITHS [Q.B.D. DIVL. CT.]	227
MEDWAY BUILDING AND SUPPLIES, LTD., BAKER (G. L.), LTD. <i>v.</i> [CH.D.]	532
MERRICKS, POTATO MARKETING BOARD <i>v.</i> [Q.B.D.]	538
METAL RECOVERY AND STORAGE CO., LTD. <i>v.</i> BUCKINGHAMSHIRE COUNTY COUNCIL [Q.B.D. DIVL. CT.]	286

	PAGE
MICHAELIDES (A.) & CO. (A FIRM), L. E. CATTAN, LTD. <i>v.</i> (TURKIE THIRD PARTY, GEORGE (TRADING AS YARNS & FIBRES CO.) FOURTH PARTY) [Q.B.D.]	125
MOORE (A. H.), LTD., BAUM & CO., LTD. <i>v.</i> [C.A.]	113
MUDD, CITY & WESTMINSTER PROPERTIES (1934), LTD. <i>v.</i> [CH.D.]	783
NATIONAL BANK OF GREECE AND ATHENS S.A., ADAMS <i>v.</i> [Q.B.D.]	3
NATIONAL BANK OF GREECE AND ATHENS, S.A., PRUDENTIAL ASSURANCE CO., LTD. <i>v.</i> [Q.B.D.]	2
NATIONAL COAL BOARD, <i>Re</i> AN APPLICATION OF [CH.D.]	351
NATIONAL DEPOSIT FRIENDLY SOCIETY (TRUSTEES) <i>v.</i> SKEGNESS URBAN DISTRICT COUNCIL [H.L.]	601
NATIONAL INSURANCE (INDUSTRIAL INJURIES) COMMISSIONER, <i>R. v.</i> <i>Ex parte</i> RICHARDSON [Q.B.D. DIVL. CT.]	689
NELSON <i>v.</i> NELSON AND SLINGER [C.A.]	744
NESTLE CO., LTD., CHAPPELL & CO., <i>v.</i> [C.A.]	155
NEWTON <i>v.</i> COMMISSIONER OF TAXATION OF THE COMMONWEALTH OF AUSTRALIA [P.C.]	759
NOLAN <i>v.</i> DENTAL MANUFACTURING CO., LTD. [MANCHESTER ASSIZES]	449
NORUM, HAVANT AND WATERLOO URBAN DISTRICT COUNCIL [C.A.]	423
NOSEDA, R. <i>v.</i> [C.C.A.]	567
ODHAMS PRESS LTD., ADDIS <i>v.</i> [C.A.]	462
ODHAMS PRESS LTD., GRECH <i>v.</i> [C.A.]	462
OSTIME (INSPECTOR OF TAXES) <i>v.</i> AUSTRALIAN MUTUAL PROVIDENT SOCIETY [C.A.]	665
OUGHTRED <i>v.</i> INLAND REVENUE COMRS. [C.A.]	443
PAPADOPOULLOS, ROSS-CLUNIS <i>v.</i> [P.C.]	23
PARLIAMENTARY PRIVILEGE ACT, 1770, IN THE MATTER OF [P.C.]	329
PARR, R. <i>v.</i> [C.C.A.]	494
PATENTS APPEAL TRIBUNAL, BALDWIN & FRANCIS, LTD. <i>v.</i> [C.A.]	368
PATMAN AND FOTHERINGHAM, LTD., GOLD <i>v.</i> [C.A.]	497
PINWILL, ALLIANCE BUILDING SOCIETY <i>v.</i> [CH.D.]	408
PIOTROWSKA <i>v.</i> PIOTROWSKI [C.A.]	729
PONTIKA, R. <i>v.</i> [C.C.A.]	494
POTATO MARKETING BOARD <i>v.</i> MERRICKS [Q.B.D.]	538
POTTER, R. <i>v.</i> [LEICESTER ASSIZES]	51
PRACTICE DIRECTION (PAYMENT OUT OF COURT TO WIDOWS AND MARRIED WOMEN) [CH.D.]	785
PRACTICE DIRECTION (SERVICE OF NOTICE OF APPEAL OUT OF TIME) [C.A.]	493
PRACTICE DIRECTIONS (SERVICE OF NOTICES: PROCEEDINGS FOR POSSESSION, ORD. 55, r. 5A) [CH.D.]	384
PRACTICE NOTE (COMPANIES COURT) [CH.D.]	124
PRACTICE NOTE (EVIDENCE OF MENTAL INCAPACITY IN PROBATE MATTERS) [PROB.]	600
PRICE <i>v.</i> HUMPHRIES [Q.B.D. DIVL. CT.]	725
PRUDENTIAL ASSURANCE CO., LTD. <i>v.</i> NATIONAL BANK OF GREECE AND ATHENS, S.A. [Q.B.D.]	3
PUBLIC TRUSTEE <i>v.</i> INLAND REVENUE COMRS. [C.A.]	720
PYE-SMITH <i>v.</i> INLAND REVENUE COMRS. [CH.D.]	785
R. <i>v.</i> ADAIR [C.C.A.]	629
R. <i>v.</i> EDGAR [C.C.A.]	494
R. <i>v.</i> FIELD [C.C.A.]	567
R. <i>v.</i> FITZPATRICK [C.C.A.]	567
R. <i>v.</i> KNIGHT [C.C.A.]	567
R. <i>v.</i> MARLEY [C.C.A.]	359
R. <i>v.</i> MATHESON [C.C.A.]	87
R. <i>v.</i> MEDICAL APPEAL TRIBUNAL (NORTH MIDLAND REGION), <i>Ex parte</i> HUBBLE [Q.B.D. DIVL. CT.]	374
R. <i>v.</i> MEDICAL APPEAL TRIBUNAL FOR SOUTH WALES DISTRICT, <i>Ex parte</i> GRIFFITHS [Q.B.D. DIVL. CT.]	227
R. <i>v.</i> NATIONAL INSURANCE (INDUSTRIAL INJURIES) COMMISSIONER, <i>Ex parte</i> RICHARDSON [Q.B.D. DIVL. CT.]	689
R. <i>v.</i> PARR [C.C.A.]	494
R. <i>v.</i> PONTIKA [C.C.A.]	494
R. <i>v.</i> POTTER [LEICESTER ASSIZES]	51
R. <i>v.</i> NOSEDA [C.C.A.]	567
R. <i>v.</i> ROONEY [C.C.A.]	494
R. <i>v.</i> ST. MARGARET'S TRUST, LTD. [C.C.A.]	289
RACECOURSE BETTING CONTROL BOARD <i>v.</i> INLAND REVENUE COMRS. [C.A.]	385
RACECOURSE BETTING CONTROL BOARD <i>v.</i> YOUNG (INSPECTOR OF TAXES) [C.A.]	385
RAMSHAW COAL CO., LTD. (IN LIQUIDATION), INLAND REVENUE COMRS. <i>v.</i> [C.A.]	91

	PAGE		PAGE
RAPHAEL, BROWN v. [C.A.]	79	TRIFFITT'S SETTLEMENT, Re [CH.D.]	299
RAYFIELD v. HANDS [CH.D.]	194	TROTT (<i>decd.</i>), Re [CH.D.]	296
RICHARDSON, <i>Ex parte</i> , R. v. NATIONAL INSURANCE (INDUSTRIAL INJURIES) COMMISSIONER [Q.B.D. DIVL. CT.]	689	TURKIE THIRD PARTY, GEORGE (TRADING AS YARNS & FIBRES Co.) FOURTH PARTY, CATTAN (L. E.), LTD. v. MICHAELIDES (A.) & Co. (A FIRM) [Q.B.D.]	125
RIGDEN v. WHITSTABLE URBAN DISTRICT COUNCIL [CH.D.]	730	TYNESIDE WINDOW CLEANING Co., WILSON v. [C.A.]	265
ROONEY, R. v. [C.C.A.]	494	UNIVERSAL CARGO CARRIERS CORPN. v. CITATI (NO. 2) [C.A.]	563
ROSS-CLUNIS v. PAPADOPOULLOS [P.C.]	23	WAITE, GRACE RYMER INVESTMENTS, LTD. v. [C.A.]	777
ROYAL AIR FORCES ASSOCIATION, KITCHEN v. [C.A.]	241	WALL (T.) & SONS, LTD., KELLEHER v. [Q.B.D.]	686
RUTTER v. SHERIDAN-YOUNG [C.A.]	13	WARD v. WARD [SCARBOROUGH DISTRICT REGISTRY]	217
RYMER (GRACE) INVESTMENTS, LTD. v. WAITE [C.A.]	777	WELLS v. COOPER [C.A.]	527
SABATH, BAYLIS BAXTER, LTD. v. [C.A.]	209	WEST HAM CORPN., GUINNESS TRUST (LONDON FUND) FOUNDED 1890 REGISTERED 1902 v. [Q.B.D. DIVL. CT.]	237
ST. MARGARET'S TRUST, LTD., R. v. [C.C.A.] ..	289	WEST SUSSEX COUNTY COUNCIL, HAMILTON v. [Q.B.D.]	174
SAYERS v. HARLOW URBAN DISTRICT COUNCIL [C.A.]	342	WHITSTABLE URBAN DISTRICT COUNCIL, RIGDEN v. [CH.D.]	730
SHERIDAN-YOUNG, RUTTER v. [C.A.]	13	WHITWORTH PARK COAL Co., LTD. (IN LIQUIDATION), INLAND REVENUE COMRS. v. [C.A.] ..	91
SILKIN v. BEAVERBROOK NEWSPAPERS, LTD. [Q.B.D.]	516	WIGGINS v. WIGGINS (OTHERWISE BROOKS) AND INGRAM [BIRMINGHAM DISTRICT REGISTRY]	555
SIMONS (TRADING AS ACME CREDIT SERVICES) v. GALE [P.C.]	504	WILLIAMSON v. BRITISH BOXING BOARD OF CONTROL (1929) [Q.B.D.]	228
SKEGNESS URBAN DISTRICT COUNCIL, NATIONAL DEPOSIT FRIENDLY SOCIETY (TRUSTEES) v. [H.L.]	601	WILLS' WILL TRUSTS, Re [CH.D.]	472
SLINGER, NELSON AND, NELSON v. [C.A.]	744	WILSON v. TYNESIDE WINDOW CLEANING Co. [C.A.]	265
SMITH, ATTORNEY-GENERAL (AT THE RELATION OF EGHAM URBAN DISTRICT COUNCIL) v. [Q.B.D.]	557	WORTHINGTON (INSPECTOR OF TAXES), LONDON INVESTMENT AND MORTGAGE Co., LTD. v. [H.L.]	230
SOCIEDAD FINANCIERA DE BIENES RAICES, S.A., AGRIMPEX HUNGARIAN TRADING COMPANY FOR AGRICULTURAL PRODUCTS v. [C.A.]	695	WRIGHT v. BOYCE (INSPECTOR OF TAXES) [C.A.]	703
STOCKTON-ON-TEES CORPN., BAXTER v. [C.A.]	675	YOUNG (INSPECTOR OF TAXES), RACECOURSE BETTING CONTROL BOARD v. [C.A.]	385
STONE v. BOREHAM [Q.B.D. DIVL. CT.]	715		
SULLIVAN, ANDREWS AND, ANDREWS v. [DIV.]	305		
TENNEKON (COMMISSIONER FOR REGISTRATION OF INDIAN AND PAKISTANI RESIDENTS) v. DURAISAMY [P.C.]	479		
TRANSPLANTERS (HOLDING COMPANY), LTD., Re [CH.D.]	711		

INDEX

	PAGE
ACCOUNT	
Constructive trust of business. <i>See</i> TRUST AND TRUSTEE (Constructive trust— <i>Business and lease bequeathed to executors beneficially</i>).	
ACKNOWLEDGMENT	
Debt, of. <i>See</i> LIMITATION OF ACTION.	
ACTION	
Civil. <i>See</i> PRIVY COUNCIL (Ceylon— <i>Appeal to Judicial Committee</i>).	
ADMINISTRATION OF ESTATES	
Gift— <i>Gift of real estate contracted to be purchased—Death of testator before completion—Unpaid balance of purchase money—Cost of completion—Whether charged on real estate specifically devised—Contrary intention—Administration of Estates Act, 1925 (c. 23), s. 35 (1) [Re BIRMINGHAM (decd.)]</i> .. .	397
Grant of administration— <i>On intestacy. See</i> INTESTACY (Grant of administration).	
ADMIRALTY	
Appeal— <i>Time for appeal. See</i> COURT OF APPEAL (Time for appeal).	
ADVANCEMENT	
<i>See</i> PERPETUITIES (Rule against perpetuities— <i>Power of advancement</i>); TRUST AND TRUSTEE (Powers of trustee— <i>Power of advancement</i>).	
AFFIDAVIT	
No settlement— <i>No longer needed for payment out of court [PRACTICE DIRECTION]</i> .. .	785
AFFILIATION	
Illegitimate child born to married woman— <i>Decree of divorce made absolute later the same day—Father then free to marry—Subsequent marriage of father and mother—Whether affiliation proceedings lay after the parents' marriage—Bastardy Laws Amendment Act, 1872 (c. 65), s. 3, as amended—Legitimacy Act, 1926 (c. 60), s. 1 (1) [KRULAK v. KRULAK (No. 2)]</i> .. .	294
AGRICULTURE	
Potato marketing. <i>See</i> POTATO MARKETING.	
AMENDMENT	
<i>See</i> DIVORCE (Practice); PRACTICE.	
APPEAL	
Court of Appeal, to. <i>See</i> COURT OF APPEAL.	
Criminal appeal. <i>See</i> CRIMINAL LAW.	
Divorce proceedings, in. <i>See</i> DIVORCE.	
Judge without jury— <i>Question of fact—Inference of contributory negligence [HICKS v. BRITISH TRANSPORT COMMISSION]</i> .. .	39
Notice of. <i>See</i> COURT OF APPEAL (Notice of appeal).	
Time for appeal. <i>See</i> COURT OF APPEAL (Time for appeal).	
APPOINTMENT	
Power of. <i>See</i> POWER OF APPOINTMENT.	
ARBITRATION	
Case stated by arbitrator— <i>Power of court to draw inferences of fact—Arbitration Act, 1950 (c. 27), s. 21—R.S.C., Ord. 34, r. 1, r. 7 [UNIVERSAL CARGO CARRIERS CORPN. v. CITATI (No. 2)]</i> .. .	563
Costs— <i>Discretion of arbitrator—Judicial exercise—String of contracts—Counterclaim by ultimate buyer that goods not of contract quality—Suppliers added by seller as third party and by third party as fourth party—Counterclaim failed—Seller ordered to pay costs incurred by third and fourth parties but not awarded their amount against buyer [L. E. CATTAN, LTD. v. A. MICHAELIDES & CO. (A FIRM) (TURKIE THIRD PARTY, GEORGE (TRADING AS YARNS & FIBRES CO.) FOURTH PARTY)]</i> .. .	125
Setting aside award— <i>Misconduct—Procedure of board of appeal—Custom of trade contrary to implied term of agreement—Approach to question of setting aside award on grounds of irregularity in procedure or infringement of the rules of natural justice [LONDON EXPORT CORPN., LTD. v. JUBILEE COFFEE ROASTING CO., LTD.]</i> .. .	411
ARTICLES OF ASSOCIATION	
<i>See</i> COMPANY.	
ASSIGNMENT	
Copyright. <i>See</i> COPYRIGHT.	
ATTESTATION	
Will. <i>See</i> PROBATE (Grant).	
ATTORNEYMENT CLAUSE	
Mortgage, in. <i>See</i> MORTGAGE.	
AUSTRALIA	
<i>See</i> PRIVY COUNCIL.	
AWARD	
<i>See</i> ARBITRATION (Setting aside award).	
BANKRUPTCY	
Inquiry as to debtor's dealings and property— <i>Summons to person capable of giving information to do so to the court—Application to Court of Appeal after refusal of registrar to grant summons—Hearing of application in camera—Bankruptcy Act, 1914 (c. 59), s. 25 (1)—R.S.C., Ord. 58, r. 13 (3) [Re GREEN (A BANKRUPT), Ex parte THE TRUSTEE]</i> .. .	57

BIGAMY

Re-marriage after decree of nullity. See NULLITY (Re-marriage).

BORSTAL TRAINING

See CRIMINAL LAW (Sentence).

BUILDING

Building in course of construction—*Negligence—Material falling down open shaft—Foreseeability* [BAILEY v. AYR ENGINEERING & CONSTRUCTIONAL CO., LTD.] .. 222

Building regulations—*Falling material or article—Whether includes part of structure which becomes detached—Building (Safety, Health and Welfare) Regulations, 1948 (S.I. 1948 No. 1145), reg. 90 (1)* [BAILEY v. AYR ENGINEERING & CONSTRUCTIONAL CO., LTD.].. 222

BUILDING CONTRACT

Insurance—*Building contractors' obligation to insure against subsidence and collapse of adjoining properties—Whether obligation extended to insurance of building owner—R.I.B.A. form of contract (1939), revised 1952, condition 15 (a)* [GOLD v. PATMAN AND FOTHERINGHAM, LTD.] 497

BUILDING REGULATIONS

See BUILDING.

BURDEN OF PROOF

See STATUTORY DUTY (Breach).

BUSINESS

Constructive trust. See TRUST and TRUSTEE (Constructive trust).

BUSINESS PREMISES

New tenancy. See LANDLORD AND TENANT (New tenancy).

CAPITAL

Reduction. See COMPANY (Reduction of capital).

CAPITAL MURDER

See CRIMINAL LAW.

CASE STATED

Arbitrator, by. See ARBITRATION.

CAUSE LIST

See PRACTICE (Trial).

CERTIORARI

Error on face of record—*Construction of documents—Technical scientific terms—Evidence necessary to inform court of meaning of terms—Patent specifications—Whether part of record—Whether certiorari would lie to Patents Appeal Tribunal if expert evidence needed to explain technicalities—Patents Act, 1949 (c. 87), s. 9, s. 85 (10)* [BALDWIN & FRANCIS, LTD. v. PATENTS APPEAL TRIBUNAL] .. 303
Patents appeal tribunal. See PATENT (Appeal tribunal).

CEYLON

See PRIVY COUNCIL.

CHARITY

Imperfect trust provision—*Donations for two specific objects and then to "worthy causes" in memory of certain persons—Specific objects achieved—Whether trusts of surplus were validated—Whether donations were dispositions creating more than one interest in the same property—Charitable Trusts (Validation) Act, 1954 (c. 58), s. 1 (2), s. 2 (3)* [Re GILLINGHAM BUS DISASTER FUND] .. 749
Uncertainty—"Worthy causes"—*Gift of memorial fund to such worthy causes as mayors may determine* [Re GILLINGHAM BUS DISASTER FUND] .. 749

CHARTERPARTY

See SHIPPING.

CINEMATOGRAPH

Film renters' protection society—*Investigation of complaint by member concerning exhibitor's returns of takings—Committee recommending barring of further film renting contracts—Natural justice—Whether recommendation valid* [BYRNE v. KINEMATOGRAPH RENTERS SOCIETY, LTD.] .. 579

CITIZENSHIP

See NATIONALITY.

COAL MINING

Nationalisation of industry—*Colliery company—Interim income—Income tax—Coal Industry Nationalisation Act, 1946 (c. 59), s. 22 (2), (3)—Coal Industry (No. 2) Act, 1949 (c. 79), s. 1 (2)* [INLAND REVENUE COMRS. v. WHITWORTH PARK COAL CO., LTD. (IN LIQUIDATION), SAME v. RAMSHAW COAL CO., LTD. (IN LIQUIDATION), SAME v. BRANCEPETH COAL CO., LTD. (IN LIQUIDATION)] .. 91
Working facilities—*Interim order—Mines (Working Facilities and Support) Act, 1923 (c. 20)—R.S.C., Ord. 54.0, r. 12* [Re AN APPLICATION OF THE NATIONAL COAL BOARD].. 551

COMPANY

Articles of association—*Construction—Principle to be adopted* [HOLMES v. KEYES (LORD)].. 129
Contract between members and directors—Provision that directors "will take . . . at a fair value" shares offered to them—Companies Act, 1948 (c. 38), s. 20 (1) [RAYFIELD v. HANDS] 194
Director—*Vacation of office—Failure to acquire qualification shares within two months after election—Election by poll—Result declared on following day—Date of election—"Holding" shares—Companies Act, 1948 (c. 38), s. 182 (1), (3)* [HOLMES v. KEYES (LORD)].. 129
Meeting—*Completion—Business of meeting and voting on poll completed on one day—Counting votes completed on following day—When meeting completed* [HOLMES v. KEYES (LORD)].. 129
Practice—*Title of proceedings—Applications brought to or issued out of office of the Registrar, Companies Court—Group A to be added after Chancery Division in title—R.S.C., Ord. 5, r. 9—R.S.C., Ord. 53B—Name of judge to be omitted from general title of proceedings in winding-up or under Companies Act, 1948 (c. 38), s. 210—Companies (Winding-up) (Amendment) Rules, 1957 (S.I. 1957 No. 973), r. 1 (f)* [PRACTICE NOTE] .. 124

COMPANY—continued.	PAGE
Reduction of capital—Cancellation of some unissued shares and subdivision of all unissued shares before cancellation of some—Cancellation of issued shares held by company's nominee—Confirmation by the court—Companies Act, 1948 (c. 38), s. 61, s. 66 (1), s. 67 (1), (2), s. 69 (1), (2) [Re CASTIGLIONE, ERSKINE & CO., LTD.]	455
Shares—Cancellation on reduction of capital. See Reduction of capital, ante.	
Winding-up—Compulsory winding-up—Concurrent jurisdiction—Transfer of proceedings—Petitions presented by two judgment creditors—One petition in county court and the other in the High Court—Procedure—Costs—Companies Act, 1948 (c. 38), s. 219 (1)—Companies (Winding-up) Rules, 1949 (S.I. 1949 No. 330), r. 46 [Re FILBY BROS. (PROVENDER), LTD.]	458
COMPENSATION	
Requisitioned property. See REQUISITION.	
CONFLICT OF LAWS	
Foreign law—Recognition—Succession by newly created foreign company to liability of company then dissolved—Subsequent foreign decree altering law of succession so as to exclude retrospectively the succession to liabilities—Whether decree a law of succession or a law for discharging liabilities—Whether decree effective to discharge contractual liabilities under English contracts [ADAMS v. NATIONAL BANK OF GREECE AND ATHENS, S.A., PRUDENTIAL ASSURANCE CO., LTD., v. SAME]	3
Succession—Universal succession by foreign law of one foreign company to another—Retrospective alteration by subsequent foreign law to discharge liabilities to which successors succeeded—Whether effective to discharge liabilities under English contracts [ADAMS v. NATIONAL BANK OF GREECE AND ATHENS, S.A., PRUDENTIAL ASSURANCE CO., LTD. v. SAME]	3
CONSTITUTIONAL LAW	
Diplomatic privilege—Immunity from legal process—Employee of foreign embassy—Extension to member of his family—Application to make infant son ward of court—Law Reform (Miscellaneous Provisions) Act, 1949 (c. 100), s. 9 [Re C. (AN INFANT)]	656
CONSTRUCTIVE TRUST	
See TRUST AND TRUSTEE.	
CONTRACT	
Building. See BUILDING CONTRACT.	
Duration—Whether determinable by reasonable notice—Length of notice—Agreement by trading companies not to employ persons employed by each other within previous five years [KORNS MANUFACTURING CO., LTD. v. KOLOK MANUFACTURING CO., LTD.]	65
Rescission. See MISREPRESENTATION (Innocent misrepresentation).	
CONTRIBUTORY NEGLIGENCE	
See NEGLIGENCE.	
COPYRIGHT	
Agreement for sale of sole rights in opera—Proviso for reverter of rights on failure of purchaser to produce as stipulated—Opera produced as stipulated—Whether rights transferred by agreement personal to purchaser or transferable rights [LOEW'S INCORPORATED v. LITTLER]	200
Assignment—Assignment before July 1, 1912, for whole term of copyright—Extension of terms of copyright by Copyright Act, 1911—Notice requiring assignment of statutory extension not given—Rights of assignee during statutory extension—Whether exclusive rights—Copyright Act, 1911 (c. 46), s. 24 (1), proviso (a) (ii) [LOEW'S INCORPORATED v. LITTLER]	200
Infringement—Music—Record—Manufacture of records for chocolate suppliers' advertising campaign—Records to be sold by suppliers each for sum of money to a purchaser tendering three wrappers from suppliers' chocolate bars—Sales at that price showed profit—Whether sale by "retail"—Whether price ordinary retail selling price as defined—Copyright Act, 1956 (c. 74), s. 8 (1)—Copyright Royalty System (Records) Regulations, 1957 (S.I. 1957 No. 866), reg. 1 (1) (f), reg. 3 [CHAPPELL & CO., LTD. v. NESTLÉ CO., LTD.]	155
COSTS	
Agreement. See SOLICITOR (Costs—Non-contentious business).	
Appeal to Court of Appeal—Appeal as to costs without leave of trial judge—Discretion of trial judge—Jurisdiction of Court of Appeal—Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 31 (1) (h), s. 50 (1)—R.S.C., Ord. 65, r. 1 [BAYLIS BAXTER, LTD. v. SABATH]	209
Company—Directors—Shareholders' action against directors and company alleging vacation of directorship—Company not served with notice of appeal—Whether order would be made for company's costs of appearing on appeal [HOLMES v. KEYES (LORD)]	129
Arbitration. See ARBITRATION.	
Company winding-up. See COMPANY (Winding-up—Compulsory winding-up).	
Counterclaim—Claim and counterclaim both successful—Lesser sum found to be due to plaintiff—Items in counterclaim in the nature of set-off—Defendant's right to costs on claim and counterclaim [HANAK v. GREEN]	141
Disallowing costs of successful defendants—Point of law not raised as separate preliminary issue—Alleged breach of contract—Defendants successful on appeal on issue of construction of contract—Adverse findings at trial on all disputed issues of fact—Issues of fact occupying substantial part of time of trial [GOLD v. PATMAN AND FOTHERINGHAM, LTD.]	497
Disallowing costs of successful plaintiff—Evidence of plaintiff's witness rejected—Evidence of defendant also rejected—Plaintiff a company—Discretion of trial judge—Jurisdiction of Court of Appeal—Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 31 (1) (h), s. 50 (1)—R.S.C., Ord. 65, r. 1 [BAYLIS BAXTER, LTD. v. SABATH]	209
Set-off—Set-off of full amount counterclaimed—Lesser sum found to be due to plaintiff—Costs of action in county court [HANAK v. GREEN]	141
Solicitor. See SOLICITOR (Professional misconduct).	
Solicitors' remuneration orders. See SOLICITOR.	
Third party—Sale of goods—Third and fourth parties added on issue whether goods are of contract quality—Ordinary rule as to costs of successful parties where goods are of contract quality [L. E. CATTAN, LTD. v. A. MICHAELIDES & CO. (A FIRM) (TURKIE THIRD PARTY, GEORGE (TRADING AS YARNS & FIBRES CO.) FOURTH PARTY)]	125
COUNTERCLAIM	
Costs. See COSTS.	
See also PLEADING.	

COUNTY COURT	PAGE
Company— <i>Winding-up—Concurrent jurisdiction—Transfer of proceedings to High Court</i>	458
[<i>Re FILBY BROS. (PROVENDER), LTD.</i>]	
COURT OF APPEAL	
Costs. <i>See</i> COSTS (Appeal to Court of Appeal).	
Evidence— <i>Further evidence—Perjury—Witness' confession that relevant evidence accepted at trial was perjured</i> [<i>PIOTROWSKA v. PIOTROWSKI</i>]	739
Hearing in camera— <i>Application by trustee in bankruptcy for order for examination of person capable of giving information about debtor—Bankruptcy Act, 1914 (c. 59), s. 25 (1)—R.S.C., Ord. 58, r. 13 (3) [Re GREEN (A BANKRUPT), Ex parte THE TRUSTEE]</i>	57
Notice of appeal— <i>Service—Notice served out of time</i> [<i>PRACTICE DIRECTION</i>]	493
Time for appeal— <i>Admiralty action—Time for service of notice of appeal—From what date calculated—R.S.C., Ord. 58, r. 4 (1) [FERRANTI (OWNERS) v. AMERICAN JURIST (OWNERS) & CLAYCARRIER (OWNERS), AMERICAN JURIST (OWNERS) v. FERRANTI (OWNERS) & CLAYCARRIER (OWNERS), THE AMERICAN JURIST AND THE CLAYCARRIER]</i>	659
COVENANT	
Lease, in. <i>See</i> LANDLORD AND TENANT (Lease; Repair).	
CRIMINAL LAW	
Appeal— <i>Substitution of verdict—Verdict of guilty on a second count of receiving substituted for verdict of guilty on first count of larceny where conviction on first count not upheld—Jury discharged at trial from giving verdict on second count—Criminal Appeal Act, 1907 (c. 23), s. 5 (2) [R. v. ADAIR]</i>	629
Capital murder— <i>Diminished responsibility—Evidence—Medical evidence of abnormality of mind not challenged—Verdict of capital murder—Verdict set aside as unsupported by the evidence—Homicide Act, 1957 (c. 11), s. 2 [R. v. MATHESON]</i>	87
Depositions— <i>Signing—Some depositions not signed by examining justice—Whether committal for trial invalidated where other signed depositions are sufficient to justify committal on some charges—Magistrates' Courts Rules, 1952 (S.I. 1952 No. 2190), r. 5 (2) [R. v. EDGAR, R. v. PARR, R. v. PONTIKA, R. v. ROONEY]</i>	494
Evidence— <i>Statutory declaration—Need to comply with exact terms of the statute—Criminal Justice Act, 1948 (c. 58), s. 41 (3) [R. v. MARLEY]</i>	359
False pretences— <i>Procuring delivery of chattel with intent to defraud—Impersonation at driving test in order to obtain driving certificate to enable another person to obtain driving licence—Larceny Act, 1916 (c. 50), s. 32 (1) [R. v. POTTER]</i>	51
Forgery— <i>Signature on driving certificate—Signature in driving examiner's journal—Impersonation at driving test to enable another person to obtain driving licence—Forgery Act, 1913 (c. 27), s. 1—Criminal Justice Act, 1925 (c. 86), s. 35 (1) [R. v. POTTER]</i>	51
Mens rea— <i>Statutory offence—Prohibition of disposal of goods by hire-purchase—Whether prohibition absolute—Hire-purchase and Credit Sale Agreements (Control) Order, 1956 (S.I. 1956 No. 180), art. 1 [R. v. ST. MARGARET'S TRUST, LTD.]</i>	289
Practice— <i>Capital murder—Diminished responsibility—Plea of guilty of manslaughter not to be accepted on indictment for capital murder—Homicide Act, 1957 (c. 11), s. 2 [R. v. MATHESON]</i>	87
Road traffic offences. <i>See</i> ROAD TRAFFIC.	
Sentence— <i>Borstal training—Further offences committed while on licence from, absconded from, or absent without leave from, Borstal—Appropriate sentences for further offences [R. v. NOSEDA, R. v. FIELD, R. v. KNIGHT, R. v. FITZPATRICK]</i>	567
Trial— <i>Direction to jury—Question asked by jury after they had retired indicating that they were inferring facts for which there was no supporting evidence—Necessity for further direction by trial judge [R. v. ADAIR]</i>	629
CROWN	
Tax— <i>Immunity. See</i> INCOME TAX (Exemption).	
CRUELTY	
Divorce, on ground of. <i>See</i> DIVORCE.	
CYPRUS	
<i>See</i> PRIVY COUNCIL.	
DAMAGE	
Remoteness of damage. <i>See</i> DAMAGES.	
DAMAGES	
Remoteness— <i>Negligence—Risk taken to avoid inconvenience—Plaintiff shut in cubicle of public lavatory owing to defective lock—No attendant present—Plaintiff injured while returning to the ground after endeavouring to climb out of cubicle [SAYERS v. HARLOW URBAN DISTRICT COUNCIL]</i>	842
DEATH	
Presumption. <i>See</i> DIVORCE (Maintenance of wife).	
DEATH DUTY	
<i>See</i> ESTATE DUTY.	
DELAY	
Ship. <i>See</i> SHIPPING (Demurrage).	
DEMURRAGE	
<i>See</i> SHIPPING.	
DEPOSITIONS	
<i>See</i> CRIMINAL LAW.	
DE-RATING	
<i>See</i> RATES.	
DESERTION	
<i>See</i> DIVORCE.	
DEVELOPMENT	
Land. <i>See</i> TOWN AND COUNTRY PLANNING (Permission for development).	
DIFFERENTIAL RENT SCHEME	
<i>See</i> HOUSING (Rent).	
DIPLOMATIC PRIVILEGE	
<i>See</i> CONSTITUTIONAL LAW.	

DIRECTOR	PAGE
See COMPANY.	
DISABLEMENT BENEFIT	
See INDUSTRIAL INJURY (Medical appeal tribunal).	
DIVORCE	
Appeal— <i>Fresh evidence—Perjury—Witness's confession that relevant evidence accepted at trial was perjured—R.S.C., Ord. 58, r. 10 [PIOTROWSKA v. PIOTROWSKI]</i>	729
Setting down—Time allowed—Appeal against refusal of decree nisi—R.S.C., Ord. 58, r. 4 (1), r. 5 (1), r. 15 (3), (4) [MEDCALF v. MEDCALF]	11
Cruelty—Child-bearing—Refusal of wife to bear children—Refusal of sexual intercourse—Wife's loss of interest in husband—Injury to husband's health—Intentional acts of wife [WARD v. WARD]	217
Custody—Relationship of jurisdiction. See INFANT (Removal outside jurisdiction).	
Desertion—Consensual separation—Deed providing for maintenance signed—Wife's request to return rejected—Maintenance agreement subsequently dated and copies exchanged—Whether husband in desertion [BOSLEY v. BOSLEY]	167
Maintenance of wife—Conduct of parties—Discretion [CLEAR v. CLEAR]	353
Evidence—Further evidence after conclusion of case—Defence of wife's adultery to be inferred from non-access of husband at time relevant to birth of child—Evidence discovered after cross-examination of wife tending to show adultery at time subsequent to that relevant to birth of child—Alleged inference of adultery at relevant time—Further evidence inadmissible [BURGESS v. BURGESS]	63
Jurisdiction to order on decree of presumption of death and dissolution of marriage—"Dissolution"—"Divorce"—Matrimonial Causes Act, 1950 (c. 25), s. 16, s. 19 [DEACOCK v. DEACOCK]	632
Nullity. See NULLITY.	
Petition—Petition within three years of marriage—Exceptional hardship suffered by petitioner—Adultery of wife leading to pregnancy—Domestic situation causing nervous distress to husband—Matrimonial Causes Act, 1950 (c. 25), s. 2 (1), proviso, (2) [HILLIER v. HILLIER AND LATHAM]	261
Practice—Amendment—Petition for dissolution of marriage on ground of desertion—Answer charging cruelty—Amending petition to charge cruelty—Facts relating to charge of cruelty known to petitioner at date of filing petition—R.S.C., Ord. 28, r. 1—Matrimonial Causes Rules, 1957 (S.I. 1957 No. 619), r. 15 (1), r. 82 [NELSON v. NELSON AND SLINGER]	744
Pleading—Answer—Amendment—Petition for divorce on ground of cruelty and for exercise of court's discretion and disclosing petitioner's adultery—Application at trial to amend so as to include allegation of adultery in answer and to adjourn trial for service of amended answer—No previous steps to obtain proof of adultery—Refusal of leave to amend [CLEAR v. CLEAR]	353
Solicitor's lien. See SOLICITOR (Lien).	
DOCUMENT	
Admissibility in evidence—"Person interested"—Employee's action for damages for personal injuries against employers—Statement made by employers' supervisor in department where accident occurred sought to be put in evidence by employers—Supervisor present when accident occurred—Efficient administration of department called into question in action—Whether supervisor's statement admissible in evidence after his death—Evidence Act, 1938 (c. 28), s. 1 (3) [KELLEHER v. T. WALL & SONS, LTD.]	686
DOMESTIC TRIBUNAL	
See TRADE UNION.	
DOUBLE TAXATION	
See INCOME TAX.	
DRIVING LICENCE	
Impersonation to obtain driving licence. See CRIMINAL LAW (False pretences).	
ENFORCEMENT NOTICE	
See TOWN AND COUNTRY PLANNING.	
EQUITABLE ASSIGNMENT	
Declaration of trust. See TRUST AND TRUSTEE (Declaration of trust).	
ESTATE DUTY	
Determination of life interest—Allotment of fully paid shares—Life tenant releasing life interest in the shares in favour of remaindermen—Trustees renouncing shares in favour of remaindermen—Death of life tenant within five years—Liability to duty—Finance Act, 1940 (c. 29), s. 43 (1) (a), as amended by Finance Act, 1950 (c. 15), s. 43 [PYE-SMITH v. INLAND REVENUE COMRS.]	785
Exemption—Interest as holder of an office—Share of income of residuary estate given to trustee for life while a trustee—Death of trustee—Passing under s. 1 and not under s. 2 (1) of Finance Act, 1894—Whether capital of share exempted from liability to duty—Finance Act, 1894 (c. 30), s. 1, s. 2 (1) (b) [PUBLIC TRUSTEE v. INLAND REVENUE COMRS.]	720
Gift inter vivos—Exclusion of donor. See PRIVY COUNCIL (Australia—New South Wales—Death duty).	
EVIDENCE	
Admissibility—Expert evidence—Building contract—Whether evidence of practical difficulties consequent on one construction of a clause of the contract was admissible [GOLD v. PATMAN AND FOTHERINGHAM, LTD.]	497
Criminal proceedings, in. See CRIMINAL LAW (Capital murder—Diminished responsibility; Evidence).	
Further evidence after conclusion of case. See DIVORCE (Maintenance of wife).	
Document. See DOCUMENT (Admissibility in evidence).	
EXECUTOR AND ADMINISTRATOR	
Grant of administration. See TESTACY (Grant of administration); PROBATE (Grant).	
Limitation of action—Tort of deceased. See LIMITATION OF ACTION (Negligence).	
Probate. See PROBATE.	
EYES	
Protection of—In factory. See FACTORY (Protection of eyes).	
FACTORY	
Building regulations. See BUILDING (Building regulations).	

Protection of eyes—Grinding machine—Obligation to provide goggles—Injury to workman's eye—Failure of workman to show that he would have worn goggles if they had been provided—Causation—Factories Act, 1937 (c. 67), s. 49—Protection of Eyes Regulations, 1938 (S.R. & O. 1938 No. 654), schedule [NOLAN v. DENTAL MANUFACTURING CO., LTD.] 440

FAIR COMMENT

See LIBEL.

FALSE PRETENCES

See CRIMINAL LAW.

FAMILY PROVISION

Extension of time for application—Birth of posthumous child of testator—Person having an "interest in the estate"—Circumstance affecting the administration or distribution of the estate—Jurisdiction to extend time—Inheritance (Family Provision) Act, 1938 (c. 45), s. 2 (1) (1A) (c) (as amended by Intestates' Estates Act, 1952 (c. 64), s. 7, Sch. 3) [RE TROTT (dec'd.)] 296

FOLLOWING TRUST PROPERTY

Money. See MONEY.

FOREIGN LAW

Recognition by English courts. See CONFLICT OF LAWS.

FORFEITURE

Clause in settlement. See SETTLEMENT (Protected life interest).

FORGERY

See CRIMINAL LAW.

FRIENDLY SOCIETY

Rates—Limitation of rates. See RATES (Limitation of rates chargeable).

GIFT

Income tax, on. See INCOME TAX (Income—Voluntary payments).

HIGHWAY

Negligence—Construction of highway by county council—Subsequent taking over by borough council—Road accident alleged to be due to negligent construction of island on road and absence of sufficient protection for public against danger—Misfeasance and non-feasance—Whether borough council liable—Development and Road Improvement Funds Act, 1909 (c. 47), s. 8 (1) (a), s. 10, as amended—Local Government Act, 1929 (c. 17), s. 32 [BAXTER v. STOCKTON-ON-TEES CORPN.] 675

HIRE-PURCHASE

Control—Contravention of statutory requirement that percentage of cash price must be paid before agreement is signed—Finance company ignorant of contravention—Whether finance company guilty of offence—Hire-Purchase and Credit Sale Agreements (Control) Order, 1956 (S.I. 1956 No. 180), art. 1 [R. v. ST. MARGARET'S TRUST, LTD.] 289

HOUSING

Rent—Differential rent scheme—Rebate from rent varying with income of tenant—Review of tenant's income and rebate effected towards end of current year—Excess rebate—Additional weekly payments as rent for next year to recover excess rebate—Tenant quitting before excess discharged—Whether balance of excess recoverable as rent in arrear [HAVANT AND WATERLOO URBAN DISTRICT COUNCIL v. NORUM] 423

HUSBAND AND WIFE

Divorce. See DIVORCE.

Maintenance—Application to High Court—Amount of periodical payments—Considerations—Husband's realisable capital given to mistress and used by her to purchase mink farm—Husband living free on farm but receiving no wages—Husband in receipt of service pension—Ordered to pay whole of pension to wife for her and two children—Matrimonial Causes Act, 1950 (c. 25), s. 23 (1) [DONALDSON v. DONALDSON] 660

Costs—No inquiry by wife's solicitors as to husband's income and liabilities—Failure of application—Liability of wife's solicitors to pay husband's costs—Matrimonial Causes Act, 1950 (c. 25), s. 23 [EDWARDS v. EDWARDS] 179

Payment out of court to wife—Affidavit of no settlement no longer needed [PRACTICE DIRECTION] 785

IMPOTENCE

Nullity, ground for. See NULLITY.

IN CAMERA

Court of Appeal—Power to sit in camera. See COURT OF APPEAL (Hearing in camera).

INCOME TAX

Annual payment—Interim income payments in respect of compensation on nationalisation of coal industry—Recurrence—Pure income profit—Payment by the Crown—Income Tax Act, 1918 (c. 40), Sch. D, Case III, r. 1 (a)—Coal Industry Nationalisation Act, 1946 (c. 59), s. 22 (1), (2), (3), (4)—Coal Industry (No. 2) Act, 1949 (c. 79), s. 1 (1), (2), (3) [INLAND REVENUE COMRS. v. WHITWORTH PARK COAL CO., LTD. (IN LIQUIDATION), SAME v. RAMSHAW COAL CO., LTD. (IN LIQUIDATION), SAME v. BRANCEFETH COAL CO., LTD. (IN LIQUIDATION)] 91

Avoidance—"Arrangement" having the purpose or effect of avoiding liability [NEWTON v. COMR. OF TAXATION OF THE COMMONWEALTH OF AUSTRALIA] 759

Deduction in computing profits—Capital expenditure—Improvement—Statutory appropriations towards installations at racecourses—Whether capital expenditure [RACECOURSE BETTING CONTROL BOARD v. YOUNG (INSPECTOR OF TAXES), SAME v. INLAND REVENUE COMRS., YOUNG (INSPECTOR OF TAXES) v. RACECOURSE BETTING CONTROL BOARD, INLAND REVENUE COMRS. v. SAME] 385

Distribution by statutory body—Distribution pursuant to statute from funds after deduction of working expenses—Distribution benefiting body's trading activity—Whether deductible as expense for income tax purposes—Racecourse Betting Act, 1923 (c. 41), s. 3 (6)—Income Tax Act, 1952 (c. 10), s. 137 (a) [RACECOURSE BETTING CONTROL BOARD v. YOUNG (INSPECTOR OF TAXES), SAME v. INLAND REVENUE COMRS., YOUNG (INSPECTOR OF TAXES) v. RACECOURSE BETTING CONTROL BOARD, INLAND REVENUE COMRS. v. SAME] 385

Double taxation—Mutual life assurance society—Resident abroad—Australian company with branch office in the United Kingdom—Assessments to income tax on income of society's life assurance fund—Whether assessments competent—Income Tax Act, 1918 (c. 40), Sch. 1, Sch. D, Rules applicable to Case III, r. 3—Finance (No. 2) Act, 1945 (c. 13), s. 51 (1)—Income Tax Act, 1952 (c. 10), s. 430, s. 437 (1)—Double Taxation Relief (Taxes on Income) (Australia) Order, 1947 (S.R. & O. 1947 No. 806), Schedule, art. II (1) (i), (3), art. III, para. (2), para. (3) [OSTIME (INSPECTOR OF TAXES) v. AUSTRALIAN MUTUAL PROVIDENT SOCIETY] 665

- Exemption—*Crown*—Whether a "person" within income tax legislation—*Income Tax Act, 1918* (c. 40), Sch. D, Case III, r. 1 (a), All Schedules Rules, r. 19, r. 21 [INLAND REVENUE COMRS. v. WHITWORTH PARK COAL CO., LTD. (IN LIQUIDATION), SAME v. RAMSHAW COAL CO., LTD. (IN LIQUIDATION), SAME v. BRANCEPETH COAL CO., LTD. (IN LIQUIDATION)] 91
- Income—Voluntary payments—*Huntsman*—Christmas gifts—*Income Tax Act, 1952* (c. 10), s. 156, Sch. E, paras. 1 and 2, Sch. 9, Rules applicable to Sch. E, r. 1 [WRIGHT v. BOYCE (INSPECTOR OF TAXES)] 708
- Profits—Computation of profits—Year of assessment—Interim income payments in respect of compensation on nationalisation of coal industry—Payments in respect of specified periods—Whether income of those periods or of years of receipt—*Income Tax Act, 1918* (c. 40), Sch. D, Case VI, r. 2 [INLAND REVENUE COMRS. v. WHITWORTH PARK COAL CO., LTD. (IN LIQUIDATION), SAME v. RAMSHAW COAL CO., LTD. (IN LIQUIDATION), SAME v. BRANCEPETH COAL CO., LTD. (IN LIQUIDATION)] 91
- War damage value payments—Property dealing company—Damage to properties comprising stock-in-trade—Whether value payments part of trading receipts—*War Damage Act, 1943* (c. 21), s. 66 (1)—*Income Tax Act, 1918* (c. 40), Sch. D, Case I—*War Damage (Public Utility Undertakings, etc.) Act, 1949* (c. 36), s. 28 [LONDON INVESTMENT AND MORTGAGE CO., LTD. v. INLAND REVENUE COMRS., SAME v. WORTHINGTON (INSPECTOR OF TAXES)] 230

INDUSTRIAL HEREDITAMENT

See RATES (De-rating).

INDUSTRIAL INJURY

Disablement benefit. See Medical appeal tribunal, post.

- Medical appeal tribunal—Jurisdiction—Appeal by claimant against final assessment of disability as too small—Tribunal's right and duty to use their own expert knowledge—Whether tribunal had jurisdiction to set aside assessment on the ground that there was then no loss of faculty resulting from the industrial injury—*National Insurance (Industrial Injuries) Act, 1946* (c. 62), s. 39 (2) [R. v. MEDICAL APPEAL TRIBUNAL (NORTH MIDLAND REGION), *Ex parte HUBBLE*] 374
- "Organ of the body"—Injury to leg—Previous injury to other leg—Whether legs were two similar organs, the functions of which would be interchangeable or complementary—*National Insurance (Industrial Injuries) (Benefit) Regulations, 1948* (S.I. 1948 No. 1372), reg. 2 (5) [R. v. MEDICAL APPEAL TRIBUNAL FOR SOUTH WALES DISTRICT, *Ex parte GRIFFITHS*] 227
- Right to benefit—Burden of proof whether accident arose out of employment—*National Insurance (Industrial Injuries) Act, 1946* (c. 62), s. 7 (4) [R. v. NATIONAL INSURANCE (INDUSTRIAL INJURIES) COMR., *Ex parte RICHARDSON*] 689

INFANT

- Removal outside jurisdiction—Custody granted to father by Divorce Court—Infants made wards of court in Chancery Division—Application by father to Chancery Division that infants should cease to be wards of court—*Law Reform (Miscellaneous Provisions) Act, 1949* (c. 100), s. 9 (3) [Re ANDREWS (INFANTS)] 308
- Infants made wards of court in Chancery Division—Application by father to Divorce Division for leave to take infants out of jurisdiction—*Law Reform (Miscellaneous Provisions) Act, 1949* (c. 100), s. 9 (2)—*Matrimonial Causes Act, 1950* (c. 25), s. 26 (1)—*R.S.C., Ord. 54p, r. 3* [ANDREWS v. ANDREWS & SULLIVAN] 305
- Ward of court. See WARD OF COURT.

INFRINGEMENT

Copyright. See COPYRIGHT.

Trade mark. See TRADE MARK.

INHERITANCE (FAMILY PROVISION)

See FAMILY PROVISION.

INJUNCTION

- Statute—Procedure provided by statute misused for delay—Penalty provided by statute—Restraining infringement of public right [ATTORNEY-GENERAL (AT THE RELATION OF EGHAM RURAL DISTRICT COUNCIL) v. SMITH] 557

INNOCENT MISREPRESENTATION

See MISREPRESENTATION.

INSPECTION

Power—Scope of power. See POTATO MARKETING (Charge on registered producers—Powers of Potato Marketing Board to "enter and inspect" and to demand information relating to potatoes).

INSURANCE

- Building contract, under. See BUILDING CONTRACT.
- Life assurance—Income tax—Mutual insurance. See INCOME TAX (Double taxation—Mutual life assurance society).
- Marine insurance—Commencement—"Inception of this insurance" [SIMONS (TRADING AS ACME CREDIT SERVICES) v. GALE] 504

INTESTACY

- Grant of administration—Administration pendente lite—Number of administrators—*Supreme Court of Judicature (Consolidation) Act, 1925* (c. 49), s. 163 (1) [Re HASLIP (*dec.*)] 275
- Person incapable of managing his own affairs—Applicant not authorised by Court of Protection—Evidence of incapacity of person for whose benefit grant required [PRACTICE NOTE] 600

INVITEE

- Negligence—Duty of occupier—Employment of independent contractor to do work requiring special skill—Electrical wiring of offices defective—Premises re-wired by reputable electrical engineering company five years before date of accident—Defect not apparent—Whether occupier liable as a consequence of contractor's negligence [GREEN v. FIBREGLOSS, LTD.] 521
- Occupier carrying out work himself on his own premises—Work not requiring special skill and knowledge—Standard of care and skill required—Outside door handle fixed by householder—Handle coming off door when pulled by tradesman—Tradesman injured—Whether occupier liable [WELLS v. COOPER] 527

JURISDICTION

- Infants—Chancery Division and Probate, Divorce and Admiralty Division [Re ANDREWS (INFANTS)] 308
- Medical appeal tribunal. See INDUSTRIAL INJURY (Medical appeal tribunal).

JURY	PAGE
Direction to. <i>See</i> CRIMINAL LAW (Trial).	
LACHES	
Constructive trust— <i>Business—Promptitude necessary in pursuing remedy against a constructive trustee in relation to such an asset as a business</i> [Re JARVIS (decd.)].	336
LAND REGISTRATION	
Charge— <i>Date of vesting of legal estate—Land Registration Act, 1925 (c. 21), s. 20 (1), s. 27 (3)</i> [GRACE RYMER INVESTMENTS, LTD. v. WAITE]	777
LANDLORD AND TENANT	
Differential rent scheme. <i>See</i> HOUSING (Rent).	
Lease— <i>Covenant against use except as business premises—Construction of lease—Reference to drafts—Consideration of history and of conduct of parties after the grant—Consideration of nature of demised premises</i> [CITY & WESTMINSTER PROPERTIES (1934), LTD. v. MUDD].	733
<i>Forfeiture—Breach of covenant—Waiver—Promise by landlord before execution of lease that tenant could continue to live on premises—Enforceability of landlord's promise</i> [CITY & WESTMINSTER PROPERTIES (1934), LTD. v. MUDD]	733
<i>Rectification—Absence of common intention to include words in lease</i> [CITY & WESTMINSTER PROPERTIES (1934), LTD. v. MUDD]	733
New tenancy— <i>Business premises—Landlord a company—Wrong company made respondent to tenant's originating summons—Summons amended by making landlord company respondent—Amendment not made within time prescribed for making application—Landlord and Tenant Act, 1954 (c. 56), s. 29 (3)—R.S.C., Ord. 53D, r. 6 (3), Ord. 70, r. 1</i> [Re NOS. 55 AND 57, HOLMES ROAD, KENTISH TOWN]	311
<i>Opposition by landlord—Breach of covenant to repair—Negotiations for rebuilding premises—Discretion of court over refusal of grant of tenancy—Landlord and Tenant Act, 1954 (c. 56), s. 30 (1) (a), s. 31</i> [LYONS v. CENTRAL COMMERCIAL PROPERTIES, LTD.]	767
<i>Intention to occupy premises on termination of current tenancy—Resolution of board passed—Landlord negotiating for lease of other premises—Undertaking given to court to occupy—Intention—Landlord and Tenant Act, 1954 (c. 56), s. 30 (1) (g)</i> [ESPRESSO COFFEE MACHINE CO., LTD. v. GUARDIAN ASSURANCE CO.]	692
Rent— <i>Differential rents.</i> <i>See</i> HOUSING (Rent).	
Repair— <i>Breach of covenant—Defence of want of notice specifying breaches and of leave to proceed—Defendant a former assignee who had assigned his leasehold interest before action—Meaning of "lessee"—Law of Property Act, 1925 (c. 20), s. 146—Leasehold Property (Repairs) Act, 1938 (c. 34), s. 1 (3)</i> [CUSACK-SMITH v. GOLD]	361
<i>Covenant—Construction—"Structural repairs of a substantial nature"</i> [GRANADA THEATRES LTD. v. FREEHOLD INVESTMENT (LEYTONSTONE) LTD.]	551
LAY DAYS	
<i>See</i> SHIPPING (Charterparty).	
LEASE	
Covenant. <i>See</i> LANDLORD AND TENANT.	
LEGITIMATION	
Legitimation per subsequens matrimonium— <i>Child born before, but on same day as, decree of divorce of mother made absolute—Father then free to marry—Subsequent marriage of father and mother—Whether child legitimated—Legitimacy Act, 1926 (c. 60), s. 1 (1)</i> [KRULAK v. KRULAK (No. 2)]	294
LIBEL	
Fair comment— <i>Findings that words complained of untrue but fair comment—Comment founded on inaccurate statement of witness in judicial proceedings—Whether findings inconsistent or comment unfair</i> [GRECH v. ODHAMS PRESS LTD., ADDIS v. SAME]	462
<i>Test is whether the comment is an honest expression of opinion</i> [SILKIN v. BEAVERBROOK NEWSPAPERS LTD.]	516
LIEN	
Solicitor's lien. <i>See</i> SOLICITOR.	
Vendor's lien. <i>See</i> SALE OF LAND (Vendor's lien).	
LIMITATION OF ACTION	
Acknowledgment— <i>Loan to company by director—Balance sheet signed by creditor director—Signature of accountants to their certificate of the balance sheet and accounts—Whether accountants agents to give acknowledgment—Limitation Act, 1939 (c. 21), s. 23 (4), s. 24 (2)—Companies Act, 1948 (c. 38), s. 155 (1)</i> [Re TRANSPLANTERS (HOLDING COMPANY), LTD.]	711
Negligence— <i>Death of tortfeasor—Action brought after lapse of more than six years after accident but within six months of administration—Whether action against tortfeasor's administrator barred—Law Reform (Miscellaneous Provisions) Act, 1934 (c. 41), s. 1 (3)—Limitation Act, 1939 (c. 21), s. 2, s. 32</i> [AIREY v. AIREY]	59, 571
Postponement of limitation period— <i>Negligence—Right of action concealed by fraud—Failure by solicitor to commence an action on behalf of client within statutory period—Ex gratia payment subsequently made by intended defendant for client's benefit—Concealment of source of gift—Limitation Act, 1939 (c. 21), s. 26 (b)</i> [KITCHEN v. ROYAL AIR FORCES ASSN.]	241
Trust— <i>Breach of trust—Fraud or fraudulent breach of trust to which trustee a party—Payment by trustee to innocent third party—Whether third party can rely on any period of limitation—When time begins to run in favour of third party—Limitation Act, 1939 (c. 21), s. 19 (1) (a), (2), s. 26 (a), (b)</i> [G. L. BAKER, LTD. v. MEDWAY BUILDING AND SUPPLIES, LTD.]	582
LIST	
<i>See</i> PRACTICE (Trial—Cause list).	
LOCAL GOVERNMENT	
Transport— <i>Travel concessions—Local authority running public services in area of another local authority—Contribution to cost—Basis of calculation—Public Service Vehicles (Travel Concessions) Act, 1955 (c. 26), s. 1 (4)</i> [LITHERLAND URBAN DISTRICT COUNCIL v. LIVERPOOL CORPN.]	489
LOOK-OUT	
Duty of railway to provide. <i>See</i> RAILWAY.	
MAGISTRATES	
Summons— <i>Consent to the institution of proceedings—Omnia praesumuntur rite esse acta</i> [PRICE v. HUMPHRIES]	725

	PAGE
MAINTENANCE	
Agreement. <i>See</i> DIVORCE (Desertion— <i>Consensual separation—Deed providing for maintenance signed</i>).	
Order. <i>See</i> HUSBAND AND WIFE.	
Wife. <i>See</i> DIVORCE (Maintenance of wife); HUSBAND AND WIFE.	
MARRIAGE	
Dissolution. <i>See</i> DIVORCE.	
Re-marriage after decree of nullity. <i>See</i> NULLITY (Re-marriage).	
MASTER AND SERVANT	
Duty of master— <i>Reasonable care not to expose servant to unnecessary risk—Extent of duty with regard to work places not under master's control—Servant sent to clean third party's windows—Injury due to handle coming away from window—Liability of master</i> [WILSON v. TYNESIDE WINDOW CLEANING CO.]	265
Negligence— <i>Building</i> . <i>See</i> BUILDING (Building in course of construction).	
Railwaymen. <i>See</i> RAILWAY (Look-out).	
Safe system of working. <i>See</i> SAFE SYSTEM OF WORKING.	
MEDICAL APPEAL TRIBUNAL	
National Insurance (Industrial Injuries) Act, 1946. <i>See</i> INDUSTRIAL INJURY.	
MEDICAL BOARD	
National Insurance (Industrial Injuries) Act, 1946. <i>See</i> INDUSTRIAL INJURY (Medical appeal tribunal).	
MEETING	
Company. <i>See</i> COMPANY.	
MENS REA	
<i>See</i> CRIMINAL LAW.	
MINE	
Coal mine. <i>See</i> COAL MINING.	
MISREPRESENTATION	
Innocent misrepresentation— <i>Sale of goods—Misrepresentation as to condition of motor lorry—Acceptance of delivery—Buyer's claim to rescind contract within week of delivery</i> [LONG v. LLOYD]	402
<i>Sale of reversion in trust fund set aside to pay an annuity—Statement, in particulars of sale, that annuitant was believed to have no aggregable estate—No reasonable ground for belief—Rescission of contract</i> [BROWN v. RAPHAEL]	79
MONEY	
Following trust money— <i>Fraudulent payment to innocent third party—Value not given by third party—Whether beneficiary can recover from third party</i> [G. L. BAKER, LTD. v. MEDWAY BUILDING AND SUPPLIES, LTD.]	532
MORTGAGE	
Attornment clause— <i>Creation of relationship of landlord and tenant—Notice to quit—Length of notice required—Whether property let as a dwelling—Rent Act, 1957 (c. 25), s. 16</i> [ALLIANCE BUILDING SOCIETY v. PINWILL]	408
Possession of mortgaged property— <i>Mortgagor not in occupation—Registered land—Oral tenancy agreed and completed by tenant's entry before mortgagor has completed purchase of property—Purchase completed and mortgage granted on same day—Whether mortgagee entitled to possession as against tenant—Land Registration Act, 1925 (c. 21), s. 20 (1), s. 27 (3), s. 70 (1) (g)—Law of Property Act, 1925 (c. 20), s. 55 (c)</i> [GRACE RYMER INVESTMENTS, LTD. v. WAITE]	777
<i>Originating summons—Service of certain notices—Default of appearance—Notice to proceed after a year's delay—R.S.C., Ord. 55, r. 5A—R.S.C., Ord. 64, r. 13—R.S.C., Ord. 67, r. 4</i> [PRACTICE DIRECTIONS]	384
MOTOR VEHICLE	
<i>See</i> ROAD TRAFFIC.	
MURDER	
Capital murder. <i>See</i> CRIMINAL LAW (Capital murder).	
MUTUAL TRADING	
Insurance— <i>Income tax</i> . <i>See</i> INCOME TAX (Double taxation— <i>Mutual life assurance society</i>).	
NAME	
Use of own name as trade mark. <i>See</i> TRADE MARK (Infringement).	
NATIONAL INSURANCE	
Industrial injury. <i>See</i> INDUSTRIAL INJURY.	
Offence— <i>Institution of proceedings by or with the consent of the Minister or by an inspector or other officer authorised in that behalf—Whether prosecution have to prove authorisation—National Insurance Act, 1946 (c. 67), s. 53 (1)</i> [PRICE v. HUMPHRIES]	725
NATIONALITY	
Citizenship— <i>Ceylon—Intention permanently to settle—Declarations in money remittance forms that residence temporary—Evidential value of such declarations in relation to intention for purposes of nationality or domicile—Indian and Pakistani Residents (Citizenship) Act (Ceylon) (No. 3 of 1949), s. 22, as amended by Indian and Pakistani Residents (Citizenship) (Amendment) Act (Ceylon) (No. 37 of 1950), s. 4</i> [TENNEKOON, COMR. FOR REGISTRATION OF INDIAN AND PAKISTANI RESIDENTS v. DURAISAMY]	479
NATURAL JUSTICE	
Arbitration award— <i>Application of rules of natural justice to the setting aside of an award</i> [LONDON EXPORT CORPN., LTD. v. JUBILEE COFFEE ROASTING CO., LTD.]	411
Domestic tribunal. <i>See</i> TRIBUNAL (Decision).	
NEGLIGENCE	
Building. <i>See</i> BUILDING (Building in course of construction).	
Contributory negligence— <i>Appeal—Whether inference of contributory negligence from circumstances substituted on appeal—Shunter injured by fall from railway engine caused by ground lever working points</i> [HICKS v. BRITISH TRANSPORT COMMISSION]	39
Highway. <i>See</i> HIGHWAY.	
Invitee. <i>See</i> INVITEE.	

NEGLIGENCE—continued.	
Limitation of action. <i>See</i> LIMITATION OF ACTION.	
Master— <i>Liability to servant.</i> <i>See</i> MASTER AND SERVANT (Duty of master).	
Solicitor. <i>See</i> SOLICITOR.	
NEW SOUTH WALES	
<i>See</i> PRIVY COUNCIL (Australia).	
NEW TENANCY	
Business premises. <i>See</i> LANDLORD AND TENANT.	
NOTICE	
Contract, to determine. <i>See</i> CONTRACT (Duration).	
Dilapidations, of. <i>See</i> LANDLORD AND TENANT (Repair).	
NOTICE OF APPEAL	
<i>See</i> COURT OF APPEAL.	
NOTICE OF INTENDED PROSECUTION	
<i>See</i> ROAD TRAFFIC.	
NULLITY	
Impotence— <i>Husband's incapacity—Failure to consummate after reasonable time—Seven days' cohabitation—Husband giving false reasons for failure to attempt intercourse</i> [B. (OTHERWISE S.) v. B.]	76
Re-marriage— <i>Wife granted decree nisi of nullity, on the ground of husband's incapacity—Re-marriage of wife before decree made absolute—Whether second marriage bigamous</i> [WIGGINS v. WIGGINS (OTHERWISE BROOKS) AND INGRAM]	555
OBSTRUCTION	
Highway, on. <i>See</i> HIGHWAY (Negligence).	
OCCUPIER	
Duty to invitee. <i>See</i> INVITEE (Negligence).	
OMNIBUS	
Free travel. <i>See</i> LOCAL GOVERNMENT (Transport).	
ORIGINATING SUMMONS	
<i>See</i> MORTGAGE (Possession of mortgaged property).	
PARLIAMENT	
Privilege— <i>Writ beginning action against member of Parliament in respect of a speech or proceeding by him in Parliament—Whether to treat the issue of such a writ as a breach of Parliamentary privilege was contrary to statute—Parliamentary Privilege Act, 1770 (c. 50), s. 1</i> [IN THE MATTER OF THE PARLIAMENTARY PRIVILEGE ACT, 1770]	329
PASSING OFF	
Name of maker—"Bona fide" use by defendant of own name— <i>Confusion of defendant's goods with plaintiffs'</i> [BAUME & CO., LTD. v. A. H. MOORE, LTD.]	113
PATENT	
Appeal tribunal— <i>Certiorari</i> [BALDWIN & FRANCIS, LTD. v. PATENTS APPEAL TRIBUNAL]	365
PAYMENT OUT OF COURT	
<i>See</i> PRACTICE.	
PERJURY	
New trial on ground evidence was perjured. <i>See</i> COURT OF APPEAL (Evidence).	
PERPETUITIES	
Rule against perpetuities— <i>Power of advancement—Power extending to "vested" share—Construction—Power exercisable in anticipation of absolute vesting not in defeasance—Power admittedly invalid for remoteness in relation to some interests—Whether power void</i> [Re WILLS' WILL TRUSTS]	472
PETITION	
Divorce. <i>See</i> DIVORCE.	
PLEA	
<i>See</i> CRIMINAL LAW (Practice).	
PLEADING	
Counterclaim— <i>Charterparty—Breach of obligation to provide cargo delaying ship's becoming an arrived ship—Whether defence to action or matter of counterclaim</i> [AGRIMPEX HUNGARIAN TRADING COMPANY FOR AGRICULTURAL PRODUCTS v. SOCIEDAD FINANCIERA DE BIENES RAICES S.A.]	695
Divorce. <i>See</i> DIVORCE (Practice).	
POSSESSION	
Mortgaged property, of. <i>See</i> MORTGAGE (Possession of mortgaged property).	
Rights of mortgagee. <i>See</i> MORTGAGE (Possession of mortgaged property).	
POTATO MARKETING	
Charge on registered producers— <i>Powers of Potato Marketing Board to "enter and inspect" and to demand information relating to potatoes—Whether entitled to enter and measure acreage—Whether entitled to demand information of arable acreage—Potato Marketing Scheme, 1955 (S.I. 1955 No. 690), para. 81 (1), para. 82 (1), para. 83 (1) (a)</i> [POTATO MARKETING BOARD v. MERRICKS]	538
Disciplinary committee— <i>Chairman to be not a member of the Potato Marketing Board but an "independent person"—Chairman paid a fee by the board—Special Case—Whether jurisdiction to remit award—Agricultural Marketing Act, 1949 (c. 38), s. 8 (1)—Arbitration Act, 1950 (c. 27), s. 22—Potato Marketing Scheme, 1955 (S.I. 1955 No. 690), para. 83 (2) (a), para. 83 (3)</i> [POTATO MARKETING BOARD v. MERRICKS]	538
POWER OF ADVANCEMENT	
<i>See</i> TRUST AND TRUSTEE (Powers of trustee).	
POWER OF APPOINTMENT	
Delegation of power— <i>Power with consent to appoint generally except to named persons—Appointment to new trustees on discretionary trusts—Validity</i> [Re TRIFFITT'S SETTLEMENT]	299

PRACTICE	PAGE
Amendment— <i>Parties—Substituting different party as respondent to originating summons—Time for making application expired before amendment—Whether misnomer—Whether amendment allowed—Landlord and Tenant Act, 1954 (c. 56), s. 29 (3)—R.S.C., Ord. 53D, r. 6 (3), Ord. 70, r. 1 [Re Nos. 55 AND 57, HOLMES ROAD, KENTISH TOWN]</i>	311
Divorce. <i>See</i> DIVORCE.	
Payment out of court— <i>Affidavit of no settlement no longer required [PRACTICE DIRECTION]</i> ..	785
Preliminary point of law— <i>Disallowing costs where point of law not raised as preliminary issue. See COSTS (Disallowing costs of successful defendants).</i>	
Service— <i>Mortgage—Possession—Proceedings in default of appearance. See MORTGAGE (Possession of mortgaged property—Originating summons).</i>	
Third-party procedure— <i>Costs. See COSTS (Third party).</i>	
Transfer of winding-up proceedings. <i>See</i> COMPANY (Winding-up— <i>Compulsory winding-up—Concurrent jurisdiction</i>).	
Trial— <i>Cause list—Removal of case from cause list—Order obtained by defendants dismissing jury action against them for want of prosecution—Crown Office not notified of order so that case left in list and brought on for hearing—Duty of both parties' solicitors to notify Crown Office of order—Liability for costs thrown away—R.S.C., Ord. 36, r. 29 (6) [WILLIAMSON v. BRITISH BOXING BOARD OF CONTROL (1929)]</i>	228
PREMIUM	
Prohibition of payment by Rent Restriction Acts. <i>See</i> RENT RESTRICTION.	
PRESUMPTION	
Death. <i>See</i> DIVORCE (Maintenance of wife).	
Omnia praesumuntur rite esse acta— <i>Consent to institution of proceedings [PRICE v. HUMPHRIES]</i>	725
PRICE MAINTENANCE	
<i>See</i> RESTRICTIVE TRADE PRACTICES.	
PRIVILEGE	
Parliamentary. <i>See</i> PARLIAMENT.	
PRIVY COUNCIL	
Australia— <i>Income tax—Avoidance—"Arrangement" having the purpose or effect of "avoiding liability"—Transactions which may be disregarded by commissioner—Sale by shareholders of shares having rights to special dividend—Commonwealth Income Tax and Social Services Contribution Assessment Act, 1936-1951, Division 7, s. 260 (c) [NEWTON v. COMR. OF TAXATION OF THE COMMONWEALTH OF AUSTRALIA]</i>	759
<i>New South Wales—Death duty—Gift inter vivos—Exclusion of donor—Gift of property by deceased to son without reservation, qualification or condition—Partnership agreement between deceased and his sons—Deceased manager of partnership business—Property used for depaupering of partnership stock—Whether bona fide possession and enjoyment retained by son to the entire exclusion of deceased—New South Wales Stamp Duties Act, 1920-1956, s. 102 (2) (d) [CHICK v. COMR. OF STAMP DUTIES]</i>	623
<i>Insurance—Marine insurance—Warranty—Warranty that "all arrangements" for conversion of ship made at "inception of this insurance" [SIMONS (TRADING AS ACME CREDIT SERVICES) v. GALB]</i>	504
Ceylon— <i>Appeal to Judicial Committee—Jurisdiction of Supreme Court of Ceylon to grant leave—"Civil suit or action in the Supreme Court"—Appeals (Privy Council) Ordinance of Ceylon (c. 85, Vol. II, Legislative Enactments of Ceylon), s. 3 [TENNEKON, COMR. FOR REGISTRATION OF INDIAN AND PAKISTANI RESIDENTS v. DURAISAMY]</i>	479
<i>Registration of Indian and Pakistani residents—Permanently settled in Ceylon—Indian and Pakistani Residents (Citizenship) Act (Ceylon) (No. 3 of 1949), s. 22, as amended by Indian and Pakistani Residents (Citizenship) (Amendment) Act (Ceylon) (No. 37 of 1950), s. 4 [TENNEKON, COMR. FOR REGISTRATION OF INDIAN AND PAKISTANI RESIDENTS v. DURAISAMY]</i>	479
Cyprus— <i>Emergency legislation—Collective fine—Duty on commissioner to hold inquiry and satisfy himself that the inhabitants of the area are given adequate opportunity of understanding subject-matter of inquiry and making representations thereon—"Satisfy himself"—Subjective or objective test—Validity of regulations imposing collective fine—Emergency Powers Order in Council, 1939, s. 6 (1)—Cyprus Emergency Powers (Collective Punishment) Regulations, 1955 to (No. 1) 1955, reg. 3 (g) (1), reg. 5 (1), (2) [ROSS-CLUNIS v. PAPADOPOULLOS]</i>	23
PROBATE	
Grant— <i>Attestation—Holograph will on single sheet of paper—Names of two unidentified persons on reverse side of paper—No attestation clause—Presumption of due execution [Re DENNING (decd.)]</i>	1
<i>Person incapable of managing his own affairs—Applicant not authorised by Court of Protection—Evidence of incapacity of person for whose benefit grant required [PRACTICE NOTE]</i>	600
PROCEEDINGS	
Consent to the institution of proceedings— <i>Omnia praesumuntur rite esse acta [PRICE v. HUMPHRIES]</i>	725
PROFESSIONAL MISCONDUCT	
Solicitor. <i>See</i> SOLICITOR.	
PROFITS TAX	
Computation of profits— <i>Deduction—Racecourse Betting Control Board—Whether payments made as working expenses or as statutory distributions of surplus deductible where board's business beneficial—Racecourse Betting Act, 1928 (c. 41), s. 3 (6)—Income Tax Act, 1952 (c. 10), s. 137 (a) [RACECOURSE BETTING CONTROL BOARD v. YOUNG (INSPECTOR OF TAXES), SAME v. INLAND REVENUE COMRS., YOUNG (INSPECTOR OF TAXES) v. RACECOURSE BETTING CONTROL BOARD, INLAND REVENUE COMRS. v. SAME]</i>	385
<i>War damage value payments—Whether to be included in computing profits of property dealing company [LONDON INVESTMENT AND MORTGAGE CO., LTD. v. INLAND REVENUE COMRS., SAME v. WORTHINGTON (INSPECTOR OF TAXES)]</i>	230
PROTECTIVE TRUSTS	
<i>See</i> SETTLEMENT (Protected life interest).	
QUARTER SESSIONS	
Sentence— <i>Borstal training. See</i> CRIMINAL LAW (Sentence).	

RACECOURSE	
Improvements— <i>Payments by Racecourse Betting Control Board—Taxation of the board. See INCOME TAX (Deduction in computing profits—Distribution by statutory body).</i>	PAGE
RAILWAY	
Look-out— <i>Statutory duty of railway to appoint look-out—Work "for the purpose of . . . repairing the permanent way"—Sub-ganger lengthman engaged on tightening loose fish-plates on goods line—Train going at slow speed—Whether "danger . . . likely to arise"—Prevention of Accidents Rules, 1902 (S.R. & O. 1902 No. 616), r. 9 [CADE v. BRITISH TRANSPORT COMMISSION]</i>	615
Points. <i>See</i> Statutory duty— <i>Ground lever working point, post.</i>	
Statutory duty— <i>Ground lever working point—Shunter caused to fall from step of locomotive by the lever—Whether breach of statutory duty—Whether lever negligently sited—Contributory negligence—Prevention of Accidents Rules, 1902 (S.R. & O. 1902 No. 616), r. 5 [HICKS v. BRITISH TRANSPORT COMMISSION]</i>	39
RATES	
De-rating— <i>Industrial hereditament—Purposes of user—Purposes other than those of a factory—Maintenance of occupier's road vehicles—Distinction from reconditioning—Rating and Valuation (Apportionment) Act, 1928 (c. 44), s. 3 (1), (2) [LONDON TRANSPORT EXECUTIVE v. BETTS (VALUATION OFFICER)]</i>	636
Limitation of rates chargeable— <i>"Established or conducted for profit"—Whether charitable organisation, though not established for profit, was conducted for profit by reason of terms of trust—Rating and Valuation (Miscellaneous Provisions) Act, 1955 (c. 9), s. 8 (1) (a) [GUINNESS TRUST (LONDON FUND) FOUNDED 1890 REGISTERED 1902 v. WEST HAM CORPN.]</i>	237
Friendly society— <i>Whether society non-profit making organisation—Whether "main objects are charitable or are otherwise concerned with the advancement of . . . social welfare"—Rating and Valuation (Miscellaneous Provisions) Act, 1955 (c. 9), s. 8 (1) (a) [TRUSTEES OF THE NATIONAL DEPOSIT FRIENDLY SOCIETY v. SKEGNESS URBAN DISTRICT COUNCIL]</i>	601
RECTIFICATION	
Absence of common intention to include words in lease [CITY & WESTMINSTER PROPERTIES (1934), LTD. v. MUDD]	739
REDUCTION OF CAPITAL	
<i>See</i> COMPANY.	
REMOVEDNESS OF DAMAGE	
<i>See</i> DAMAGES.	
RENT	
Differential rents. <i>See</i> HOUSING.	
RENT RESTRICTION	
Attornment clause. <i>See</i> MORTGAGE (Attornment clause).	
Premium— <i>Rent paid for three years in advance—Whether payment constituted a premium—Whether tenancy rendered invalid by payment of premium—Landlord and Tenant (Rent Control) Act, 1949 (c. 40), s. 2 [GRACE RYMER INVESTMENTS, LTD. v. WAITE]</i>	777
REPAIR	
Liability of landlord. <i>See</i> LANDLORD AND TENANT.	
Liability of tenant. <i>See</i> LANDLORD AND TENANT.	
REQUISITION	
Compensation— <i>Sale of requisitioned land—Derequisitioned before completion—Entitlement to compensation—Compensation (Defence) Act, 1939 (c. 75), s. 2 (1) (b), (3) [Re HAMILTON-SNOWBALL'S CONVEYANCE]</i>	319
RESCISSION	
Misrepresentation. <i>See</i> MISREPRESENTATION (Innocent misrepresentation).	
RESTRAINT OF TRADE	
<i>See</i> TRADE.	
RESTRICTIVE TRADE PRACTICES	
Price maintenance— <i>Sale by retailer below fixed price—Notice of the condition relating to price—What constitutes notice—Restrictive Trade Practices Act, 1956 (c. 68), s. 25 (1) [GOODYEAR TYRE & RUBBER CO. (GREAT BRITAIN), LTD. v. LANCASHIRE BATTERIES, LTD.]</i>	324
REVERSION	
<i>Sale. See</i> MISREPRESENTATION (Innocent misrepresentation).	
ROAD TRAFFIC	
Accident— <i>Negligence—Negligence of highway authority. See</i> HIGHWAY (Negligence).	
Notice of intended prosecution— <i>Notice sent to defendant's residence by registered post—Defendant away on holiday unknown to police—Notice returned to police undelivered—Defendant, bus driver employed by London Transport Executive—Not warned of prosecution at the time offence committed—No notice served on London Transport Executive as registered owners of vehicle—Whether notice served on defendant—Whether case within exemption from requirement of service—Road Traffic Act, 1930 (c. 43), s. 21 (c), proviso (i)—Interpretation Act, 1889 (c. 68), s. 26 [BEER v. DAVIES]</i>	255
RULE AGAINST PERPETUITIES	
<i>See</i> PERPETUITIES.	
SAFE SYSTEM OF WORKING	
Extent of master's duty— <i>Duty not only to provide safety appliances but also to ensure their use by means of orders and supervision—Machine shop—Risk of injury to eyes at grinder for sharpening tools—Goggles not provided—Probability that toolsetter would not have used goggles, if provided, unless compelled to do so [NOLAN v. DENTAL MANUFACTURING CO., LTD.]</i>	449
<i>See also</i> MASTER AND SERVANT (Duty of master—Reasonable care not to expose servant to unnecessary risk).	
SALE OF GOODS	
Quality— <i>Suppliers brought in as third and fourth parties—Costs. See</i> COSTS (Third party).	
SALE OF LAND	
Requisitioned land— <i>Compensation in respect of the taking possession of land—Land derequisitioned after date of contract but before conveyance—Whether compensation comprehended in sale—Compensation (Defence) Act, 1939 (c. 75), s. 2 (1) (b), (3) [Re HAMILTON-SNOWBALL'S CONVEYANCE]</i>	319
Vendor's lien— <i>Contractual right of resale in case of non-completion—Whether lien excluded [Re BIRMINGHAM (dec'd.)]</i>	397

SENTENCE	PAGE
See CRIMINAL LAW.	
SERVICE	
Mortgage— <i>Recovery of possession. See MORTGAGE (Possession of mortgaged property—Originating summons).</i>	
Notice of appeal. See COURT OF APPEAL (Notice of appeal).	
SET-OFF	
Costs. See COSTS.	
Cross-claim— <i>Equitable right of set-off for cross-claim</i> [HANAK v. GREEN].. . . .	141
SETTLEMENT	
Power of appointment. See POWER OF APPOINTMENT.	
Protected life interest— <i>Variation of settlement following divorce—Husband's interests extinguished as if he were dead—Whether discretionary trust on forfeiture capable of operation</i> [Re ALLSOPP'S MARRIAGE SETTLEMENT TRUSTS].. . . .	393
SHIPPING	
Charterparty— <i>Lay days—Loading—"Weather working days"—Ship ordered by harbour master from berth for six days due to threat of bore tide—Illegality of loading—Whether time when ship absent from berth to be included in assessment of lay-time</i> [COMPANIA CRISTAL DE VAPORES OF PANAMA v. HERMAN & MOHATTA (INDIA), LTD.]	508
<i>Loading. See also Demurrage, post.</i>	
Demurrage— <i>Port charterparty—Time lost waiting for berth—Delay due to cargo not being available—No berthing permit until cargo available—Ship kept lying in roads—Whether ship an arrived ship</i> [AGRIMPEX HUNGARIAN TRADING CO. FOR AGRICULTURAL PRODUCTS v. SOCIEDAD FINANCIERA DE BIENES RAICES S.A.]	695
Port charterparty— <i>Duty of charterer to provide cargo—Breach of duty—Whether matter of defence or counterclaim</i> [AGRIMPEX HUNGARIAN TRADING CO. FOR AGRICULTURAL PRODUCTS v. SOCIEDAD FINANCIERA DE BIENES RAICES S.A.]	695
SHOP	
Sunday closing— <i>Mobile van equipped as shop—Sale of goods in street from van—Whether van a shop—Whether retail trade or business carried on in van—Whether portion of street at which van stationary a "place" where retail trade or business is carried on—Shops Act, 1950 (c. 28), s. 53, s. 74 (1)</i> [STONE v. BOREHAM]	715
SOLDIER	
Will. See WILL.	
SOLICITOR	
Costs— <i>Non-contentious business—Agreement for payment of gross sum—Mistaken statement by solicitor as to basis on which remuneration could be calculated—Right of client to an order for delivery of itemised bill and taxation of bill—Solicitors Act, 1957 (c. 27), s. 57 (4)</i> [RUTTER v. SHERIDAN-YOUNG]	13
<i>Payment by solicitor personally—Cause list—Removal of case from cause list—Failure to notify Crown Office of order involving removal of case from cause list</i> [WILLIAMSON v. BRITISH BOXING BOARD OF CONTROL (1929)]	223
Lien— <i>Retaining lien—Divorce suit—Petitioner's solicitor entitled only to qualified lien as parties other than petitioner interested in the petition</i> [HUGHES v. HUGHES]	366
Limitation of action— <i>Concealment of right of action. See LIMITATION OF ACTION (Postponement of limitation period—Negligence).</i>	
Negligence— <i>Damages—Action under Fatal Accidents Acts, 1846 to 1908, not brought within limitation period</i> [KITCHEN v. ROYAL AIR FORCES ASSN.]	241
Professional misconduct— <i>Litigation—Improper continuance of proceedings—Change of position on discovery—Irrelevance of civil aid certificate—Solicitors to pay costs personally—R.S.C., Ord. 65, r. 11—Legal Aid and Advice Act, 1949 (c. 51), s. 1 (7) (b)</i> [EDWARDS v. EDWARDS]	179
STAMP DUTY	
Conveyance on sale— <i>Transfer of shares—Shares subject to settlement—Oral agreement to exchange reversionary interest in settled shares for shares owned by life tenant—Trustees' subsequent transfer of shares to life tenant—Whether conveyance of beneficial interest or legal estate only—Stamp Act, 1891 (c. 39), s. 54, Sch. 1—Law of Property Act, 1925 (c. 20), s. 53 (1), (2)</i> [OUGHTRED v. INLAND REVENUE COMRS.]	443
Voluntary disposition— <i>Inter vivos—Disposition by declaring new trusts—Transfer of shares—Transfer by settlor to trustees of settlement—Subsequent oral direction to trustees on what trust shares to be held—Deed of declaration by trustees subsequently confirming trusts—Whether direction a "disposition" of settlor's interest—Whether deed liable to ad valorem stamp duty—Stamp Act, 1891 (c. 39), Sch. 1—Finance (1909-10) Act, 1910 (c. 8), s. 74 (1)—Law of Property Act, 1925 (c. 20), s. 53 (1) (c), s. 205 (1) (ii)</i> [GREY v. INLAND REVENUE COMRS.]	423
STATUTE	
Construction— <i>Consolidating statute—New wording used—"Disposition" in place of grant or assignment—Whether effect of new wording limited to scope of former statute—Law of Property Act, 1925 (c. 20), s. 53 (1) (c), s. 205 (1) (ii)</i> [GREY v. INLAND REVENUE COMRS.].. . . .	423
<i>Offence—Whether mens rea an ingredient of an offence created by statute. See CRIMINAL LAW (Mens rea).</i>	
Injunction to restrain abuse of machinery of Act for delay. See INJUNCTION.	
Order made under statutory power. See STATUTORY INSTRUMENT (Validity).	
STATUTORY DUTY	
Breach— <i>Causation—Onus of proof</i> [NOLAN v. DENTAL MANUFACTURING CO., LTD.].. . . .	449
See also RAILWAY.	
STATUTORY INSTRUMENT	
Validity— <i>Condition for making instrument that authority should "satisfy himself"—Subjective or objective test</i> [ROSS-CLUNIS v. PAPADOPOULLOS]	23
SUBSCRIPTIONS	
Fund raised by public subscriptions— <i>Whether resulting trust. See CHARITY (Uncertainty—"Worthy causes").</i>	
SUMMING-UP	
See CRIMINAL LAW (Trial).	

SUNDAY CLOSING Shop. See SHOP.	PAGE
TENANCY New tenancy under Landlord and Tenant Act, 1954. See LANDLORD AND TENANT (New tenancy).	
THIRD-PARTY PROCEDURE Costs. See COSTS (Third party).	
TOWN AND COUNTRY PLANNING Enforcement notice—Appeal against notice—Jurisdiction of justices to determine whether or not matters referred to in notice constituted development—Town and Country Planning Act, 1947 (c. 51), s. 17 (2), proviso, s. 23 (4) [EASTBOURNE CORPN. v. FORTES ICE CREAM PARLOUR (1955), LTD.]	276
Renewal of previous use of land after July 1, 1948—Whether appeal should be allowed on the ground that there was no development of land—Town and Country Planning Act, 1947 (c. 51), s. 23 (4) [FYSON v. BUCKINGHAMSHIRE COUNTY COUNCIL, METAL RECOVERY AND STORAGE CO., LTD. v. SAME]	286
Use of machinery of Town and Country Planning Act, 1947, for purpose of delay—Injunction—Town and Country Planning Act, 1947 (c. 51), s. 12 [ATTORNEY-GENERAL (AT THE RELATION OF EGHAM URBAN DISTRICT COUNCIL) v. SMITH]	557
Validity of notice—Application by originating summons for declaration that notice invalid—Town and Country Planning Act, 1947 (c. 51), s. 23—R.S.C., Ord. 54A, r. 1, r. 1A [RIGDEN v. WHITSTABLE URBAN DISTRICT COUNCIL]	730
Permission for development—Outline permission—Design and siting reserved for subsequent approval—Subsequent application for approval on reserved matters refused on ground that development contrary to planning authority's proposals for the area—Whether outline permission a sufficient valid permission for development—Town and Country Planning General Development Order and Development Charge Applications Regulations, 1950 (S.I. 1950 No. 728), art. 5 (2) [HAMILTON v. WEST SUSSEX COUNTY COUNCIL]	174
TRADE Restraint of trade—Agreement in restraint of trade—Companies each agreeing not to employ persons employed by the other within previous five years—Reasonableness—Restriction on employees' freedom of choice of employment—Public policy [KORES MANUFACTURING CO., LTD. v. KOLOK MANUFACTURING CO., LTD.]	65
TRADE MARK Infringement—Maker's name—"Bona fide" use of own name as trade mark—Confusion in the course of trade—Trade Marks Act, 1938 (c. 22), s. 4 (1), s. 8 [BAUME & CO., LTD. v. A. H. MOORE, LTD.]	113
Passing off. See PASSING OFF (Name of maker).	
TRADE UNION Domestic tribunal—Trade union representing certain exhibitors represented on tribunal of film renters' association—Tribunal's recommendation to ban films to exhibitor, member of another trade union—Validity of recommendation [BYRNE v. KINEMATOGRAH RENTERS SOCIETY, LTD.]	579
TRAMWAY Free travel. See LOCAL GOVERNMENT (Transport).	
TRANSFER Company winding-up, of. See COMPANY (Winding-up—Compulsory winding-up—Concurrent jurisdiction). Equitable interest—By declaration of trust. See TRUST AND TRUSTEE (Declaration of trust).	
TRANSPORT See LOCAL GOVERNMENT.	
TRESPASS Cinema—Inspector of trade association buying tickets for purpose of calculating number of patrons—Whether entry on premises a trespass [BYRNE v. KINEMATOGRAH RENTERS SOCIETY, LTD.]	579
TRIBUNAL Decision—Natural justice—Remedies for conduct of proceedings being contrary to natural justice—Whether contractual relationship necessary—Whether proceedings of joint investigating committee of film renters protection society and trade union of exhibitors conducted in accordance with natural justice [BYRNE v. KINEMATOGRAH RENTERS SOCIETY, LTD.]	579
Disciplinary committee. See POTATO MARKETING (Disciplinary committee).	
TRUST AND TRUSTEE Constructive trust—Business and lease bequeathed to executors beneficially—New lease granted to one executor—Business carried on by one executor—Form of account to be taken—Laches [Re JARVIS (dec'd.)]	336
Declaration of trust—Transfer by way of declaration of new trust and determination of subsisting equitable interest—Personalty—Whether a "disposition" for which writing needed—Law of Property Act, 1925 (c. 20), s. 53 (1) (c) [GREY v. INLAND REVENUE COMRS.]	423
Discretionary trust—Appointment in exercise of power. See POWER OF APPOINTMENT (Delegation of power). Following trust money. See MONEY (Following trust money). Limitation. See LIMITATION OF ACTION (Trust). Powers of trustee—Power of advancement—Power to "raise" any part and to pay or "apply" the same for the benefit of any child—Exercise of power by creating new settlement for children—Validity [Re WILLS' WILL TRUSTS]	472
Protected life interest. See SETTLEMENT (Protected life interest). Separate trusts—Fund raised by public appeal—Whether donations created more than one interest in the same property—Charitable Trusts (Validation) Act, 1954 (c. 58), s. 2 (3) [Re GILLINGHAM BUS DISASTER FUND]	749
VALUE PAYMENT War Damage Act, 1943, under. See WAR DAMAGE.	
VENDOR AND PURCHASER See SALE OF LAND.	
VENDOR'S LIEN See SALE OF LAND.	

	PAGE
VERDICT	
Substitution of by Court of Criminal Appeal. <i>See</i> CRIMINAL LAW (Appeal— <i>Substitution of verdict</i>).	
VOLUNTARY DISPOSITION	
Liability to stamp duty. <i>See</i> STAMP DUTY.	
WAIVER	
Landlord and tenant— <i>Covenants</i> . <i>See</i> LANDLORD AND TENANT (Lease— <i>Forfeiture—Breach of covenant</i>).	
WAR DAMAGE	
Value payment— <i>Whether trading receipt for income tax purposes</i> [LONDON INVESTMENT AND MORTGAGE Co., LTD. <i>v.</i> INLAND REVENUE COMRS., SAME <i>v.</i> WORTHINGTON (INSPECTOR OF TAXES)]	230
WARD OF COURT	
Application that infant should cease to be a ward of court— <i>Relationship of the jurisdiction over infants of the Chancery Division and of the Probate, Divorce and Admiralty Division</i> [Re ANDREWS (INFANTS)]	308
Diplomatic privilege— <i>Immunity of father from legal process—Whether son can be made a ward of court</i> [Re C. (AN INFANT)]	656
Jurisdiction— <i>Whether jurisdiction of Chancery Division supersedes jurisdiction of Divorce Division in relation to infant made a ward of court</i> [ANDREWS <i>v.</i> ANDREWS & SULLIVAN]	305
WIFE	
Maintenance. <i>See</i> DIVORCE (Maintenance of wife); HUSBAND AND WIFE (Maintenance).	
WILL	
Advancement— <i>Exercise of powers</i> . <i>See</i> TRUST AND TRUSTEE (Powers of trustee— <i>Power of advancement</i>).	
Execution— <i>Attestation</i> . <i>See</i> PROBATE (Grant).	
Soldier's will— <i>Actual military service—Soldier on leave in England from British army of occupation in Germany—Wills Act, 1837 (c. 26), s. 11</i> [In the <i>Estate of COLMAN (decd.)</i>].	35
WINDING-UP	
Company, of. <i>See</i> COMPANY.	
WINDOW CLEANER	
Safe system of working— <i>Duty of master</i> [WILSON <i>v.</i> TYNESIDE WINDOW CLEANING Co.] .. .	265
WORK AND LABOUR	
Employment of contractor— <i>Whether any duty on occupier of premises to employ skilled contractor to do work to premises</i> . <i>See</i> INVITEE (Negligence— <i>Duty of occupier</i>).	

STATUTES, ETC., REFERRED TO

PUBLIC GENERAL STATUTES

PAGE

Administration of Estates Act, 1925 (c. 23), s. 35 (1)	397
Agricultural Marketing Act, 1949 (c. 38), s. 8 (1)	538
Arbitration Act, 1950 (c. 27)—	
s. 21	563
s. 22	538
Bankruptcy Act, 1914 (c. 59), s. 25 (1)	57
Bastardy Laws Amendment Act, 1872 (c. 65), s. 3, as amended	294
Charitable Trusts (Validation) Act, 1954 (c. 58), ss. 1 (2), 2 (3)	749
Coal Industry (No. 2) Act, 1949 (c. 79), s. 1 (2)	91
Coal Industry Nationalisation Act, 1946 (c. 59), s. 22 (2), (3)	91
Companies Act, 1948 (c. 38)—	
s. 20 (1)	194
ss. 61, 66 (1), 67 (1), (2), 69 (1), (2)	455
s. 155 (1)	711
s. 182 (1), (3)	129
s. 210	124
s. 219 (1)	458
Compensation (Defence) Act, 1939 (c. 75), s. 2 (1) (b), (3)	319
Copyright Act, 1911 (c. 46), s. 24 (1), <i>proviso</i> (a) (ii)	200
Copyright Act, 1956 (c. 74), s. 8 (1)	155
Criminal Appeal Act, 1907 (c. 23), s. 5 (2)	629
Criminal Justice Act, 1925 (c. 86), s. 35 (1)	51
Criminal Justice Act, 1948 (c. 58), s. 41 (3)	359
Development and Road Improvement Funds Act, 1909 (c. 47), ss. 8 (1) (a), 10, as amended	675
Evidence Act, 1938 (c. 28), s. 1 (3)	686
Factories Act, 1937 (c. 67), s. 49	449
Finance Act, 1894 (c. 30), ss. 1, 2 (1) (b)	720
Finance (1909-10) Act, 1910 (c. 8), s. 74 (1)	428
Finance Act, 1940 (c. 29), s. 43 (1) (a), as amended by Finance Act, 1950 (c. 15), s. 43	785
Finance (No. 2) Act, 1945 (c. 13), s. 51 (1)	665
Forgery Act, 1913 (c. 27), s. 1	51
Homicide Act, 1957 (c. 11), s. 2	87
Income Tax Act, 1918 (c. 40)—	
<i>Sch. 1</i>	665
<i>Sch. D, Case I</i>	230
<i>Case III, r. 1 (a)</i>	91
<i>r. 3</i>	665
<i>Case VI, r. 2</i>	91
<i>All Schedules Rules, rr. 19, 21</i>	91
Income Tax Act, 1952 (c. 10)—	
s. 137 (a)	385
s. 156, <i>Sch. E, paras. 1, 2</i>	703
ss. 430, 437 (1)	665
<i>Sch. 9, Rules applicable to Sch. E, r. 1</i>	703
Inheritance (Family Provision) Act, 1938 (c. 45), s. 2 (1), (1A) (c) (as amended by the In- testates' Estates Act, 1952 (c. 64), s. 7, <i>Sch. 3</i>)	296
Interpretation Act, 1889 (c. 63), s. 26	255
Land Registration Act, 1925 (c. 21), ss. 20 (1), 27 (3), 70 (1) (g)	777
Landlord and Tenant (Rent Control) Act, 1949 (c. 40), s. 2	777
Landlord and Tenant Act, 1954 (c. 56)—	
s. 29 (3)	311
s. 30 (1) (a)	767
(g)	692
s. 31	767
Larceny Act, 1916 (c. 50), s. 32 (1)	51
Law of Property Act, 1925 (c. 20)—	
s. 53 (1)	443
(c)	428
(2)	443
s. 55 (c)	777
s. 146	361
s. 205 (1) (ii)	428
Law Reform (Miscellaneous Provisions) Act, 1934 (c. 41)—	
s. 1 (3)	59
(b)	371
Law Reform (Miscellaneous Provisions) Act, 1949 (c. 100)—	
s. 9	656
(2)	305
(3)	308
Leasehold Property (Repairs) Act, 1938 (c. 34), s. 1 (3)	361
Legal Aid and Advice Act, 1949 (c. 51), s. 1 (7) (b)	179
Legitimacy Act, 1926 (c. 60), s. 1 (1)	294
Limitation Act, 1939 (c. 21)—	
s. 2	59, 571
s. 19 (1) (a), (2)	532
ss. 23 (4), 24 (2)	711
s. 26 (a)	532
(b)	241, 532
s. 32	59, 571
Local Government Act, 1929 (c. 17), s. 32	675
Matrimonial Causes Act, 1950 (c. 25)—	
s. 2 (1), <i>proviso</i> (2)	261
ss. 16, 19	633
s. 23	179
(1)	660
s. 26 (1)	305
Mines (Working Facilities and Support) Act, 1923 (c. 20)	351

National Insurance (Industrial Injuries) Act, 1946 (c. 62)—

<i>s.</i> 7 (4)	689
<i>ss.</i> 39 (2), 40 (1)	374
National Insurance Act, 1946 (c. 67), <i>s.</i> 53 (1)	725
Parliamentary Privilege Act, 1770 (c. 50), <i>s.</i> 1	329
Patents Act, 1949 (c. 87), <i>ss.</i> 9, 85 (10)	368
Public Service Vehicles (Travel Concessions) Act, 1955 (c. 28), <i>s.</i> 1 (4)	489
Racecourse Betting Act, 1928 (c. 41), <i>s.</i> 3 (6)	385
Rating and Valuation (Apportionment) Act, 1928 (c. 44), <i>s.</i> 3 (1), (2)	636
Rating and Valuation (Miscellaneous Provisions) Act, 1955 (c. 9), <i>s.</i> 8 (1) (a)	237, 601
Rent Act, 1957 (c. 25), <i>s.</i> 16	408
Restrictive Trade Practices Act, 1956 (c. 68), <i>s.</i> 25 (1)	324
Road Traffic Act, 1930 (c. 43), <i>s.</i> 21 (c), <i>proviso</i> (1)	255
Shops Act, 1950 (c. 28), <i>ss.</i> 58, 74 (1)	715
Solicitors Act, 1957 (c. 27), <i>s.</i> 57 (4)	13
Stamp Act, 1891 (c. 39)—	
<i>s.</i> 54	443
<i>Sch.</i> 1	428, 443
Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49)—	
<i>ss.</i> 31 (1) (h), 50 (1)	209
<i>s.</i> 163 (1)	275
Town and Country Planning Act, 1947 (c. 51)—	
<i>s.</i> 12	557
<i>s.</i> 17 (2), <i>proviso</i>	276
<i>s.</i> 23	730
(4)	276, 286
Trade Marks Act, 1938 (c. 22), <i>ss.</i> 4 (1), 8	113
War Damage Act, 1943 (c. 21), <i>s.</i> 66 (1)	230
War Damage (Public Utility Undertakings, etc.) Act, 1949 (c. 36), <i>s.</i> 23	230
Wills Act, 1837 (c. 26); <i>s.</i> 11	35

COMMONWEALTH AND DEPENDENCIES

Appeals (Privy Council) Ordinance of Ceylon (c. 85, Vol. II, Legislative Enactments of Ceylon),

<i>s.</i> 3	479
Commonwealth Income Tax and Social Services Contribution Assessment Act, 1936-1951, <i>Division</i> 7, <i>s.</i> 260 (c)	759
Cyprus Emergency Powers (Collective Punishment) Regulations, 1955 to (No. 1) 1955, <i>regs.</i> 3 (g) (i), 5 (1), (2)	28
Emergency Powers Order in Council, 1939, <i>s.</i> 6 (1)	22
Indian and Pakistani Residents (Citizenship) Act (Ceylon) (No. 3 of 1949), <i>s.</i> 22, as amended by Indian and Pakistani Residents (Citizenship) (Amendment) Act (Ceylon) (No. 37 of 1950), <i>s.</i> 4	479
New South Wales Stamp Duties Act, 1920-1956, <i>s.</i> 102 (2) (d)	622

RULES

Companies (Winding-up) Rules, 1949 (S.I. 1949 No. 330), <i>r.</i> 46	458
Companies (Winding-up) (Amendment) Rules, 1957 (S.I. 1957 No. 973), <i>r.</i> 1 (f)	124
Magistrates' Courts Rules, 1952 (S.I. 1952 No. 2190), <i>r.</i> 5 (2)	494
Matrimonial Causes Rules, 1957 (S.I. 1957 No. 619), <i>rr.</i> 15 (1), 82	744
Prevention of Accidents Rules, 1902 (S.R. & O. 1902 No. 616)—	
<i>r.</i> 5	39
<i>r.</i> 9	615
R.S.C.—	
<i>Ord.</i> 5, <i>r.</i> 9	124
<i>Ord.</i> 28, <i>r.</i> 1	744
<i>Ord.</i> 34, <i>rr.</i> 1, 7	563
<i>Ord.</i> 36, <i>r.</i> 29 (6)	228
<i>Ord.</i> 53B	124
<i>Ord.</i> 53D, <i>r.</i> 6 (3)	311
<i>Ord.</i> 54A, <i>rr.</i> 1, 1A	730
<i>Ord.</i> 54C, <i>r.</i> 12	351
<i>Ord.</i> 54F, <i>r.</i> 3	305
<i>Ord.</i> 55, <i>r.</i> 5A	384
<i>Ord.</i> 58, <i>r.</i> 4 (1)	11, 659
5 (1)	11
10	729
13 (3)	57
15 (3), (4)	11
<i>Ord.</i> 64, <i>r.</i> 13	384
<i>Ord.</i> 65, <i>r.</i> 1	209
11	179
<i>Ord.</i> 67, <i>r.</i> 4	384
<i>Ord.</i> 70, <i>r.</i> 1	311

REGULATIONS

Building (Safety, Health and Welfare) Regulations, 1948 (S.I. 1948 No. 1145), <i>reg.</i> 90 (1)	222
Copyright Royalty System (Records) Regulations, 1957 (S.I. 1957 No. 866), <i>regs.</i> 1 (1) (f), 3	155
National Insurance (Industrial Injuries) (Benefit) Regulations, 1948 (S.I. 1948 No. 1372), <i>reg.</i> 2 (5)	227
Protection of Eyes Regulations, 1938 (S.R. & O. 1938 No. 654), <i>schedule</i>	449
Town and Country Planning General Development Order and Development Charge Applica- tions Regulations, 1950 (S.I. 1950 No. 723), <i>art.</i> 5 (2)	174

ORDERS

Double Taxation Relief (Taxes on Income) (Australia) Order, 1947 (S.R. & O. 1947 No. 806), <i>Schedule</i> , <i>arts.</i> II (1) (i), (3), III, <i>paras.</i> (2), (3)	665
Hire-Purchase and Credit Sale Agreements (Control) Order, 1956 (S.I. 1956 No. 180), <i>art.</i> 1	289
Potato Marketing Scheme (Approval) Order, 1955 (S.I. 1955 No. 690), <i>paras.</i> 81 (1), 82 (1), 83 (1) (a), (2) (a), (3)	538

MISCELLANEOUS

R.I.B.A. form of contract ((1939), revised 1952), condition 15 (a)	497
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WORDS AND PHRASES

	PAGE
<i>Action.</i> See "Civil suit or action in the Supreme Court"	
<i>Administration.</i> See "Circumstance affecting the administration . . . of the estate."	
<i>Advancement</i> (otherwise concerned with the advancement of . . . social welfare)	601
<i>All arrangements</i> ("all arrangements for conversion" of a ship) . . .	504
<i>Apply</i> . . .	472
<i>Arrangement</i> . . .	759
<i>Arrangements.</i> See "All arrangements."	
<i>Avoiding liability</i> . . .	759
<i>Bona fide</i> . . .	113
<i>Circumstance affecting the administration or distribution of the estate</i>	296
<i>Civil suit or action in the Supreme Court</i> . . .	479
<i>Conducted.</i> See "Established or conducted for profit."	
<i>Danger</i> . . . likely to arise . . .	615
<i>Disposition</i> . . .	428
<i>Dissolution</i> . . .	633
<i>Divorce</i> . . .	633
<i>Enter and inspect</i> . . .	538
<i>Established or conducted for profit</i> . . .	237
<i>For the purpose of</i> . . . repairing the permanent way . . .	615
<i>Fresh evidence</i> . . .	374
<i>Holding</i> . . .	129
<i>Independent person</i> . . .	538
<i>Inspect.</i> See "Enter and inspect."	
<i>Intend</i> . . .	692
<i>Interest in the estate</i> . . .	296
<i>Lessee</i> . . .	361
<i>Main objects are charitable or are otherwise concerned with the advancement of</i> . . . social welfare . . .	601
<i>Maintenance</i> (maintenance of road vehicles) . . .	636
<i>Omnia praesumuntur rite esse acta</i> . . .	725
<i>Organ of the body</i> . . .	227
<i>Person</i> . . .	91
<i>Person interested</i> . . .	686
<i>Place</i> . . .	715
<i>Raise</i> . . .	472
<i>Repair.</i> See "Structural repairs of a substantial nature."	
<i>Retail</i> . . .	155
<i>Sale by retail.</i> See "Retail."	
<i>Satisfy himself</i> . . .	23
<i>Social welfare</i> (otherwise concerned with the advancement of religion, education or social welfare) . . .	601
<i>Structural repairs of a substantial nature</i> . . .	551
<i>Substantial</i> (Structural repairs of a substantial nature) . . .	551
<i>Vested</i> (in interest, not in possession) . . .	472
<i>Weather working days</i> . . .	508
<i>Will take</i> . . . at a fair value . . .	194
<i>Worthy causes</i> . . .	749

CORRIGENDA

1958] 2 All E.R.

- p. 14: *RUTTER v. SHERIDAN-YOUNG*. Counsel for the defendant: read "*A. E. Holdsworth*" instead of "*M. E. Holdsworth*."
- p. 62: *AIREY v. AIREY*. Line C.5: for ". . . not less than six months . . ." read ". . . not later than six months . . ." Page 63, line 4: for ". . . cannot be reserved . . ." read ". . . can be reserved . . ."
- p. 184: *EDWARDS v. EDWARDS*. Line F.1: for counsel "*J. Stevenson*" read "*J. Stephenson*."
- p. 476: *Re WILLS' WILL TRUSTS*. Lines C.4, F.5, and I.1: for "power of appointment" read "power of advancement."
- p. 675: *BAXTER v. STOCKTON-ON-TEES CORPN.* Second footnote: for "p. 697" read "p. 679."

THE ALL ENGLAND LAW REPORTS

INCORPORATING THE
LAW TIMES REPORTS
AND THE
LAW JOURNAL REPORTS

Re DENNING (*deceased*).
HARNETT *v.* ELLIOTT AND OTHERS.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Sachs, J.), March 19, 1958.]

Probate—Grant—Attestation—Holograph will on single sheet of paper—Names of two unidentified persons on reverse side of paper—No attestation clause—Presumption of due execution.

A holograph will, which was the only testamentary document found after the deceased's death, consisted of a small single sheet of writing paper. On one side appeared the date and the words "I give all I possess to my cousins Mary Jane and John Harnett . . ." followed by the signature of the deceased. On the other side and upside down two names were written in different hands "Edith Freeman" and "Dorothy Edwards" one below the other. There was no attestation clause and no indication why Edith Freeman's and Dorothy Edwards' names were on the back of the document. The sole surviving cousin now sought to propound the will. There was no evidence as to the identity of Edith Freeman or Dorothy Edwards.

Held: applying the maxim *omnia praesumuntur rite esse acta*, probate would be granted since the only practical reason why the names of Edith Freeman and Dorothy Edwards were on the back of the document must be that the names were there for the purpose of attesting the will.

In the Goods of Peverett ([1902] P. 205) applied.

[As to presumption of due execution in absence of attestation clause, see 16 HALSBURY'S LAWS (3rd Edn.) 205, para. 362, note (g); and for cases on the subject, see 23 DIGEST (Repl.) 102, 103, 1027-1039.]

Case referred to:

(1) *In the Goods of Peverett*, [1902] P. 205; 71 L.J.P. 114; 87 L.T. 143; 23 Digest (Repl.) 102, 1030.

Action.

The plaintiff, John Harnett, who was the sole surviving beneficiary, claimed as residuary legatee to set up the will of the deceased, Alice Mary Denning, dated Sept. 3, 1939. All the next of kin were made defendants but no one appeared at the hearing in opposition.

J. P. Comyn for the plaintiff.

SACHS, J.: I am asked to admit to probate a document which appears to consist of a small single sheet of writing paper, the whole of the face of which

is taken up by the date "Sept. 3rd. Year of our Lord 1939" followed by five lines which consist of the words:

"I give all I possess to my cousins Mary Jane and John Harnett in parish of St. Feock, county of Cornwall",

and lastly a word intended to read "signed" followed by the signature "Alice Mary Denning, spinster". That, as I have said, takes up the whole page. On the reverse side if one turns the sheet upside down one finds written in two different hands: "Edith Freeman" and "Dorothy Edwards", one below the other. Save for a single letter which is crossed out there is nothing else whatsoever on the back of the document. Very considerable searches have been made but no one has been able to identify either "Edith Freeman" or "Dorothy Edwards". The only other really material facts known are first that at some stage the deceased did tell John Harnett, the plaintiff in this case, that she had made a will and that he was one of the beneficiaries and his sister the other, and secondly that that particular document to which I have referred was found after the death of the deceased and that no other testamentary document has been discovered.

In those circumstances the real issue for the court is whether the maxim *omnia praesumuntur rite esse acta* can be applied. In *In the Goods of Peverett* (1) ([1902] P. 205), SIR FRANCIS JEUNE, P., in dealing with a case in which the signatures of two ladies appeared on the face of the document, one of them with the words: "Mary Ann Brand, Sep. 14, 1893, sine these wishes" said (*ibid.*, at p. 206):

"Two things may be laid down as general principles. The first is, that the court is always extremely anxious to give effect to the wishes of persons if satisfied that they really are their testamentary wishes; and, secondly, the court will not allow a matter of form to stand in the way if the essential elements of execution have been fulfilled. Those are principles which I can act upon, although I am conscious that in this case, where there is no attestation clause at all, I am going to the furthest limit."

That was a case in which, as I have said, the words: "Mary Ann Brand, . . . sine these wishes" appear on the face of the document. If I grant probate in the present case it seems to me that I am going a step further than that which was regarded in 1902 as the furthest limit, in that here there is no indication why the names were on the back of the document upside down. Having taken into account all the factors I think it proper to go that step further because it seems to me that there is no other practical reason why those names should be on the back of the document unless it was for the purpose of attesting the will. In those circumstances I think this is a proper case for the grant of probate.

Order accordingly.

Solicitors: *Gregory, Rowcliffe & Co.*, agents for *Sitwell, Harvey & Money*, Truro (for the plaintiff).

[Reported by A. T. HOOLAHAN, Esq., Barrister-at-Law.]

A ADAMS AND OTHERS v. NATIONAL BANK OF GREECE
AND ATHENS, S.A. PRUDENTIAL ASSURANCE CO., LTD.
AND OTHERS v. NATIONAL BANK OF GREECE AND
ATHENS, S.A.

B [QUEEN'S BENCH DIVISION (Diplock, J.), March 10, 11, 12, 13, 1958.]

Conflict of Laws—Foreign law—Recognition—Succession by newly created foreign company to liability of company then dissolved—Subsequent foreign decree altering law of succession so as to exclude retrospectively the succession to liabilities—Whether decree a law of succession or a law for discharging liabilities—Whether decree effective to discharge contractual liabilities under English contracts.

C The plaintiffs were holders of sterling mortgage bonds issued by a Greek company, payment of interest on the bonds being guaranteed by the National Bank of Greece, S.A. The proper law of the bonds and of the guarantee was English law. Interest on the bonds was unpaid since the beginning of 1950, a moratorium having been imposed by Greek law. By D Greek law 2292 and a ministerial decree, both passed in 1953, the guarantor company was amalgamated with another Greek company to form the defendant company as the universal successor of the guarantor company and the two former companies were dissolved. The effect of art. 4 of law 2292 was (as was decided on July 12, 1956, in the High Court, and affirmed in the House of Lords in *National Bank of Greece and Athens, S.A. v. Melliss*, [1957] 3 All E.R. 608), that the contractual liability of the guarantor on the bonds was transferred to the defendant company. Greek decree E 3504, which came into force on July 16, 1956, provided that art. 4 of law 2292 "is substituted as from the time it entered into force as follows: . . . the new company formed by the amalgamation becomes . . . the universal successor to the rights and obligations of the companies amalgamated, F except for the obligations to which such companies were liable whether as principal or guarantor or otherwise under bonds . . . issued by limited liability companies . . . the new company formed by the amalgamation shall not be or be deemed by reason of this law . . . or otherwise howsoever to be the successor to the above obligations. . .". The decree further provided that the rights and obligations of the defendant company were to be governed, as G from the date of the company's creation, by law 2292 as amended by decree 3504. The plaintiffs, having presented to the proper paying agents in London in August or September, 1956, coupons for interest due on the bonds, and having received no payment, sought to recover from the defendant company, as guarantor, interest falling due within the period of six years prior to the issue of the writ in the action.

H **Held:** the plaintiffs were entitled to recover the interest notwithstanding Greek decree 3504, because, as the contractual rights of the plaintiffs against the defendant company (as successor of the guarantor company) were in existence at the time when decree 3504 was made, that law was in substance a law discharging liabilities and was not a law of succession or status, and therefore was ineffective under English private international law to discharge I the contractual rights of the plaintiffs as against the defendant company under contracts of which the proper law was English.

[As to the recognition of the dissolution of foreign corporations, see 7 HALSBURY'S LAWS (3rd Edn.) 13, para. 22; as to the discharge of contracts, see *ibid.*, p. 82, para. 151; as to the limited recognition of foreign expropriatory legislation, see *ibid.*, p. 9, para. 11.]

Cases referred to:

(1) *National Bank of Greece and Athens, S.A. v. Melliss*, [1957] 3 All E.R. 608.

- (2) *Aksionairnoye Obschestvo A.M. Luther v. Sagor (James) & Co.*, [1921] 3 K.B. 532; 90 L.J.K.B. 1202; 125 L.T. 705; 11 Digest (Repl.) 325, 19. A
- (3) *Paley (Princess Olga) v. Weisz*, [1929] 1 K.B. 718; 98 L.J.K.B. 465; 141 L.T. 207; 11 Digest (Repl.) 612, 421.
- (4) *Re Helbert Wagg & Co., Ltd., Re Prudential Assurance Co., Ltd.*, [1956] 1 All E.R. 129; [1956] 1 Ch. 323; 3rd Digest Supp. B
- (5) *Lazard Bros. & Co. v. Midland Bank, Ltd.*, [1933] A.C. 289; 102 L.J.K.B. 191; 148 L.T. 242; 10 Digest (Repl.) 1299, 9161.
- (6) *Lynch v. Paraguay Provisional Government*, (1871), L.R. 2 P. & D. 268; 40 L.J.P. & M. 81; 25 L.T. 164; 35 J.P. 761; 11 Digest (Repl.) 394, 513.
- (7) *Re Aganoor's Trusts*, (1895), 64 L.J.Ch. 521; 11 Digest (Repl.) 395, 514. C

Actions.

These were actions by Ronald Shaw Adams and certain other persons and limited companies, the plaintiffs, holders of seven per cent. sterling mortgage bonds issued by the National Mortgage Bank of Greece (referred to hereinafter as "the principal debtor"), for the recovery of arrears of interest payable on the bonds, from the National Bank of Greece and Athens, S.A., the defendants, a corporation constituted under Greek law and carrying on business at 6, Old Jewry, London, E.C.2, as guarantors of payment of the interest, payment having been refused on behalf of the principal debtor on presentation by the plaintiffs of the appropriate coupons to the agreed paying agents in London on a date subsequent to July 16, 1956. By the terms of the mortgage bonds, which were of the same issue as those which were the subject of the decision in *National Bank of Greece and Athens, S.A. v. Metliss* (1) ([1957] 3 All E.R. 608), the principal debtor, for value received, agreed to pay in sterling to the bearer of the bonds on the dates specified, the principal sums secured and, in the meantime, to pay in sterling interest on the principal sum at the rate of seven per cent. per annum, half-yearly on July 1 and Dec. 1, on presentation of the coupons attached to the bonds as they became due; the rate of interest was subsequently reduced to four and three quarter per cent. Under the terms of the bonds, another Greek company, the National Bank of Greece, S.A., unconditionally guaranteed the due payment of the principal moneys and interest. The bonds became subject to a moratorium by Greek law in 1949 and interest was unpaid from the beginning of 1950. D

By a Greek law 2292 of 1953, and a ministerial decree, dated Feb. 27, 1953, which was made pursuant to that law, the National Bank of Greece, S.A. was amalgamated with the Bank of Athens, S.A. to form a new company, namely, the present defendants. Law 2292 provided: E

"When the amalgamation of limited liability banking companies is concerned, the legal provisions in force are amended as follows . . . 4. No description of the items contributed is required in the relative contract of amalgamation nor in the statutes, in the case of amalgamation by formation of a new company, provided that all the assets and liabilities of the banking companies amalgamating are contributed as a whole. The company which absorbs another company by merger, or the new company formed by the amalgamation, becomes the universal successor to the rights and obligations in general of the amalgamated companies, without any other formality or act whatsoever." F

The decree made pursuant to law 2292 was as follows: G

" . . . Sole article. The Hellenic limited liability banking companies by shares, seated in Athens, under styles 'National Bank of Greece, Ltd. Cy' and 'Bank of Athens, Ltd. Cy', are amalgamated and a new limited liability banking company by shares is formed by these presents under the style H I

- A 'National Bank of Greece and Athens, Ltd. Cy' ... under the following terms: ... 5. As from the publication of the present decrees, the National Bank of Greece, Ltd. Cy. and the Bank of Athens, Ltd. Cy. cease to exist and the entire property of each of them in its whole (assets and liabilities) on the day of publication is considered as being automatically contributed to the new limited liability company by shares, constituted by virtue of these
- B presents, which is substituted ipso jure and without any other formality, in all rights and obligations of the said amalgamated banks, as their universal successor."

On July 16, 1956, legislative decree 3504 was passed by the Greek government which provided:

- C "Article 1. The second paragraph of art. 4 of law 2292/1953 'concerning the amalgamation of limited liability banking companies' is substituted as from the time it entered into force as follows: 'The company absorbing another company by amalgamation or the new company formed by the amalgamation becomes, without any other formality or act, the universal successor to the rights and obligations of the companies amalgamated,
- D except for the obligations to which such companies were liable whether as principal or guarantor or otherwise under bonds, securities in general or contracts or otherwise howsoever in relation to loans through bonds payable to bearer or not in gold or foreign currency, issued by limited liability companies, public bodies, municipalities and communities, etc. The company absorbing another company or the new company formed by the
- E amalgamation shall not be or be deemed by reason of this law or other law or decree or articles of association issued pursuant thereto or otherwise howsoever to be the successor to the above obligations under loans in gold or foreign currency until the promulgation of law providing for the extent and the manner of their submission to these obligations.' Article 2. Is abolished as from the time of its promulgation para. 5 of the sole article of the royal decree of Feb. 26/27, 1953 'concerning the amalgamation of
- F the National Bank of Greece and the Bank of Athens by the creation of a new limited liability banking company.' The rights and obligations of the new limited liability banking company under the name of 'National Bank of Greece and Athens' created by said decree are governed as from the time of its creation by the relative provisions of law 2292/1953 as amended by the present law. Article 3. The present enters into force as
- G from its promulgation in the official Gazette."

- The date of that promulgation was July 16, 1956. No such law as that referred to in art. 1 of decree 3504 had been passed. The plaintiffs presented coupons for the interest due to the appropriate paying agents in August or September, 1956, and notice of this was given to the defendant company but no interest was
- H paid. The plaintiffs claimed payment from the defendant company of interest falling due within the period of six years prior to the issue of the writ in the action.

- The defendants contended that by virtue of the legislative decree 3504 dated July 16, 1956, they were not liable as guarantors of the interest payable on the mortgage bonds; the plaintiffs contended that it was against English public policy to give effect to decree 3504 on the ground, *inter alia*, that the
- I decree was confiscatory in that it purported to deprive the plaintiffs of property rights vested in them immediately before the decree was passed.

J. G. Foster, Q.C., Mark Littman and L. J. Blom-Cooper for the plaintiffs.

T. G. Roche, Q.C., and N. H. Lever for the defendants.

DIPLOCK, J.: By a Greek law 2292 of 1953 and a ministerial decree made pursuant to it dated Feb. 27, 1953, the National Bank of Greece, S.A. was amalgamated with another Greek company, the Bank of Athens, S.A., to form a new company, the present defendants. They were created by

law 2292 and the decree itself which at the same time dissolved the two former companies which were so amalgamated. It was held by the House of Lords in *National Bank of Greece and Athens, S.A. v. Metliss* (1) ([1957] 3 All E.R. 608) that the effect of law 2292 and the decree in Greek law was that the defendants succeeded to the liabilities of the National Bank of Greece, S.A. (inter alia) as guarantor of the bonds and that as the provision in law 2292 and the decree which had this effect was one which created the defendants and constituted them the "universal successor" of the two dissolved companies, the relevant provision was one which dealt with "succession" or with the "status" of the newly created juristic person and was one to which the English courts would accordingly give effect as transferring to the defendants the liability of the former National Bank of Greece, S.A. as guarantor of the bonds notwithstanding that the proper law of the bonds and of the ancillary contract of guarantee was English law.

It would be open to the defendants to contend on fresh evidence as to Greek law that law 2292 and the decree in the form in which they were at the time of the decision in *National Bank of Greece and Athens, S.A. v. Metliss* (1) did not have in Greek law the effect which the House of Lords found they had. They do not, however, seek to do so, and it is accepted that the House of Lords' findings of fact as to the meaning and effect of law 2292 and the decree in the form in which they were at the relevant date in *National Bank of Greece and Athens, S.A. v. Metliss* (1) (that is before July 16, 1956) are correct. What the defendants say is that by virtue of a Greek legislative decree 3504 passed on July 16, 1956, which has the same effect as a Greek law, the defendants are absolved from any liability as guarantors of the bonds. The relevant terms of law 2292 and the decree dated Feb. 27, 1953, as they existed before July 16, 1956, are set out in the speech of VISCOUNT SIMONDS in *National Bank of Greece and Athens, S.A. v. Metliss* (1) ([1957] 3 All E.R. at pp. 609, 610). It is only necessary to repeat here for clarity art. 4 of law 2292 and para. 5 of the decree, adding that the expert evidence of Greek law called in this case shows that although law 2292 does not expressly provide that the companies to be amalgamated shall cease to exist on the amalgamation, para. 5 of the decree was in fact otiose since it only re-states what would in any event have resulted implicitly from law 2292 itself and from general principles of Greek law as a consequence of the amalgamation of the two former companies by ministerial decree.

[HIS LORDSHIP then read art. 4 of law 2292, para. 5 of the decree dated Feb. 27, 1953, and the relevant terms of decree 3504, dated July 16, 1956; these are set out at p. 4, letter H, and p. 5, letters A to F, ante. HIS LORDSHIP continued:] It is established by expert evidence of Greek law that in Greek law legislative decree 3504 absolves the defendants from any liability as guarantors of the bonds which are the subject-matter of this action, and also that the Greek courts (as one would expect) would give retrospective effect to this enactment although it would not have the effect of disturbing any judgment given before July 16, 1956* on the basis of the pre-existing law, nor would the new law be given retrospective effect in any case in which the hearing was concluded before July 16, 1956, even although judgment were given thereafter. The expert witnesses were unable to say positively whether, if the defendants had in fact made a payment (not under a judgment) in satisfaction of a liability from which they were absolved retrospectively by the legislative decree of July 16, 1956, they could recover the amount so paid from the payee. I am not surprised at their inability to answer this question on which there must be a dearth of precedent. In the absence of satisfactory evidence that Greek law in this respect differs from English law, I hold (if it be relevant) that if any such payments had been made, they would not have been recoverable by the defendants.

* July 16, 1956, was the date on which decree 3504 came into force.

A It is important to keep in the forefront of one's consideration of the legal problems involved that the defendants were not a party to the contract of guarantee contained in or evidenced by the bonds of which the proper law is English law. The original guarantor was the dissolved company, the National Bank of Greece, S.A. There was no novation of the original contract of guarantee. To establish the defendants' liability the plaintiffs must rely on some
 B provision of Greek law which will be given effect to by the English courts as transferring to the defendants a liability of the dissolved Greek company under a contract of which the proper law is English law.

The defendants' case (if I may put the cart before the horse) is that at the time the plaintiffs' cause of action arose—that is after July 16, 1956, when they presented their interest coupons to the paying agents for payment and
 C were not paid—there was in existence no provision of Greek law which transferred to the defendants the liability of the dissolved company as guarantors of the bonds. The plaintiffs on the other hand adopt the historical approach. They say that on July 15, 1956, the defendants were liable to the plaintiffs in English law under the guarantee: The House of Lords has so decided*. If the defendants have ceased to be liable since that date, but have nevertheless
 D continued to exist as a juristic person, it must be by virtue of a discharge of their contractual liability that is valid in English law, which is the proper law of the contract.

Although the arguments have ranged over a wide field, I think that the case really turns on which of these two rival methods of approach to the defendants' liability is correct. The point is a short one, and like that in *National Bank of Greece and Athens, S.A. v. Metliss* (1), is itself devoid of previous authority. It is not, I think, possible to shirk it by holding (as counsel for the plaintiffs argued) that even if the original law 2292 and the original decree had been initially in the form which they have now retrospectively assumed, the English court could have applied that part of them which made the defendants the successor of the dissolved National Bank of Greece, S.A., and ignored that part which
 E excluded from the succession its liability as guarantor of the bonds. Although the English court can recognise and give effect to the attributes of the new fictitious person given to it by its creator, the Greek government—since those attributes have in the circumstances in which the defendants were created been held by the House of Lords* to be part of its status and governed by the law of its domicile—the English court cannot usurp the function of the creator by
 F bestowing on it attributes with which its creator has not endowed it. Put bluntly, I do not think that the English court can blow hot and cold.

Counsel for the plaintiffs argues that there is a rule of public policy that entitles the English court to blow hot and cold, and permits it to give effect to part of the law, but prevents it from giving effect to that part which is confiscatory and/or discriminatory. That English law will give effect to confiscatory legislation
 G relating to property and rights within the territorial jurisdiction of the legislating state is well established; *Aksionairnoye Obschestvo A.M. Luther v. James Sagor & Co.* (2) ([1921] 3 K.B. 532); *Paley (Princess Olga) v. Weisz* (3) ([1929] 1 K.B. 718); and I agree with UPJOHN, J., in *Re Helbert Wagg & Co., Ltd., Re Prudential Assurance Co., Ltd.* (4) ([1956] 1 All E.R. 129 at p. 139) that this is so whether the owners of the property or rights are nationals of or domiciled in the legislating
 H state or not. Counsel for the plaintiffs contends that as an exception to this rule the courts will not give effect to the confiscatory legislation where it purports to operate on private proprietary rights outside the jurisdiction of the legislating state. This, I think, may be true of any foreign legislation whether confiscatory or not, but I do not think that the exception would cover law 2292 and the decree if they had originally been made in the form in which they now are. The proprietary rights outside the jurisdiction of Greece were rights against the National
 I

* See *National Bank of Greece and Athens, S.A. v. Metliss* (1) ([1957] 3 All E.R. 608).

Bank of Greece, S.A. They were extinguished by the dissolution of that company; and it is conceded that, subject only to its own statutory power to wind up the company in England, the English court must give effect to that dissolution (see *Lazard Bros. & Co. v. Midland Bank, Ltd.* (5), [1933] A.C. 289 at p. 297). The existing rights being so extinguished, the real complaint against law 2292 and the decree in their now existing form is that they fail to create new rights against a different guarantor in substitution for rights against the dissolved guarantor.

I do not see on what principle the English courts can create new rights which the Greek legislature has omitted to do itself. This is something quite different from refusing to recognise the destruction of existing rights. There would be the same fundamental objection in seeking to apply any rule of English law against giving effect to discriminatory legislation. I need not, therefore, embark on the inquiry whether this rule exists in the form contended for by counsel for the plaintiffs, or to what kind of legislation it applies.

In considering and rejecting these two arguments of counsel for the plaintiffs I should make it plain that I am expressing no moral judgment one way or the other about the policy or purpose of the Greek government in passing the law of July 16, 1956. In the view that I take of this case this is irrelevant. The only question which I have to determine is has that law had the effect of relieving the defendants of the liability which lay on them in English law before the date of law 3504 as guarantors of the bonds held by the plaintiffs? On what I regard as the crucial point in this case I think that the plaintiffs' historical method of approach is the correct one. I should not shut my eyes to what has happened even although the Greek courts are by their legislature compelled to do so. The rights that the plaintiffs are seeking to enforce are contractual rights. They are none the less so because the person against whom they seek to enforce them was not originally a party to the contract, but has been substituted as a party by operation of a law (albeit passed by the Greek government) which the English courts recognise as effective to bring about the substitution. To say that the plaintiffs are seeking to exercise statutory rights arising under a Greek statute, while true in one sense, does not seem to me to be true in the relevant sense of making the proper law of the plaintiffs' rights Greek law—which I apprehend in the case of a Greek statutory right it must be—instead of English law which is the proper law of the contract. I think that this is also implicit in that part of the House of Lords' decision in *National Bank of Greece and Athens, S.A. v. Metliss* (1) ([1957] 3 All E.R. 608) which rejected the application to a bondholder's rights against the defendants of the Greek laws relating to the moratorium to which effect must have been given if the proper law of the bondholder's rights against the defendants was Greek law.

Whatever may be the proper method of approach to rights under some other type of contract, it seems to me that in the case of a contract contained in bearer bonds, the benefit of which is transferable by delivery of the bonds, and where individual bondholders may have acquired their rights under the contract at any time since the issue of the bonds in 1927—including the period between the passing of law 2292 and law 3504—it would be quite wrong to approach the legal problem with which I am confronted in this case except on the basis that on July 15, 1956 (the day before which law 3504 was passed) the holder of the bond possessed legally enforceable rights against the defendants as guarantor under a contract of which the proper law is English law. It is, therefore, I think for the defendants to show that their liability which existed on July 15, 1956, has been discharged.

They rely on law 3504. I have to look at the substance of the law, not merely at its form. If it is a law which in substance merely discharges as from July 16 the liability of (inter alios) the defendants from liabilities which include (inter alia) liabilities under the contract of guarantee contained in the bonds whose proper law

A is English, it is in my view beyond question that an English court will not treat it as effective to do so so far as the liabilities under a contract whose proper law is English law are concerned. I have deliberately inserted the latin parentheses to make it clear that my judgment is in no way dependent on any inference that law 3504 was specifically directed against the holders of this issue of bonds, although I should have drawn that inference if the matter were relevant. The discharge of contractual liabilities of banks in the position of the defendants is obviously one of the objects which law 3504 is seeking to achieve. Is it saved from being in substance a law discharging contractual liabilities, and brought into the category of a law of succession because it purports to achieve that object by amending a pre-existing law of succession? I think that the short answer to that is that a law which alters the rights and liabilities of persons who are already successors, although it may be a law relating to "successors" is not a law of succession at all. A law of succession deals with what happens to the rights and liabilities of a natural person on his decease, or in the case of a company on its ceasing to exist. A law which deals with the existing rights and liabilities of a person not on his decease, but on some other date or event, does not become a law of succession merely because, as a matter of history, those rights and liabilities originally vested in him as the result of a law of succession. In my view, therefore, law 3504 is not a law of succession, but a law which discharges contractual liabilities.

Counsel for the plaintiffs, while arguing (in my view correctly) that law 3504 was not a law of succession, relied on an alternative argument that in any event it should be ignored because for the purpose of probate and administration the English courts only recognised the laws of succession in force in the country of the deceased's domicile at the date of his death. The rule is so stated in DICEY'S CONFLICT OF LAWS (6th Edn.) at p. 817, and is supported by *Lynch v. Paraguay Provisional Government* (6) ((1871), L.R. 2 P. & D. 268) and *Re Aganoor's Trusts* (7) ((1895), 64 L.J.Ch. 521). This rule, counsel for the plaintiffs urged, should be applied by analogy to the case of succession of fictitious persons which ceased to exist on amalgamation. Although LORD PENZANCE in *Lynch v. Paraguay Provisional Government* (6), when applying the rule to a grant of probate, appears to have based it as much on convenience as anything else, I think that probably the true basis is that which I have expressed above, namely, that a law which regulates the rights of persons who are already successors is not a law of succession, and the English courts recognise as affecting movable property locally situate in England only the law of succession of the country of domicile of the deceased.

This branch of the case has been argued principally on the basis that the question whether the English court would give effect to law 3504 depended on whether it was a law of succession; but although this was the ground on which the Court of Appeal and the minority of the House of Lords (LORD MORTON OF HENRYTON and LORD KEITH OF AVONHOLM) decided that effect should be given to law 2292, the majority of the House of Lords (VISCOUNT SIMONDS, LORD TUCKER and LORD SOMERVELL OF HARROW) appear to have based their decision on the ground that comity which requires us to recognise the existence of a fictitious person created by another sovereign state requires us to recognise the attributes with which it has been created, for those can properly be regarded as a matter pertaining to its "status", which is governed by the law of the country which created it. There is, however, no authority which compels me to hold that when a sovereign state has created a fictitious person with attributes and capacity to confer rights in English law on third parties not subject to the jurisdiction of that sovereign state, and such rights have become vested in such third parties, an English court should give effect to legislation of that sovereign state which purports to annul those vested rights in English law, either directly or under the guise of restricting the attributes or capacity of the fictitious person which it has previously created.

I think that the matter can be tested quite simply. If the Greek legislature in 1952 had passed a law saying that the National Bank of Greece, S.A. had not the capacity to pay the interest on this issue of bonds, or any particular class of bonds which it had already issued, or that it was ultra vires for them to do so, would the English court have given effect to such a law? The answer is, I think, plainly "No". The reason that it is "No" is that such a law is not in substance a law relating to capacity or "status"; it is a law discharging a liability. A

Finally, I have to consider whether—even although law 3504 might have been ineffective to discharge the defendants' liability which existed on July 15, 1956, had it purported to do so as from the date of the law coming into force—its retrospective character converts it into a law of succession or status, and thus one to which an English court should give effect. No doubt when the British Parliament passes a retrospective law and tells a statutory lie (which it may do for the best possible motives) the English law has got to pretend to believe it. But if I am right in thinking that a law which alters the rights and liabilities of persons who are already successors is not a law of succession, it does not become so because it says untruthfully that they never were successors at all. So also if a Greek law which purported to deprive a fictitious person created by Greek law of the capacity to fulfil an obligation which it has validly incurred would be treated by the English court as a law discharging a liability, and not as a law relating to capacity or "status", I do not see how its substance is changed merely because it purports to say untruthfully that the fictitious person never had the capacity to incur the liability. B

In my view law 3504 of July 16, 1956, was not a law of succession or relating to capacity or "status", but was in substance a law relating to the discharging of liabilities, and as such it is not, under English rules of private international law, effective to discharge the liability of the defendants as guarantors of the bonds held by the plaintiffs, which I am bound by the decision of the House of Lords in *National Bank of Greece and Athens, S.A. v. Metliss* (1) ([1957] 3 All E.R. 608) to hold existed on July 15, 1956, before law 3504 was passed. C

This action therefore succeeds. D

Judgment for the plaintiffs. E

Solicitors: *Herbert Smith & Co.* (for the plaintiffs); *Stibbard, Gibson & Co.* (for the defendants).

[Reported by WENDY SHOCKETT, Barrister-at-Law.]

A MEDCALF v. MEDCALF.

[COURT OF APPEAL (Hodson, Morris and Pearce, L.JJ.), March 3, 1958.]

Divorce—Appeal—Setting down—Time allowed—Appeal against refusal of decree nisi—R.S.C., Ord. 58, r. 4 (1), r. 5 (1), r. 15 (3), (4).

B An appeal against a judgment dismissing a petition for a decree nisi of divorce is not an appeal against a decree nisi and therefore the time for appealing against the judgment is within six weeks after the judgment (R.S.C., Ord. 58, r. 4 (1)) and the time for setting down the appeal is within seven days after the service of the notice of appeal, or such further time as may be allowed by the proper officer under R.S.C., Ord. 58, r. 5 (1), and R.S.C., Ord. 58, r. 15, relating to an appeal against a decree nisi and requiring both service and setting down to be effected within the six weeks, does not apply.

D A petitioner for a decree nisi of divorce served notice of appeal against the dismissal of her petition on the respondent and the party named within six weeks of the judgment dismissing the petition and on the day after that period had expired sent a copy to the District Registry. On being informed by the District Registry that the appeal was out of time, since it should have been set down within the period of six weeks, she applied to the Court of Appeal to extend the time for setting down the appeal.

E **Held:** the petitioner should apply to the registrar as the proper officer to extend the time for setting down the appeal under R.S.C., Ord. 58, r. 5 (1), which was the appropriate rule (and not r. 15 relating to appeals against decrees nisi).

[For R.S.C., Ord. 58, r. 4 (1), r. 5 (1) and r. 15 (3), (4), see the ANNUAL PRACTICE.]

Motion.

F A wife presented a petition for a decree nisi of divorce in the Reading District Registry on the ground of her husband's adultery with a woman named, and included a prayer for the exercise of the court's discretion in respect of her own adultery. The petition was undefended. On Dec. 16, 1957, Mr. Commissioner RAWLINS in a reserved judgment found the allegation of adultery proved but refused to exercise his discretion in the wife's favour and dismissed her petition. On Jan. 25, 1958, the solicitors for the wife sent notices of appeal to the solicitors acting for the husband and the woman named, who received them on Jan. 27, and on the same day they sent a copy to the Reading District Registry which was received on Jan. 28. On that date they were informed by telephone by the District Registry that the documents were not complete to enable the appeal to be set down, and that the appeal was out of time as it had to be set down after service within the period of six weeks ended on the previous day. The solicitors applied to the Court of Appeal to extend the time for setting down the appeal.

H By R.S.C., Ord. 58:

I "4. Time for appealing.—(1) Subject to the provisions of this rule, every notice of appeal shall be served under para. (5) of r. 3 of this order within the following period (calculated from the date on which the judgment or order of the court below was signed, entered or otherwise perfected), that is to say:— . . . (c) in any other case, six weeks.

"5. Setting down.—(1) The appellant shall, within seven days after service of the notice of appeal or within such further time as may be allowed by the proper officer, apply in accordance with this rule to set down the appeal.

"15. Appeal against decree nisi.—(1) The following provisions of this rule shall apply to any appeal to the Court of Appeal in a matrimonial cause against a decree nisi of divorce or nullity of marriage.

"(2) The period of six weeks specified in r. 4 of this order shall be calculated from the date on which the decree was pronounced, and r. 14 of this order shall not apply in relation to that period.

"(3) The appellant shall, within the said period and after service of the notice of appeal, leave with the appropriate registrar two copies of the notice of appeal (one of which shall be impressed with the appropriate judicature fee stamp or indorsed with the amount of the fee paid, and the other indorsed with a certificate of the date of service of the notice); and the appeal shall not be competent unless this paragraph has been complied with.

"(4) One copy of the notice left with the appropriate registrar as aforesaid shall forthwith be filed by that registrar; and for the purposes of r. 5 of this order the leaving of the said copies shall be sufficient application to set down the appeal, and paras. (1) and (2) of that rule shall not apply.

"(6) In this rule 'the appropriate registrar' means . . . in relation to a cause proceeding in a district registry the registrar of that registry."

F. J. White for the wife.

The husband was not represented.

HODSON, L.J.: We are obliged to Mr. White for calling our attention to this rule. The notice was given in time in this case, which does not appear to be covered by R.S.C., Ord. 58, r. 15, since it is not an appeal against a decree nisi. In those circumstances, it seems that the right course is for those instructing counsel to deal with the matter in the ordinary way through the proper officer. I do not think that we ought to issue a direction to him how he is to act; but if his attention is drawn to this rule, and he has no special reason for refusing to extend the time, I imagine that he will extend the time, because R.S.C., Ord. 58, r. 5, provides, in effect, that the proper officer can extend the seven days by such further time as he thinks fit. We are of opinion that the matter ought to be dealt with in that way.

MORRIS, L.J.: I agree.

PEARCE, L.J.: I agree.

Motion referred to registrar.

Solicitors: *Lovegrove & Durant*, Windsor (for the wife).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

A

RUTTER v. SHERIDAN-YOUNG.

[COURT OF APPEAL (Lord Evershed, M.R., Parker and Sellers, L.J.J.), February 27, 28, March 3, 4, 1958.]

B

Solicitor—Costs—Non-contentious business—Agreement for payment of gross sum—Mistaken statement by solicitor as to basis on which remuneration could be calculated—Right of client to an order for delivery of itemised bill and taxation of bill—Solicitors Act, 1957 (5 & 6 Eliz. 2 c. 27), s. 57 (4).

C

Where a client has entered into an agreement with his solicitor to pay a gross sum as remuneration in respect of the transaction of non-contentious business by the solicitor, the client is not entitled (by virtue of the proviso to s. 57 (4) of the Solicitors Act, 1957*) to the delivery of a bill of costs unless he can show to the satisfaction of the court that there is something into which, as a matter of general principle or private right or both, the court should inquire (see p. 20, letter C, post).

Re Palmer ((1890), 45 Ch.D. 291) applied.

D

By an agreement between a solicitor and a client, the client agreed to pay to the solicitor the sum of £157 10s. as remuneration for work done in connexion with acquiring a lease of certain premises on behalf of the client. Before the agreement was made, the solicitor informed the client erroneously that he was entitled to charge on the basis permitted by Sch. 2 to the Solicitors' Remuneration Order, 1883, as amended by the Solicitors' Remuneration Order, 1953. He was not in fact entitled to do so as respects the greater part of the work because he had not made a written election in compliance with art. 6 of the Order of 1883, as amended by the Order of 1953, before undertaking the work. The solicitor had received some moneys on behalf of the client in connexion with certain other matters, and, in settling his accounts with the client, had, by mistake, paid to the client £150 too much. In an action by the solicitor to recover the £150 as money paid to the client under a mistake of fact, the client applied, by summons, for an order for delivery of a bill of costs for the work done by the solicitor in connexion with the lease of the premises, and for taxation of the bill.

E

F

G

Held: there should be an order for delivery of an itemised bill and for taxation of the bill, because the solicitor's mistaken statement that he was entitled to charge in accordance with Sch. 2 to the Order of 1883, as amended, had been one of the factors which led to the making of the agreement for the payment of the lump sum of £157 10s. and required the court to look into the charges in order to see whether they were reasonable.

Appeal dismissed.

H

[As to agreements for remuneration in regard to non-contentious business, see 31 HALSBURY'S LAWS (2nd Edn.) 171, 172, paras. 205, 206; and for cases on the subject, see 42 DIGEST 132, 133, 1261-1271.]

For the Solicitors Act, 1957, s. 57, see HALSBURY'S STATUTES (2nd Edn.) Interim Service and Vol. 37; and for the Solicitors Act, 1932, s. 57, see 24 HALSBURY'S STATUTES (2nd Edn.) 51.

I

For the Solicitors' Remuneration Order, 1883, art. 6, as amended by the Solicitors' Remuneration Order, 1953, see 20 HALSBURY'S STATUTORY INSTRUMENTS 197.]

Cases referred to:

- (1) *Re Palmer*, (1890), 45 Ch.D. 291; 59 L.J.Ch. 575; 62 L.T. 778; 42 Digest 128, 1226.
- (2) *Re Frape, Ex p. Perrett*, [1893] 2 Ch. 284; 62 L.J.Ch. 473; 68 L.T. 558; 42 Digest 128, 1224.

* The terms of s. 57 (4) are set out at p. 17, letter B, post.

(3) *Ray v. Newton*, [1913] 1 K.B. 249; 82 L.J.K.B. 125; 108 L.T. 313: 42 A Digest 133, 1270.

Interlocutory Appeal.

The plaintiff, Sydney Rutter, a solicitor practising as "S. Rutter & Co.", appealed from part of an order made by HAVERS, J., in chambers, on Dec. 19, 1957, allowing an appeal by the defendant, Peter Dumaresq Sheridan-Young, from an order made by Master CLAYTON on Nov. 12, 1957.

The plaintiff had acted as a solicitor for the defendant in both contentious and non-contentious business. The contentious business was in regard to an action brought by the defendant against his former wife, which action was settled, and the non-contentious business included the acquisition of a lease of premises known as 54, Brunswick Gardens, London. It was alleged by the plaintiff that the defendant had agreed to pay to the plaintiff a lump sum of £500 for costs and disbursements for the work done in connexion with the action which was settled, and a lump sum of £157 10s. as costs plus £12 1s. 5d. for disbursements in connexion with the lease of 54, Brunswick Gardens. In an action commenced by a specially indorsed writ, the plaintiff claimed from the defendant the sum of £150 as money paid by the plaintiff to the defendant under a mistake of fact which appeared in a cash account dated Jan. 7, 1957. After the plaintiff had issued a summons under R.S.C., Ord. 14, for leave to sign final judgment in the action, the defendant applied by summons for, among other things, (i) an order for the delivery of a bill of costs of the work done by the plaintiff in connexion with the action by the defendant against his former wife, and for taxation of the bill; (ii) an order for delivery of a bill of costs of the work in connexion with the lease of 54, Brunswick Gardens, and taxation of the bill; and (iii) an order for the stay of all further proceedings in the plaintiff's action against the defendant pending the delivery and the taxation of the two bills of costs. Master CLAYTON, by his order dated Nov. 12, 1957, gave the plaintiff leave to sign final judgment for £150 and made no order on the defendant's application. On appeal, HAVERS, J., gave the defendant unconditional leave to defend the action, and ordered the plaintiff to deliver to the defendant the bills of costs as required by him, and that the bills should be referred to taxation. The plaintiff appealed from so much of the order of HAVERS, J., as directed the plaintiff to deliver a bill of costs in regard to the work in respect of the lease of 54, Brunswick Gardens, and the taxation of that bill.

Maurice Lyell, Q.C., and *C. L. Hawser* for the plaintiff.

M. E. Holdsworth for the defendant.

LORD EVERSHED, M.R.: This is an appeal from an order made by HAVERS, J., in an action brought by a solicitor for recovery of a sum of £150. The events leading up to the action are a little complicated, but it will, I think, suffice if I say that the solicitor (referred to hereinafter as "the plaintiff") had acted for the defendant in two distinct matters: first, in an action brought by the defendant against his former wife in an attempt to recover from her certain sums of money which he said that she owed him; and, secondly, in respect of the acquisition by the defendant of a lease of premises known as 54, Brunswick Gardens, London. During the period when the plaintiff was acting for the defendant, the plaintiff received on the defendant's account the proceeds of sale of a number of securities belonging to the defendant. In due course the plaintiff delivered an account to the defendant of the receipt by him of the proceeds of sale and also of the sum recovered by way of a settlement of the action against the defendant's former wife. It is unnecessary for present purposes to go into the details. The present cause of action arose from the circumstance that, in delivering those accounts, the plaintiff omitted (as he says, and I do not think that it is in dispute) to give to himself credit for a sum of £150, which the defendant had paid to the plaintiff, in two sums or three sums, in March, 1956, and which the

A plaintiff had put into his firm's account in the name of the defendant, although, as now appears with tolerable certainty, the sums were paid to the plaintiff in respect of costs which the defendant owed, or would become liable to pay, to the plaintiff, and although it was the clear intention that those sums amounting to £150 should be taken out of the defendant's account and put into the plaintiff's account accordingly. The plaintiff having omitted to transfer the sum to his
B own account, the £150 remained, and was treated by him in the two accounts which he delivered, as though it was part of the funds belonging to the defendant which the plaintiff had received on the defendant's behalf and, in effect, the plaintiff paid over to the defendant, as he says, £150 too much. The form of the claim in the action is (as a result of amendment) stated as being a claim to recover this £150 as money paid by the plaintiff to the defendant under a mistake
C of fact, full particulars being then delivered.

The two accounts which are material show, in each case, credits to the defendant, and the sums for which the plaintiff thereby acknowledged himself indebted to the defendant were paid over by the plaintiff to the defendant: in the one case, the sum of £1,198 16s. 9d., being the balance of the Stock Exchange sales, and, in the other case, a sum of £477 10s., being the balance
D of the sum of £750 received on settlement of the action. In making up these accounts, there were included and debited against the defendant sums in respect of costs alleged to be due from the defendant to the plaintiff. One sum of costs was in respect of the action by the defendant against his former wife, which was settled. The figure of £500 was deducted for those costs against the Stock Exchange proceeds. The costs were, in fact, agreed at that figure, but, having
E regard to the form of the present legislation, it is not now in dispute that it is open to the defendant to go back on his agreement and require delivery of an itemised bill for the costs of that contentious matter. I shall say, therefore, nothing further about that matter, save that the order appealed from includes a direction that the plaintiff should deliver a bill for this contentious matter and that the bill should be referred to taxation. The relevance to the cause
F of action of the claims on the defendant's part to have itemised bills delivered is that, should the defendant be found to get a reduction in the costs which the plaintiff was entitled to charge him, and which had been agreed, then that reduction will serve by way of relief of what the defendant owes to the plaintiff for the overpayment of £150. I need say no more about the contentious matter.

The non-contentious matter, the work done by the plaintiff in regard to a
G lease of 54, Brunswick Gardens, resulted in another agreement as to costs which was made in January, 1957. As I have already stated, the deduction in respect of these costs was made from the amount eventually recovered as the result of the compromise by the defendant of his action against his former wife. When that sum by way of settlement was received in January, 1957, the plaintiff proceeded to deduct from it, as well as a certain number of other deductions,
H an amount of 150 guineas which was described as : "Re profit charges, 54, Brunswick Gardens, W.8." That formula "profit charges" excludes out-of-pocket disbursements, which amount to another £12 and as to which there is no question. The plaintiff then paid a balance figure, which was £477 10s., to the defendant and the receipt of that amount was acknowledged; thereby, in effect, the plaintiff received payment out of this money for his profit charges
I of 150 guineas for his work in connexion with the lease of 54, Brunswick Gardens. The defendant submits that he is not bound by that agreement as regards the non-contentious business and that (in the same way as with regard to the contentious business) the plaintiff must deliver to him an itemised bill and that the bill ought to be taxed. When the matter was before the learned master, he concluded adversely to the defendant, and he, therefore, made an order giving to the plaintiff leave to sign judgment for £150. That decision was reversed by HAVERS, J., who gave unconditional leave to defend and also directed delivery of bills, in respect of both the contentious business and the

non-contentious business, with directions as to taxation accordingly. Counsel for the plaintiff concedes that he is unable to resist the order which the learned judge made in regard to the contentious business, and I now confine myself to the matter of the non-contentious business. A

The right of a solicitor to charge by way of lump sum in non-contentious business is one which has been conferred on him by statute for a considerable period of time. The first statute which conferred such a right to make lump sum charges was the Attorneys' and Solicitors' Act, 1870. That provision was amended and replaced by the Solicitors Remuneration Act, 1881, and now is to be found, after appearing in the Solicitors Act, 1932, in the Solicitors Act, 1957. Having regard to the dates in the present case, it is pointed out that possibly the relevant statutory provisions applicable to this case are those in the Act of 1932, rather than those in the Act of 1957. It is also conceded, however, that the relevant language in the sections is the same, and I shall, therefore, for convenience now and henceforth refer to the Act of 1957. I should state also that for a period of a hundred years and more the right of solicitors to charge for their services has been thought by Parliament to require a certain degree of regulation by statute and by rules made under the statute. B C

In the Act of 1957 the subject of the remuneration of solicitors is found in Part 3, which, in turn, is divided under three separate sub-headings, under the first of which are s. 56 to s. 58 inclusive, the provisions relating to non-contentious business, and to those I will presently revert. Section 59 to s. 65 inclusive relate to contentious business and are not relevant for the present appeal; and, finally, s. 66 to s. 74 inclusive relate to general matters and are entitled: "General Provisions as to Remuneration." It is to be noted (and this reflects the earlier law, including the Solicitors Act, 1843) that s. 67 (1) of the Act of 1957* provides: D E

"The jurisdiction of the High Court to make orders for the delivery by a solicitor of a bill of costs and for the delivery up of, or otherwise in relation to, any deeds, documents or papers in his possession, custody or power, is hereby declared to extend to cases in which no business has been done by him in the High Court." F

Counsel for the defendant also referred to s. 68 (1)† which begins:

"Subject to the provisions of this Act, no action shall be brought to recover any costs due to a solicitor until one month after a bill thereof has been delivered" G

It was contended by counsel for the defendant that those general provisions disable the plaintiff from bringing any action to recover costs save after the delivery of a bill. For my part, I think there is more than one answer to that contention. One is that this is not, in form, an action to recover costs at all. In the second place, notwithstanding the ingenuity of counsel for the defendant, I feel no doubt that the words "Subject to the provisions of this Act" at any rate cover the terms of s. 57 of the same Act. H

I return, accordingly, to that section, which is the section relating to agreements for lump sum bills, among other forms of bill, in the case of non-contentious business. Section 57 (1) of the Act of 1957‡ provides:

"... a solicitor and his client may, either before or after or in the course of the transaction of any non-contentious business by the solicitor, make an agreement as to the remuneration of the solicitor in respect thereof." I

Section 57 (2) states that the agreement may be either by way of a gross sum or percentage or in other forms. Section 57 (3) states: "The agreement shall be

* The corresponding provision of the Act of 1932 was s. 64 (1).

† Cf. s. 65 (1) of the Act of 1932.

‡ Section 57 of the Act of 1957 contains the provisions which were formerly in s. 57 of the Act of 1932.

A in writing and signed by the person to be bound thereby or his agent in that behalf." Then comes s. 57 (4) on which the greater part of the argument in this case has turned:

B "The agreement may be sued and recovered on or set aside in the like manner and on the like grounds as an agreement not relating to the remuneration of a solicitor: Provided that if on any taxation of costs the agreement is relied on by the solicitor and objected to by the client as unfair or unreasonable, the taxing officer may inquire into the facts and certify them to the court, and if on that certificate it appears just to the court that the agreement should be cancelled, or the amount payable thereunder reduced, the court may order the agreement to be cancelled, or the amount payable thereunder to be reduced, and may give such consequential directions as they think fit."

C That form of words, which became crystallised in 1932, has an ancestry certainly as remote as the Attorneys' and Solicitors' Act, 1870. Both in that Act* and in the Solicitors Remuneration Act, 1881, there were provisions enabling solicitors to make lump sum charges. More particularly in the latter of those Acts, in the Solicitors Remuneration Act, 1881, there was a provision closely resembling that now enshrined in the Act of 1957 for enabling a solicitor to make a lump sum charge by agreement in non-contentious business. As in s. 57 (4) of the present Act, it was provided by s. 8 (4) of the Act of 1881 that such an agreement might be

E "sued and recovered on . . . in the like manner and on the like grounds as an agreement not relating to the remuneration of a solicitor . . ."

But those words were followed, not by something expressed as a proviso, but by something added by the conjunction "and":

"and if, under any order for taxation of costs such agreement being relied upon by the solicitor shall be objected to . . ."

F I have made that much reference to the earlier legislation because of the cases which have been cited and to which I must now allude. My reading of the Act of 1957, and, therefore, of the Act of 1932 and also of the Act of 1881, shows, however, that the sub-section [s. 57 (4) of the Act of 1957] presents this obvious problem to the reader: Is the proviso in the modern legislation, or the added provision of the sub-section in the earlier legislation, intended to be a qualification on the right of a solicitor to sue on a lump sum agreement and, therefore, intended to give to the court some jurisdiction only to be invoked when a solicitor does so sue, or is it in some sense, and, if so, what, an independent provision? The problem necessarily emerges because it will be observed in the first place that the sub-section confers apparently on the solicitor an unqualified right to sue on his agreement for a lump sum bill, as on any other valid agreement, and yet goes on to say that such an agreement may be looked into if "on any taxation it appears", etc. Ex concessis, if the business comprehended by the lump sum payment is treated as the only business between these two people, there can be no taxation until there has first been a bill, which the earlier part of the sub-section appears to be designed to say is not necessary. On the face of it, therefore, the two parts of the sub-section appear only to be strictly consistent and coherent in the case where the lump sum bill is put forward, not as the sole matter of accounting between solicitor and client, but as part of the bill covering many other transactions, where there is found a certain section of the bill which the solicitor says is business covered by an agreement; and, the bill as a whole being subjected to taxation, it would then, on the strict language of the sub-section, give rise to the particular problem which the proviso (as it now is) poses. But authorities, and authorities which I feel no doubt are binding on this court, have,

* In s. 4 of the Act of 1870.

as I think, qualified or put a gloss on the reading of the sub-section. It will be convenient if I turn, therefore, at once to those cases. A

Counsel for the defendant contended strenuously and with great care (and obviously it is a matter to which he has directed a great deal of attention) that these cases do not really cover the present case or do not bind this court, having been, in effect, pronounced *per incuriam*. I feel no doubt whatever that, although counsel for the defendant, had he been arguing in the year 1890, might perhaps have prevailed on the court to come to a different conclusion from that at which it did then arrive, he cannot now ask us to say that what COTTON, L.J., laid down in 1890, and which this court has twice expressly followed since, is not now applicable to such a case as the present. B

The case in 1890 to which I have been alluding, the first of the three cases, is *Re Palmer* (1) ((1890), 45 Ch.D. 291). The relevant Act was the Solicitors Remuneration Act, 1881, from s. 8 of which I have made the necessary reference. The question in that case was whether Mr. Slater, a journeyman butcher, could go behind an agreement which he had made, in form and in other respects properly in accordance with the section, to pay a lump sum of £20 to his solicitor, Mr. Palmer, for the work which Mr. Palmer had done in finding for Mr. Slater a mortgagee to lend him money on the security of his interest under a will. The Court of Appeal came to the conclusion, agreeing with NORTH, J. (though not quite on the same ground), that in the circumstances Mr. Slater was not entitled to impugn or go behind this agreement and was not entitled to require the solicitor to deliver him an itemised bill and have it taxed. The argument for Mr. Slater in the Court of Appeal was presented by counsel with great experience, Mr. Cozens-Hardy and Mr. Farwell. The argument was that an agreement for a lump sum bill could be no bar to the right of a person to have a solicitor's bill of costs taxed unless the agreement was one authorised by the Act, and then they went on to say that the particular agreement about this mortgage was not strictly within s. 8 of the Act of 1881. On this ground, therefore, counsel for the defendant in the present case impugned all these cases; he said that they never really put the proper point. The real point, he said, was that s. 8 of the Act of 1881 and all the subsequent legislation was not directed to preventing a client's ordinary right, either under the Act of 1843 or the common law, to have a bill presented as a matter of course. But it is, I think, clear that, even if the report of the argument puts the case somewhat narrowly for Mr. Slater, this court itself dealt with it on a broader ground which would have covered such an argument as counsel for the defendant said that Mr. Cozens-Hardy should have put forward; for this is the language of COTTON, L.J. (45 Ch.D. at p. 298): C D E F G

"Then it is said that, having regard to [s. 8 (4) of the Act of 1881], this agreement ought to be referred to the taxing master. But the appellant has not brought forward any evidence showing that this charge is unfair or unreasonable; and although [s. 8 (4)] does, in my opinion, give the court power, where an agreement is so impeached, to refer it to the taxing master to consider whether the charge is fair and reasonable, no foundation for such an order has been made. Mr. Farwell has argued that this is a very unreasonable charge; but I do not think that he says it is unfair. I consider, however, that the court ought not, merely upon such an argument by counsel, unsupported by affidavit or facts which will lead to that conclusion, to refer such an agreement to the taxing master to exercise the power given by [s. 8 (4)]." H I

BOWEN and FRY, L.JJ., agreed with the judgment of COTTON, L.J.

It will be observed that COTTON, L.J., appears to put the case thus. He construed s. 8 (4) of the Act of 1881, read, no doubt, against the background of the general law, as conferring a general power on the court, notwithstanding an agreement for a lump sum payment, to order that a bill be delivered and that the bill be taxed. But, said the lord justice, such a power in the court will not be

A exercised merely because the client asks for it or because his counsel thinks of some argument for suggesting that it would be a good thing; it will be exercised only when the court considers that on evidence there is shown to be a ground why the court ought to look into the matter to see whether, on investigation, it is, in truth, a reasonable and fair charge. That I take to be the clear basis of this court's decision in 1890.

B Having dealt with that case a little fully, I can deal more shortly with the two later cases. The first is *Re Frape, Ex p. Perrett* (2) ([1893] 2 Ch. 284), three years after *Re Palmer* (1). The facts of that case, so far as is relevant, were that an agreement had been made, which in other respects complied with the requirements of the Act of 1881, for the payment of £80 as a lump sum payment by Mr. Perrett to Mr. Frape, his solicitor. The agreement was challenged on the ground, among other grounds, that, on the face of it and on the facts presented, £80 might not have been a reasonable and fair charge, and in the end the court so concluded. The first point to which I wish to draw attention is that in his leading judgment LINDLEY, L.J., cited in full and adopted as correct the passage from the judgment of COTTON, L.J., which I have read. LINDLEY, L.J., made that citation after having said ([1893] 2 Ch. at p. 295):

D " . . . so long as the solicitor has a proper opportunity of resisting taxation, it cannot matter whether the application to tax is by writ or by a special petition . . . "

That was dealing with an argument as to the form of the proceedings. LINDLEY, L.J., went on to say (*ibid.*):

E " The client may say, ' I want an order to tax notwithstanding the agreement '. The agreement can be no answer to that, if he can show reasons why there ought to be a reference to the taxing master to inquire into that agreement. It appears to me that the view taken of this section by COTTON, L.J., is in accordance with common sense."

F LINDLEY, L.J., then read the passage from the judgment of COTTON, L.J., in *Re Palmer* (1), and continued ([1893] 2 Ch. at p. 296):

G " It appears to me that it would not be right to say, upon the materials before us, that this agreement was unfair and unreasonable. On the other hand, the evidence about it is such as to render it right to direct an order to tax, and the taxing master will have to look into the question and see what the truth is. The fact is, that it is impossible to decide whether the agreement is unfair or unreasonable without taxing the bill."

H In that case, the solicitor said, in effect: " I agreed £80, and now I will show you that I can produce a bill up to £140." So far from that persuading the court, it acted, perhaps not unnaturally, as something of a boomerang—if the bill was going to be as big as that, perhaps the whole matter had better be looked into. The purpose of my reference to *Re Frape* (2) is to show that three years after the decision in *Re Palmer* (1), three other lords justices treated the judgment of COTTON, L.J., as properly laying down the law which was to be found in s. 8 of the Solicitors Remuneration Act, 1881.

I The third case, *Ray v. Newton* (3) ([1913] 1 K.B. 249), was twenty years later. That was a rather more complicated case and I shall say no more about it than that *Re Palmer* (1) and *Re Frape* (2) were brought to the attention of the court, and that FARWELL and HAMILTON, L.JJ., closely followed what I take to be the ratio decidendi of those cases and said that the right of a client, notwithstanding an agreement, was to have an order for delivery of a bill, provided that he could show some prima facie case for saying that there should be inquiry into the question whether the agreement was reasonable—having due regard to the circumstance that for so long a period of time Parliament had thought it right that solicitors' charges should be somewhat strictly regulated. Even if it were

possible to say (as I think it would not be) that these cases could be disregarded by us as having all proceeded on a misapprehension of the real point, the coup de grâce to any such argument is presented by this circumstance. In 1932 Parliament re-enacted the law relating to solicitors. It is quite true that in 1890 and in 1913 the Solicitors Act, 1843, had not been repealed and the provisions, particularly of s. 37 of that Act (saying in general terms that there shall be no action by a solicitor to recover his fees until a month after delivery of his bill) were still on the statute book. In 1932, however, Parliament repealed expressly the Act of 1843 and yet re-enacted the provisions of s. 8 (4) of the Act of 1881, and, according to well known principles, it must be taken to have done so with knowledge that the Court of Appeal had interpreted s. 8 of the Act of 1881 as it had. It seems, therefore, to me quite plain that, as a matter of general principle, it is not right to say that a client who has made an agreement for paying a lump sum for non-contentious business has an unqualified right to ask for a bill of costs. His right to require a bill is limited to cases where he can show, on the facts of the particular case, to the satisfaction of the court that there is something into which, as a matter of general principle or private right or both, the court ought to look. Indeed, I will go somewhat further and say that the Act of 1932 has made it even plainer than it was before, because the second part of s. 57 (4), instead of being simply an addition to what went before, was expressed as a proviso: for, as a general matter, a proviso should *prima facie* be construed as something which merely qualifies the general terms of what has gone before.

I, therefore, reject the argument of counsel for the defendant that, apart from any special circumstances which he can extract from this case, he is now entitled to require the delivery of a bill. We are informed that HAVERS, J., had taken the view that the defendant was so entitled and based his decision on that view. In so far, therefore, as he did so, I am unable to agree with him. On careful reflection, however, I have come to the conclusion that his judgment should nevertheless be upheld on other grounds.

I turn, accordingly, to the question whether it is here established, the onus being clearly on the defendant, that there is good ground for saying that an itemised bill ought to be delivered and referred to the taxing master so that the court can see whether the agreement was, in the circumstances, unreasonable or unfair. In an affidavit sworn on Dec. 2, 1957, the plaintiff stated that, at the time when the agreement was made for a lump sum charge, he had pointed out to the defendant that, since the conveyancing work which his firm was required to do in regard to 54, Brunswick Gardens, appeared to be a somewhat complex and tortuous business, he would exercise the right (which had been recently conferred on solicitors*), to charge, not in accordance with Sch. 1 to the Solicitors' Remuneration Order, 1883, but under Sch. 2, as substituted by the Solicitors' Remuneration Order, 1953, that is to say, not by way of a scale charge on the consideration, the subject of the sale, mortgage or lease, or whatever it might be, but according to the work done. The provisions about this so-called election are, however, strict, and it is made quite plain that, if a solicitor desires to avail himself of the privilege of charging according to the work done under Sch. 2, then there must be an election in writing by the solicitor before the work is undertaken. Article 6 of the Order of 1883, as amended by the order of 1953, reads:

"In all cases to which the scales prescribed in Sch. 1 hereto shall apply, a solicitor may, before undertaking any business, by writing under his hand, communicated to the client, elect that his remuneration shall be in accordance with Sch. 2 hereto; but if no such election shall be made, his remuneration shall be according to scale prescribed by this order."

* By art. 6 of the Solicitors' Remuneration Order, 1883, as amended by the Solicitors' Remuneration Order, 1953 (S.I. 1953 No. 117); cf. Solicitors' Remuneration (Registered Land) Order, 1925, S.R. & O. 1926 No. 2, as amended by S.I. 1953 No. 118.

A A perusal of the last four or five paragraphs of the plaintiff's affidavit of Dec. 2, 1957, had led me to suppose that the plaintiff was saying that in judging the defendant's case for an inquiry into the reasonableness of his charges, one must bear in mind that this was a case in which he had elected to charge under Sch. 2 in accordance with the work done which might give a higher rate of charge than the scale charges. It was, however, conceded by counsel for the plaintiff, and
B it is quite plain, that unfortunately the plaintiff failed to comply with art. 6 of the Order of 1883 and, therefore, is unable to charge in accordance with Sch. 2 except in those cases which are not covered by Sch. 1, and that he was unable so to do when the agreement was made for the lump sum of 150 guineas, I am not saying that there was any deliberate attempt on the part of the plaintiff to deceive either the defendant or the court; but it is an unfortunate fact that in
C this respect the plaintiff made an error, and in the circumstances of this case I think that it was rather a grievous error.

On Jan. 14, 1957, the plaintiff's firm wrote a letter to the defendant as a result of which the agreement was made. The letter reads as follows:

D "Our charges have been arrived at on the basis of a reasonable amount for the actual work done, under Sch. 2 of the Solicitors' Remuneration Order; therefore, the amount of the consideration payable by you or whether the property is registered or not, does not enter into the matter. Mr. Rutter [the plaintiff] told you long ago that our charges would be based on work actually done by us and not on the basis of any consideration. The leasehold interest which is being granted to you is not registered at H.M. Land Registry but it will have to be registered immediately the lease is granted.

E "It will take a considerable time to prepare a detailed bill in this matter and if you insist, and we would point out that you are entitled to one if you so desire, then we will prepare such a bill, but would point out that it may come to a greater amount than what has been intimated to you in our recent letter, in which case we would naturally look to you for full payment. We assure you that our suggested charges are reasonable, particularly
F in view of the extremely voluminous and complicated correspondence and other work which was necessary . . . and we do respectfully suggest that you should call and inspect our file which will be made available to you, so that you can satisfy yourself as to the reasonableness of our suggested charges and thus save a lot of trouble in preparing a bill."

G On the strength of that letter, the defendant attended the plaintiff's offices and, as a consequence, he made and signed the agreement that there should be the lump sum payment of £157 10s. On Jan. 30, 1957, he sent a letter saying:

H "I herewith hand you my cheque for £12 1s. 5d. [the sum of the disbursements] which, together with the sum of £157 10s. retained by you in respect of your profit costs in regard to this matter, makes a total of £169 11s. 5d. which sum I agree is in full settlement of your agreed costs and disbursements in the above matter (as set out in your letter to me of even date)."

I As I have said, the misfortune from the plaintiff's point of view is that the main argument which he appears to have been using in his letter of Jan. 14, namely, that he was entitled in this case to charge for a great deal of the work not under Sch. 1, but under Sch. 2, was ill founded, as is now conceded. It is true that the defendant went and saw all the figures. Nevertheless, he would not be expected to be well informed about solicitors' charges and such matters as the schedules to the Solicitors' Remuneration Order, 1883. The plain fact is that one of the matters which led to the making of this agreement was the plaintiff's mistaken statement, or representation, that he was entitled to charge on the higher basis permitted by Sch. 2. No question is raised here of setting aside the agreement altogether on the ground of an innocent misrepresentation or anything of that kind. Had such a claim been made, it might or might not have been a

matter for consideration under the general terms of s. 57 (4); but, in face of the facts, and bearing in mind that it is in the general public good that solicitors' charges should not only be right, but should manifestly be shown to be right, I think that an itemised bill should be delivered in this case. I think that the unfortunate error on the part of the plaintiff produces the result that the agreement was made or induced—I am, of course, using the words without any offensive connotation—by the assertion of a right to charge which was not well-founded. *Prima facie*, I would have thought that that would not only justify but require the court in a case of this kind to look into the matter to see if there was anything which could be said to be unreasonable. If on examination of the figures it is clear that 150 guineas is reasonable, even if the plaintiff is limited to the charges in accordance with Sch. 1 for those items to which Sch. 1 applies, that will be the answer. Counsel for the plaintiff put forward a strong case for saying that, even on that basis, 150 guineas was certainly not unreasonable. I am far from saying that, when the matter is looked into, it will be found that the defendant was charged anything unreasonable, but I am satisfied that there is shown to be something which in the very special circumstances of this case the court ought, on the whole, to look into. I think, therefore, for those reasons, that the view taken by the learned judge ought to be sustained.

I have wondered whether it necessarily follows that the defendant should have the benefit of a total stay of the proceedings. If this were the only matter being investigated, I might well have thought that there was no ground for a complete stay. But I do not forget that the contentious matter, the charge in respect of which was £500, is also now the subject of an order, and it is possible, although I am not suggesting that it is necessarily likely, that the defendant may reduce the plaintiff's charges by an amount which exceeds what he is asked to pay in this action. Without saying that the charge under the agreement was unreasonable or unfair (and certainly not the latter), I think that in the special circumstances which I have stated it would not be right to say that the order for delivery of a bill for taxation which the judge made should be set aside. I think that the matter should be looked into and I would, therefore, on those grounds, dismiss the appeal.

PARKER, L.J.: I entirely agree with all that my Lord has said and there is nothing which I desire to add.

SELLERS, L.J.: I also agree and for the same reasons.

Appeal dismissed.

Solicitors: *S. Rutter & Co.* (for the plaintiff); *Helen Evans* (for the defendant).

[*Reported by F. GUTTMAN, Esq., Barrister-at-Law.*]

ROSS-CLUNIS v. PAPADOPOULLOS AND OTHERS.

[PRIVY COUNCIL (Lord Morton of Henryton, Lord Somervell of Harrow and Lord Denning), February 18, 19, 20, March 17, 1958].

Privy Council—Cyprus—Emergency legislation—Collective fine—Duty on commissioner to hold inquiry and satisfy himself that the inhabitants of the area are given adequate opportunity of understanding subject-matter of inquiry and making representations thereon—"Satisfy himself"—Subjective or objective test—Validity of regulations imposing collective fine—Emergency Powers Order in Council, 1939, s. 6 (1)—Cyprus Emergency Powers (Collective Punishment) Regulations, 1955 to (No. 1) 1955, reg. 3 (g) (i), reg. 5 (1), (2).

Under s. 6 (1)* of the Emergency Powers Order in Council, 1939, the Governor of Cyprus had power to make such regulations as "appear to him to be necessary or expedient for securing the public safety, the defence of the territory, the maintenance of public order and the suppression of mutiny, rebellion and riot". Under this power the Cyprus Emergency Powers (Collective Punishment) Regulations, 1955, as amended, were made by the Governor, and reg. 3 (g) (i) of these gave a commissioner power to impose collective fines on the assessable inhabitants of an area by reason of the commission of a series of offences in that area for which the commissioner had reason to believe that the inhabitants had been generally responsible. By reg. 5 (1)† of these regulations, no order for a collective fine could be made unless an inquiry had been held by the commissioner, and, by reg. 5 (2)†, in holding such an inquiry the commissioner must "satisfy himself" that the inhabitants of the area were given adequate opportunity of understanding the subject-matter of the inquiry and making representations thereon. As result of murders, offences and bomb outrages in the municipality of Limassol the appellant, who was the Commissioner of Limassol, held an inquiry on June 11, 1956, preparatory to deciding whether a collective fine should be imposed. At the inquiry Greek municipal councillors and others qualified to represent the Greek community appeared and the local press was represented. On July 4, 1956, the appellant made an order imposing a fine of £35,000 on the assessable Greek-Cypriot inhabitants of the area. Certiorari to quash the order was granted by the Supreme Court of Cyprus in December, 1956, and was maintained on appeal. On appeal to the Judicial Committee the original evidence of what passed at the inquiry was amplified by affidavits filed in December, 1957. The evidence as amplified showed that the appellant had explained at the inquiry that there had been many offences of violence which appeared to be due to terrorist activity and in the majority of cases to have occurred before eye-witnesses of the Greek community who had concealed their knowledge and obstructed process of the law; that representations why a collective fine should not be imposed had been invited, that the matter had received publicity in the Greek press and that representations, which the appellant had considered, had been received.

Held: the order of July 4, 1956, imposing the collective fine was valid for the following reasons—

(i) reg. 3 (g) (i) of the Regulations of 1955 was not ultra vires, because the Governor's power under s. 6 (1) of the Emergency Powers Order in Council, 1939, was to make such regulations as appeared to him to be necessary or expedient for certain purposes and this regulation was related to purposes contemplated by s. 6 (1), e.g., the securing of public safety and the maintenance of public order.

* The terms of s. 6 (1) are set out at p. 25, letter D, post.

† The terms of reg. 5 (1) and (2) are set out at p. 26, letter H, post.

Dictum of LORD RADCLIFFE in *A.-G. for Canada v. Hallet & Carey, Ltd.* ([1952] A.C. at p. 450) applied. A

(ii) the appellant had discharged the duty imposed on him by reg. 5 (1) and (2) of satisfying himself that the inhabitants were given adequate opportunity of understanding the subject-matter of the inquiry and making representations thereon, since the further evidence filed in December, 1957, showed that the explanation given at the inquiry would convey the reason why the inhabitants as a whole, rather than the actual perpetrators of the outrages, were blameworthy. B

Per CURIAM: it was submitted that the test whether the appellant had discharged the duty imposed by reg. 5 (1) and (2) to "satisfy himself" was a subjective test, but, if it could be shown that there were no grounds on which the appellant could be so satisfied, a court might infer either that he did not honestly form that view or that, in forming it, he could not have applied his mind to the relevant facts (p. 33, letter A post)., C

Appeal allowed.

[**Editorial Note.** If a statute predicates that a person shall "satisfy himself" of something before exercising a power that the statute confers on him, the question may arise whether anything is required of him beyond compliance with the subjective test, viz., whether he was in fact satisfied, assuming always that he acted in good faith. The Judicial Committee here make the qualification which is quoted at letter C, above. In *Liversidge v. Anderson* ([1941] 3 All E.R. 338) the House of Lords construed the words "if A.B. has reasonable cause to believe" as imposing the subjective test. LORD ATKIN dissented from that construction and in his opinion instanced, by way of contrast, words which to him would seem to impose a subjective test. These words were "A.B. . . . may, if he is satisfied . . . that there is reasonable cause to believe" ([1941] 3 All E.R. at p. 355, letter C). Such words are comparable to the phrase "satisfy himself" and the present decision, therefore, may be considered with *Liversidge v. Anderson* as showing that some qualification may be placed on the subjective test imposed by a requirement that a public officer should be satisfied of something before exercising a statutory power. D E F

As to the court's not interfering with the exercise of a statutory discretion, see 26 HALSBURY'S LAWS (2nd Edn.) 260, para. 573; and as to the control of the court over subordinate legislation, see 31 HALSBURY'S LAWS (2nd Edn.) 468, 469, para. 575.] G

Cases referred to:

- (1) *A.-G. for Canada v. Hallet & Carey, Ltd.*, [1952] A.C. 427; 3rd Digest Supp.
- (2) *Reference Re Regulations (Chemicals) under War Measures Act*, [1943] S.C.R. 1; [1943] 1 D.L.R. 248; 79 Can. C.C. 1; 2nd Digest Supp.

Appeal.

Appeal by Robert Chattan Ross-Chunis, Commissioner of Limassol, Cyprus, from an order of the Supreme Court of Cyprus in its appellate jurisdiction (HALLINAN, C.J., and ZANNETIDES, J.), dated Mar. 8, 1957, dismissing the appellant's appeal from an order of the Supreme Court in its original jurisdiction (ZEKIA, J.), dated Dec. 15, 1956, that an order made by the appellant on July 4, 1956, be removed into the Supreme Court and be quashed. The following facts are taken from the judgment of the Board. H

On July 4, 1956, the appellant made an order imposing a fine of £35,000 on the assessable Greek-Cypriot inhabitants of the area of the Municipality of Limassol, which was made under reg. 3 of the Cyprus Emergency Powers (Collective Punishment) Regulations, 1955 to (No. 1) 1955* (hereafter referred to as "the regulations"). They were made in exercise (or purported exercise) I

* Made by the Governor under s. 6 of the Order in Council on Nov. 6, 1955. They were amended by the Emergency Powers (Collective Punishment) (Amendment) Regulations, 1955, made on Dec. 21, 1955.

A of the powers conferred on the Governor by s. 6 of the Emergency Powers Order in Council, 1939* (hereafter referred to as "the Order in Council").

The relevant provisions of the Order in Council and the regulations were as follows:

" EMERGENCY POWERS ORDER IN COUNCIL, 1939

PART I.—GENERAL.

B " 2.—(1) In this order, unless the context otherwise requires—

" ' territory ' means any territory mentioned in Sch. 1 hereto and its dependencies, and includes the territorial waters, if any, adjacent thereto;

" ' Governor ' . . . includes any person administering the government of the territory . . .

C " ' law ' includes any order of His Majesty in Council except this order, and any ordinance, order, rule, regulation, bye-law, or other law for the time being in force in the territory.

* * * * *

PART II.—REGULATIONS.

D " 6.—(1) The Governor may make such regulations as appear to him to be necessary or expedient for securing the public safety, the defence of the territory, the maintenance of public order and the suppression of mutiny, rebellion and riot, and for maintaining supplies and services essential to the life of the community.

E " (2) Without prejudice to the generality of the powers conferred by the preceding sub-section, the regulations may, so far as appears to the Governor to be necessary or expedient for any of the purposes mentioned in that sub-section—

" (a) make provision for the detention of persons and the deportation and exclusion of persons from the territory;

" (b) authorise—(i) the taking of possession or control, on behalf of His Majesty, of any property or undertaking; (ii) the acquisition on behalf of His Majesty of any property other than land;

F " (c) authorise the entering and search of any premises;

" (d) provide for amending any law, for suspending the operation of any law and for applying any law with or without modification;

" (e) provide for charging, in respect of the grant or issue of any licence, permit, certificate or other document for the purposes of the regulations, such fee as may be prescribed by or under the regulations;

G " (f) provide for payment of compensation and remuneration to persons affected by the regulations;

" (g) provide for the apprehension, trial and punishment of persons offending against the regulations;

" Provided that nothing in this section shall authorise the making of provision for the trial of persons by military courts."

H Cyprus was mentioned in Sch. 1 to this order.

The relevant portions of the regulations were as follows:—

" 2.—(1) In these regulations, unless the context otherwise requires—

" ' assessable inhabitant ' in relation to any area, means any male who lives in such area and who is, or appears to the commissioner to be, not less than eighteen years of age;

* * * * *

I " ' offence ' means an offence the commission of which is, in the opinion of the commissioner, prejudicial to the internal security of the Colony or to the maintenance of public order in the Colony.

* * * * *

" 3. If an offence has been committed or loss of, or damage to, property

* Dated Mar. 9, 1939. The Order in Council was amended by S.I. 1952 No. 2031, which was revoked by S.I. 1956 No. 731, which also amended the 1939 Order in Council.

has wilfully and unlawfully been caused within any area of the Colony (hereinafter referred to as 'the said area') and the commissioner has reason to believe that all or any of the inhabitants of the said area have—

"(a) committed the offence or caused the loss or damage; or

"(b) connived at or in any way abetted the commission of the offence or the loss or damage; or

"(c) failed to take reasonable steps to prevent the commission of the offence; or

"(d) failed to render all the assistance in their power to discover the offender or offenders, or to effect his or their arrest; or

"(e) connived at the escape of, or harboured, any offender or person suspected of having taken part in the commission of the offence or implicated in the loss or damage; or

"(f) combined to suppress material evidence of the commission of the offence or of the occurrence of the loss or damage; or

"(g) by reason of the commission of a series of offences in the said area, been generally responsible for the commission of such offences,

it shall be lawful for the commissioner, with the approval of the Governor, to take all or any of the following actions:—

"(i) to order that a fine be levied collectively on the assessable inhabitants of the said area, or any part thereof;

"(ii) to order that all or any of the shops in the said area shall be closed until such order be revoked or shall open only during such times and under such conditions as may be specified in the order;

"(iii) to order the seizure of any movable or immovable property of any inhabitant of the said area;

"(iv) to order that all or any dwelling-houses in the said area be closed and kept closed and unavailable for human habitation for such period or periods as may be specified;

"Provided that where the commissioner has reason to believe that paras. (a) to (g) of this regulation are applicable only to any particular section, class, group or community of the inhabitants of the said area, it shall be lawful for the commissioner, with the approval of the Governor to take all or any of the actions specified in paras. (i) to (iv) of this regulation in respect of any such section, class, group or community of the inhabitants of the said area.

* * * * *

"5.—(1) No order shall be made under reg. 3 of these regulations unless an inquiry into the facts and circumstances giving rise to such order has been held by the commissioner.

"(2) In holding inquiries under these regulations the commissioner shall satisfy himself that the inhabitants of the said area are given adequate opportunity of understanding the subject-matter of the inquiry and making representations thereon, and, subject thereto, such inquiry shall be conducted in such manner as the commissioner thinks fit.

"(3) A written report of any inquiry shall be submitted to the Governor as soon as possible after the completion thereof, and shall contain a certificate that the requirements of this regulation have been complied with.

"6. The commissioner may at any time after an order under reg. 3 of these regulations has been made, in his absolute discretion, remit the whole of any fine or any part thereof or may order that any amount which has been paid by any assessable inhabitant shall be repaid to him or may return to any inhabitant all or any of the property seized from any such inhabitant or may generally revoke or vary any order made by him under reg. 3 of these regulations.

A "7.—(1) It shall be lawful for the commissioner to order that out of a fine levied in pursuance of reg. 3 of these regulations compensation shall be paid to any person who has suffered injury or loss of, or damage to, his property unlawfully in the area in which the fine was levied.

B "(2) Application for compensation shall be made in writing by the person aggrieved or his representative within two months from the date upon which the fine has been levied.

"(3) Where the injury, for which compensation is being sought, is a death, a dependant of the deceased may be deemed to be a person aggrieved.

C "(4) No application for compensation shall be granted if it appears that the applicant, or in the case of a death, the deceased, participated in the offence or offences in respect of which fines have been levied or was blameworthy in connexion with such offence or offences.

"8. Any fine ordered to be paid in pursuance of these regulations shall be apportioned among the assessable inhabitants of the said area by the commissioner in such manner as he may think fit and in particular he may order that each assessable inhabitant shall pay any amount which the commissioner shall specify.

D * * * * *

"13. Save as provided in reg. 6 of these regulations, an order made by a commissioner under reg. 3 of these regulations, shall be final and no appeal shall lie from any such order."

E The regulations were revoked on Dec. 19, 1956, by the Cyprus Emergency Powers (Collective Punishment) (Revocation) Regulations, 1956, but this fact is immaterial for the present purpose.

The order made by the appellant on July 4, 1956 (hereafter referred to as "the order"), was in the following terms:

F "Whereas between Jan. 1, 1956, and June 10, 1956, six murders, ten attempted murders and about seventy other terrorist offences have been committed within the area of the Municipality of Limassol (hereinafter referred to as 'the area') which offences, in my opinion, are offences the commission of which are prejudicial to the internal security of the Colony and to the maintenance of public order in the Colony (hereinafter referred to as 'the offences');

G "And whereas I have reason to believe that a substantial number of the Greek Cypriot inhabitants of the area failed to take reasonable steps to prevent the commission of the offences and failed to render all the assistance in their power to discover the offenders;

H "And whereas I have held an inquiry into the facts and circumstances appertaining to the offences after giving adequate opportunity to the inhabitants of the area of understanding the subject-matter of the inquiry and making representations thereon;

"And whereas I have submitted a written report of the inquiry to His Excellency the Governor and have certified that the requirements of reg. 5 have been complied with;

I "Now, therefore I, [the appellant], in exercise of the powers vested in me by reg. 3 of the Emergency Powers (Collective Punishment) Regulations, 1955 to (No. 1) 1955, and with the approval of His Excellency the Governor, do hereby order that a fine of £35,000 (thirty-five thousand pounds) be levied collectively on the assessable Greek Cypriot inhabitants of the area."

On Nov. 22, 1956, the respondents, Vassos Papadopoulos, Evagoras C. Lanitis, Nicos S. Roussos and Athanassis Limnatitis, applied for, and obtained from ZEKIA, J., leave to apply for an order of certiorari to remove the order into the Supreme Court of Cyprus and quash it. In the "Statement of grounds of

application" filed by the respondents, each of them described himself as a "Greek-Cypriot carrying on business at Limassol" and the grounds were stated as follows:

"(a) That the said order is ultra vires, illegal, void and of no effect on the following grounds:—(i) The Emergency Powers (Collective Punishment) Regulations, 1955 to (No. 1) 1955, are, in so far as they purport to empower the commissioner with the approval of the Governor to order that a fine be levied collectively on the assessable inhabitants of an area in the Colony of Cyprus or any part thereof, ultra vires, illegal, void and of no effect; and that all the regulations contained in such regulations and relating to the levying, apportionment and collection of the collective fine and of the enforcement of the order ordering the levying of such fine as well as reg. 13 of the said regulations are ultra vires, illegal, void and of no effect. (ii) The requirements of reg. 5 of the Emergency Powers (Collective Punishment) Regulations, 1955 to (No. 1) 1955, if intra vires, have not been complied with and the said order was in excess of the jurisdiction of the [appellant]. Also the rules of natural justice were not observed by the [appellant] in connexion with the inquiry held under reg. 5. (iii) That the said order was wrong in law. (iv) That the said order was contrary to natural justice."

In support of the second ground in the respondents' application the first respondent alleged in his affidavit as follows:

"The defendants failed to hold such an inquiry into the facts and circumstances giving rise to the above order as could reasonably satisfy the [appellant] that the inhabitants of the area of the Municipality of Limassol were given adequate opportunity of understanding the subject-matter of such inquiry and making representations thereon. In fact the [appellant] summoned a meeting at the office of the Commissioner of Limassol to which only the Greek Members of the Council of the Municipality of Limassol and the Greek Mukhtars and Azas of the Limassol town were invited to attend. Such meeting was held and attended by me, five Greek Municipal Councillors and the Greek Mukhtars and Azas of the town of Limassol to whom the [appellant] spoke about certain murders and other offences committed in Limassol and added that he was determined to impose a collective fine unless cause was shown to the contrary. Then all those present were asked by the [appellant] to show cause why a collective fine should not be levied on the assessable inhabitants of the area of the Municipality of Limassol and the reply was that the imposition of a collective fine would be unjustified, unwarranted and anachronistic. None of the above persons represented or claimed to represent the Greek-Cypriot assessable inhabitants of the area of the Municipality of Limassol in the above matter nor have they undertaken or accepted to communicate anything conveyed to them at the above meeting to the assessable inhabitants of Limassol nor have they done so. Furthermore, according to information received from Haralambos Hadji Arabis of Limassol, one of the said Mukhtars, the great majority of the said Greek Mukhtars (including the said Haralambos Hadji Arabis) and Azas of the Town of Limassol had resigned their office as such and ceased to exercise their powers and duties under the Village Authorities Law long before the said meeting."

In para. 3 to para. 14 inclusive of his affidavit of Dec. 4, 1956, the appellant replied to the first respondent's affidavit as follows:

"3. In my official capacity I followed six murders, ten attempted murders and a great number of bomb outrages, causing two other deaths and damage to property, which took place in the Limassol town during the six or seven months prior to July, 1956, and came to know, through confidential reports and information, that a great many of the Greek inhabitants living

A and working within the municipal limits of Limassol were in a position to identify the persons committing these outrages, but were wilfully abstaining from doing so and that a great number of the remaining Greek inhabitants were either actively or passively encouraging others to abstain from giving useful information to the authorities. I was convinced that with the full co-operation of the Greek inhabitants of the town such outrages would not have taken place or remain undetected.

B “4. After due consideration of the situation, I invited in writing the six Greek Municipal Councillors (including the Deputy Mayor) and nine Greek Mukhtars and twenty-seven Azas of the various quarters of the town of Limassol to attend a meeting in my office on June 11, 1956, at 4 p.m. informing them that the inquiry would be under reg. 5 of the Emergency Powers (Collective Punishment) Regulations, 1955. I should point out that these were the Greek authorities appointed and elected of the town of Limassol and there were no other persons qualified to represent its Greek inhabitants. In reply to the last sentence of para. 8 of [the first respondent's] affidavit I say that the resignation of the persons therein mentioned has never been accepted.

D “5. Publicity was given to the fact that such an inquiry was to be carried out on June 11, 1956, through the local representative of the Greek press.

“6. On June 11 at the time and place appointed the above-mentioned Councillors, Mukhtars and Azas appeared. All local representatives of the Greek press were also there.

E “7. I informed the meeting that I was holding this public inquiry with a view to deciding whether I should recommend to His Excellency the Governor the levying of a fine on the Greek inhabitants of the town in respect of a long list of outrages which had occurred within the town since Jan. 1, 1956. I invited them to show cause why a fine should not be imposed. After discussion I came to the conclusion that no cause was shown and I accordingly told them that I was not satisfied with their representations and asked them to inform their co-inhabitants as widely as possible of what had transpired at the meeting and suggested that if there was any person or group of persons wishing to make further representations they could do so through the elected Municipal Councillors.

F “8. The inquiry was fully reported in all Greek papers and the invitation for further representations was given full publicity. There is now produced and shown to me marked ‘A’ the translation of an extract from the Greek paper ‘Ethnos’ dated June 12, 1956.

G “9. In fact the following day I received petitions or representations submitted by groups of people representing the following localities, quarters and associations:—(a) Ayios Ioannis Quarter; (b) Katholiki Quarter; (c) Ayios Nicolaos Quarter; (d) Ayia Zoni Quarter; (e) Kessarianis locality; (f) the Committee of Shop-Keepers’ Association; (g) male and female members of KEAN factory; (h) Trade Union of the workers of LOEL; (i) Pancyprrian Labour Federation of Limassol (PEO); (j) twenty-four advocates of the Limassol town. Of the above (g) was received on the 13th, (h) on the 15th, (i) on the 19th and (j) on the 16th of June, 1956. Other individual representations were also received until the end of the first week in July, but none of the above representations contained anything to convince me that a fine should not be levied as aforesaid. I hold the originals to the above petitions and representations.

I “10. Accordingly in compliance with the Emergency Powers (Collective Punishment) Regulations, 1955 to (No. 1) 1955, I submitted a report on the inquiry to His Excellency the Governor and certified that the requirements of reg. 5 had been complied with and with the approval of the Governor I

issued my order dated July 4, 1956, which was published in the Gazette of July 12, 1956.

"11. None of the representations received between June 11 and the issue of my order on July 4 have supplied material to make me change my decision.

"12. In my view the inhabitants of the Limassol town were given adequate opportunity of understanding the subject-matter of the inquiry on June 11, 1956, and of making representations thereon as laid down in reg. 5.

"13. The amount of the fine imposed was related to the amount of the compensation which could properly have been awarded for injury and damage under reg. 7 of the regulations mentioned.

"14. In conclusion I humbly submit that I am entitled to rely on reg. 13 of the regulations above mentioned as applicable to a ministerial act on my part, alternatively I deny that I have acted in any way at variance with the rules of natural justice in exercising quasi-judicial functions (if any)."

Exhibit "A", mentioned in para. 8 of this affidavit, was as follows:

"On the conclusion of the public inquiry the [appellant] said that those who attended the public inquiry said nothing which could convince him not to suggest the imposition of a fine and he added that if there are citizens who wish to express their opinion why the collective fine should not be imposed, they must submit it to the Town Authorities who will forward it to him."

ZEKIA, J., gave judgment on Dec. 15, 1956. He rejected the respondents' contention that the regulations exceeded the powers of the Governor under s. 6 of the Order in Council, but he allowed the respondents' application, made an order of certiorari, and quashed the order of July 4, 1956, on the ground that the appellant had not complied with reg. 5 of the regulations. In the course of his judgment, the learned judge observed:

"In the meeting held no inquiry going into the facts and circumstances giving rise to the order under question had been held. The [appellant] simply informed persons attending the meeting that he was determined to impose a collective fine owing to murders and other outrages committed in the town and that they were invited to show cause why such a course should not be taken. Nothing else transpired in the meeting of June 11."

The learned judge then read para. 7 of the appellant's affidavit and para. 8 of the first respondent's affidavit and observed:

"It is clear from the contents I quoted from the two affidavits that in the meeting of June 11, 1956, no inquiry whatsoever was held in the nature of one contemplated by reg. 5 (1). Nothing was said as to the facts and circumstances giving rise to the proposed collective fine order. The persons assembled were informed of the intention of the [appellant] to make such an order on account of the offences committed in Limassol and they were invited to show cause why this course should not be taken. This was contrary to the letter and spirit of reg. 5 (1) and (2)."

The appellant appealed from the order of ZEKIA, J., and the respondents applied for a variation of that order in regard to the judge's decision that the order was not *ultra vires*. The appeal was heard by HALLINAN, C.J., and ZANNETIDES, J. Both members of the court rejected the respondents' contention that the regulations were *ultra vires*, but they differed on the question whether or not the appellant had complied with reg. 5. The Chief Justice was of opinion that the appellant had complied with this regulation, and ZANNETIDES, J., was of the contrary opinion. The appeal was, therefore, dismissed in accordance with s. 23 (1) of the Cyprus Courts of Justice Law, 1953*, which is as follows:

* No. 40 of 1953.

A “Whenever an appeal is heard by two judges of the Supreme Court, and the two judges differ in opinion as to whether the appeal should be allowed, the judgment of the court below shall stand.”

B On June 11, 1957, the Supreme Court granted the appellant final leave to appeal to Her Majesty in Council. Thereafter the appellant applied successfully, by petition, for leave to use two further affidavits at the hearing of the appeal. They were an affidavit by the appellant sworn on Dec. 27, 1957*, and an affidavit of Mr. Papadouris sworn on Dec. 28, 1957. The former affidavit gave a full account of what was, in fact, said by the appellant at the meeting on June 11, 1956, and the latter affidavit exhibited extracts or translations of extracts from four newspapers, “The Times of Cyprus”, “The Cyprus Mail”, “Eleftheria” and “Ethnos”, all published on June 12, 1956. Each newspaper gave an account of what was said at the meeting on June 11, 1956, and, in substance, confirmed the statements contained in the appellant’s affidavit.

B. J. M. MacKenna, Q.C., and J. G. Le Quesne for the appellant.

Sir David Cairns, Q.C., and I. C. Baillieu for the respondents.

D LORD MORTON OF HENRYTON stated the facts and continued: Counsel for the appellant relied on the wide words of s. 6 (1) of the Order in Council, and submitted that these words entirely justified the regulations which were made by the Governor. He further submitted that, on the true construction of reg. 5 (1) and (2), and on the facts as set out in the evidence, there had been no breach by the appellant of the provisions of reg. 5 (1) and (2). He cited several authorities in support of these submissions. He did not, however, rely on one argument put forward in the Supreme Court, namely that, by reason of reg. 13 and of the nature of the order made, the remedy by certiorari was not available to the respondents. Counsel for the respondents first submitted that reg. 3 went beyond the powers vested in the Governor by s. 6 (1) of the Order in Council. They submitted that the specific powers set out in s. 6 (2) were illustrative of the type of regulation covered by the general words in s. 6 (1), and these general words should not be construed so widely as to cover a regulation such as reg. 3. The imposition of a collective fine, they said, resulted in the punishment of the innocent for the crimes of the guilty and was contrary to British ideas of justice. They also relied on s. 6 (2) (g) of the Order in Council, and the proviso thereto, as indicating that no regulation could be made enabling persons to be punished without any trial. Similar arguments were addressed to both courts in Cyprus, and were rejected, and, in their Lordships’ opinion, rightly rejected, by all the three judges there concerned. Words substantially identical with the words of s. 6 (1) of the Order in Council were recently considered by the Board in *A.-G. for Canada v. Hallet & Carey, Ltd.* (1) ([1952] A.C. 427). LORD RADCLIFFE, delivering the opinion of the Board, quoted (*ibid.*, at p. 445) with approval the words of DUFF, C.J., in *Reference Re Regulations (Chemicals) under War Measures Act* (2) ([1943] S.C.R. 1 at p. 13):

“I cannot agree that it is competent to any court to canvass the considerations which have, or may have, led him to deem such regulations necessary or advisable for the transcendent objects set forth . . . The words are too plain for dispute: the measures authorised are such as the Governor General in Council (not the courts) deems necessary or advisable.”

I Later, LORD RADCLIFFE said ([1952] A.C. at p. 450):

“It is fair to say that there is a well-known general principle that statutes which encroach upon the rights of the subject, whether as regards person or property, are subject to a ‘strict’ construction. Most statutes can be shown to achieve such an encroachment in some form or another, and the general principle means no more than that, where the import of some enact-

* The contents of the affidavit are set out at p. 33, letter D, to p. 34, letter C, post.

ment is inconclusive or ambiguous, the court may properly lean in favour of an interpretation that leaves private rights undisturbed. But in a case such as the present the weight of that principle is too slight to counter-balance the considerations that have already been noticed. For here the words that invest the Governor with power are neither vague nor ambiguous: Parliament has chosen to say explicitly that he shall do whatever things he may deem necessary or advisable. That does not allow him to do whatever he may feel inclined, for what he does must be capable of being related to one of the prescribed purposes, and the court is entitled to read the Act in this way. But then, expropriation is altogether capable of being so related."

In their Lordships' opinion, reg. 3 is clearly "related to the purposes prescribed" by s. 6 (1) of the Order in Council. There can be no doubt as to the purpose of imposing a collective fine in a case where crimes have been committed in a particular area, and some or all of the inhabitants of the area have "failed to take reasonable steps to prevent the commission of the offence", or have "failed to render all the assistance in their power to discover the offenders or to effect their arrest". Clearly the purpose is to ensure, so far as possible, that in future the inhabitants of the area will adopt a different attitude, more helpful to "securing the public safety" and to "the maintenance of public order", two of the purposes specified in s. 6 (1) of the Order in Council. A further purpose is served by reg. 3, namely, the purpose of providing, out of the fine, for compensation to persons who have suffered injury by the crimes committed in the area: see reg. 7.

Counsel's argument, already mentioned, based on s. 6 (2) (g), was briefly and conclusively answered by ZEKIA, J., as follows:

"There is nothing to warrant the reading of s. 6 (2) (g) as a restrictive proviso to s. 6 (1). On the contrary the words 'without prejudice to the generality of the powers conferred by the preceding sub-section' in s. 6 (2) lead us to a contrary view. The language of the relevant section is clear and unambiguous."

Counsel next sought to contend that the appellant's order of July 4, 1956, was void for uncertainty, because the phrase "Greek Cypriot" had no clear meaning. This was not one of the grounds stated in the respondents' application for an order of certiorari, but counsel asked the Board to admit this contention in the exercise of its discretion. Their Lordships did not think it right to admit this contention at this stage, since it had never been considered by the courts in Cyprus, and, if it had been raised in these courts, the appellant might well have wished to file evidence in answer to it. As matters stand, their Lordships are not assisted by any evidence on the subject, save the fact that each of the respondents described himself as "a Greek-Cypriot" in the "Statement of Grounds", which seems to indicate that to them, at least, the phrase had a definite meaning.

The last contention of counsel for the respondents was that the appellant had failed to comply with reg. 5 (1) and (2). In their Lordships' opinion, the only question of substance arising under this contention is the question whether the appellant discharged the positive duty cast on him to

"satisfy himself that the inhabitants of the said area are given adequate opportunity of understanding the subject-matter of the inquiry and making representations thereon."

Counsel for the appellant submitted that the only duty cast on the appellant was to satisfy *himself* of these facts; that the test was a subjective one, and the statement in para. 12 of the appellant's affidavit of Dec. 4, 1956*, was a complete answer to the argument of counsel for the respondents, unless it could be shown that the statement in the affidavit was not made in good faith, and bad faith

* See p. 30, letter B, ante.

A was not alleged. Their Lordships feel the force of this argument, but they think that if it could be shown that there were *no* grounds on which the appellant could be so satisfied, a court might infer either that he did not honestly form that view or that, in forming it, he could not have applied his mind to the relevant facts. In the present case, however, there were ample grounds on which the appellant could feel "satisfied" of the matters mentioned in reg. 5 (2). If the matter
B had rested only on the appellant's affidavit of Dec. 4, 1956, their Lordships might have felt considerable doubt on the matter, for it would appear from para. 7 of that affidavit that, at the meeting on June 11, 1956, the appellant said nothing which would convey to the inhabitants of Limassol the reasons why *they*, as distinct from the persons who had actually committed the murders and other outrages, should be held blameworthy. It was this aspect of the
C matter which so strongly impressed ZEKIA, J., and, on appeal, ZANNETIDES, J. The information in this paragraph is, however, greatly amplified by the affidavit of the appellant sworn on Dec. 27, 1957, already mentioned which contained the following full account of the proceedings at the meeting of June 11, 1956.

"I explained to the meeting that since Jan. 1 there had been six assassinations, ten woundings and attempts to assassinate and seventy bomb outrages which from my own knowledge of the facts and circumstances and the investigations made by the police, led me to believe:

"(a) that the outrages were attributable to Greek terrorist activity;

"(b) that in the majority of the cases mentioned members of the Greek community were eye witnesses and in a position to assist the police in tracing the perpetrators and in giving evidence before the court, but without exception they had concealed their knowledge and obstructed the process of law;

"(c) that there had been instances in which the perpetrators had made good their escape through the failure of Greek onlookers to assist in their capture.

"In regard to (c) I quoted two instances as follows:—

"(i) On June 6, an English teacher, Mr. A. T. Mylrea, was assassinated as he arrived at the Lanition Gymnasium to conduct certain school examinations. It was estimated there were about thirty-five pupils at the actual scene of the assassination who should have been in a position to recognise the assassins and to effect their arrest, but no attempt was made to hinder the criminals and no one had come forward with information to the police.

"(ii) On June 7, Andreas Serghides, an Assistant District Inspector of my office was murdered as he arrived outside the office for his morning's work, in the presence of a fair number of persons, many of them believed to be persons of good standing. Here again no attempt was made to hinder the assassins and the persons believed to have been present have all denied knowledge of the incident.

"I went on to explain that under the terms of reg. 3 of the Emergency Powers (Collective Punishment) Regulations, 1955, which I cited at the meeting in detail I had reason to believe that the inhabitants of Limassol town had rendered themselves liable to a collective punishment and that unless they could show cause to the contrary, it was my intention to recommend to His Excellency the Governor that a fine should be imposed on the inhabitants of Limassol town in accordance with the Collective Punishment Regulations. I then invited them to make their representations. After hearing their representations I came to the conclusion that no cause had been shown why a fine should not be imposed and I accordingly told those present at the meeting that I was not satisfied with their representations but asked them to inform their co-inhabitants as widely as possible as to

what had transpired at the meeting and suggested that if there was any person or group of persons wishing to make further representations they could do so through the elected municipal councillors.

"In conclusion I beg to state that in my affidavit dated Dec. 4, 1956, which was filed in opposition to that of Mr. Vassos Papadopoulos dated Nov. 20, 1956, I did not enter upon a full narrative of the meeting held on June 11, 1956, and in particular did not recount the matters set forth in this my present affidavit, for the following reasons, that is to say:

"(i) because in para. 8 of the said affidavit of Mr. Papadopoulos, it was stated that I had spoken about the murders and other offences committed in Limassol and there was no indication that it would be contended that I had done so in such terms as not to make it clear why I held the inhabitants responsible;

"(ii) because, as stated in para. 10 of my said affidavit I had already made my report to the Governor, and having done so and deposed on oath in para. 12 my belief that I had complied with reg. 5, I considered that I had sufficiently dealt with the matter."

As has already been stated, this account of the meeting was confirmed by the contemporary accounts of the meeting in four Cyprus newspapers, set out in the affidavit of Mr. Papadouris. When these affidavits are read in conjunction with the appellant's affidavit of Dec. 4, 1956, it is manifest that the appellant had ample reason for being satisfied that the inhabitants of Limassol "had adequate opportunity of understanding the subject-matter of the inquiry and of making representations thereon". And it is to be noted that the opportunity given of making representations had the widespread results set out in para. 9 of the appellant's affidavit of Dec. 4, 1956.

Counsel for the respondents submitted other objections to the manner in which the appellant conducted his "inquiry into the facts and circumstances", but, in their Lordships' opinion, there is no substance in any of these objections. Regulation 5 (2) provides that, subject to the positive duty already mentioned, which was fully discharged, "such inquiry shall be conducted in such manner as the commissioner thinks fit". The manner in which the inquiry shall be conducted, if, in fact, an inquiry has been held, is thus a matter for the commissioner and not for the court; but their Lordships think it only fair to say that the careful steps taken by the appellant, as set out in his two affidavits, seem to them adequate and sensible. For these reasons, the arguments on behalf of the respondents fail, and the appeal succeeds.

There remains only the question of the costs of the proceedings. The appellant has already been ordered to pay the costs of his petition for leave to file further evidence. Having regard to the course which the proceedings have taken, as already described, their Lordships do not think it right that the respondents, though unsuccessful in their attack on the appellant's order, should be required to pay his costs.

Their Lordships will humbly advise Her Majesty that this appeal should be allowed; that the order of the appellant of July 4, 1956, should be restored, and that the order of ZEKIA, J., dated Dec. 15, 1956, should be set aside. They do not think fit to make any further order as to the costs of these proceedings.

Appeal allowed.

Solicitors: *Charles Russell & Co.* (for the appellant); *Ince & Co.* (for the respondents).

[Reported by G. A. KIDNER, Esq., Barrister-at-Law.]

A

In the Estate of COLMAN (deceased).

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Karminski, J.), December 11, 1957, March 17, 1958.]

B

Will—Soldier's will—Actual military service—Soldier on leave in England from British army of occupation in Germany—Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), s. 11.

C

From August, 1953, until September, 1954, the deceased was serving in Germany as an officer in a unit of the British Army of the Rhine. The British Army was then in military occupation of the British zone of Germany and the deceased was accordingly on active service within the meaning of s. 189 (1) of the Army Act then in force, though hostilities were not imminent. From Apr. 20 until May 6, 1954, the deceased was home on leave in England and on May 3, during that leave, he purported to execute a will, prepared on the advice of a solicitor, in accordance with the provisions of s. 9 of the Wills Act, 1837. The deceased was then under twenty-one years of age. The deceased died in 1956 at the age of twenty-two. On a motion for probate,

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Held: the will was a privileged will and would be admitted to probate since in May, 1954, the deceased was "in actual military service" within the meaning of the Wills Act, 1837, s. 11, as a member of a military force engaged on garrison duties in an occupied country in direct consequence of the surrender of Germany in 1945.

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Re Wingham ([1948] 2 All E.R. 908) applied.

[As to privilege of persons in actual military service, see 16 HALSBURY'S LAWS (3rd Edn.) 177, para. 296, note (i) and 34 HALSBURY'S LAWS (2nd Edn.) 55, para. 65, note (c); and for cases on the subject, see 39 DIGEST 333-335, 193-219.

For the Army Act, s. 189 (1), see 22 HALSBURY'S STATUTES (2nd Edn.) 407.

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For the Wills Act, 1837, s. 9, s. 11, see 26 HALSBURY'S STATUTES (2nd Edn.) 1332, 1335; and for the Wills (Soldiers and Sailors) Act, 1918, see *ibid.*, 1361.]

Cases referred to:

(1) *Re Wingham, Andrews v. Wingham*, [1948] 2 All E.R. 908; [1949] P. 187; [1949] L.J.R. 695; 2nd Digest Supp.

(2) *In the Estate of Grey*, [1922] P. 140; 91 L.J.P. 111; 126 L.T. 799; 39 Digest 334, 196.

G

Probate Motion.

In this case the executors sought probate of a will executed by the deceased on May 3, 1954, at a time when the deceased was nineteen years of age and while he was on leave from the British Army of the Rhine.

A. H. Ormerod for the executors.

H

C. R. Beddington for the next of kin (the mother of the deceased).

KARMINSKI, J.: The late Mr. Russell Mark Adeane Colman died at the age of twenty-two domiciled and resident in England and a bachelor, on July 3, 1956. He purported to execute a will on May 3, 1954, in accordance with the provisions of s. 9 of the Wills Act, 1837. He was at that time nineteen years of age, but he was serving as an officer in the first battalion of the King's Royal Rifle Corps, then stationed in Germany. He had indeed joined his battalion in Germany on Aug. 23, 1953, and he remained there until his demobilisation in September, 1954. At the time that he is said to have executed his will he was on leave in England; he was in this country from Apr. 20, 1954, to May 6, 1954. The will itself was prepared on the advice of a solicitor, and there is no suggestion here of any kind that the deceased was under any sort of disability, except for the fact that he had not at that time in 1954 attained the age of twenty-one. But, if in fact he was at that time, namely, in May, 1954, on actual military service,

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then the will was valid by virtue of the provisions of the Wills Act, 1837, s. 11, A
and the Wills (Soldiers and Sailors) Act, 1918.

The point in this case is whether or not he was in May, 1954, on actual military service. When the case first came before me in December, 1957, I was in some doubt as to the position in fact and in law of Her Majesty's forces in Germany in May, 1954. It was agreed that inquiries should be made at the War Office as to the status and position of the British Army of the Rhine at that time. It is clear from the answers to those inquiries, which I accept, that the deceased in May, 1954, was a member of Her Majesty's forces in Germany and was on active service, within the meaning of s. 189 (1) of the Army Act of 1881, that being the Army Act then in force*. I am also told by the War Office, and I of course accept it, that Her Majesty's forces were in military occupation of the British zone in Germany and the British sector of Berlin by virtue of the unconditional surrender of Germany in 1945, and that, therefore, the deceased was on active service for the reasons given. It was not, according to the War Office, contemplated in May, 1954, that hostilities with any foreign power were imminent. Lastly, I am told that the position, status and function of Her Majesty's forces in Germany in May, 1954, were that of an army in occupation of a foreign country by force of arms. B C D

I turn thus to the provisions of the Army Act of 1881. Section 189 (1) says this:

"In this Act, if not inconsistent with the context, the expression 'on active service' as applied to a person subject to military law means whenever he is attached to or forms part of a force which is engaged in operations against the enemy or is engaged in military operations in a country or place wholly or partly occupied by an enemy, or is in military occupation of any foreign country." E

Having accepted the statement of facts given by the War Office I am bound to hold, as I do, that Her Majesty's forces in Germany in May, 1954, were there in military occupation of a foreign country, and it must therefore follow that the deceased was on active service within the provisions of the Army Act of 1881. The term "active service" appears to have derived from the Mutiny Act, 1867, where it was used, as I understand it, to define amongst other things a state of affairs in which a soldier might be flogged. Subsequently it came to have a less fearsome meaning, but it still leaves a state of affairs in which certain special disciplinary precautions might be applied. F

I have to decide whether or not this young man was in May, 1954, in actual military service within the provisions of the Wills Act, 1837. It is, of course, clear from the line of authorities that actual military service could be said to exist if at the time when the will was made hostilities were said to be imminent. That cannot be said in this case, because no hostilities were imminent. I have to consider the position as it was in 1954. The British forces were there in military occupation of Germany following the surrender of Germany. The tests sufficient to allow a privileged will have been much canvassed as a result of two world wars, and there was, at any rate at one time, some doubt as to the meaning of the words "in actual military service". Some confusion possibly had arisen due to the attempt to apply the privilege of the Roman legionary to the somewhat different conditions of modern warfare, but the difficulties have now been resolved by the decision of the Court of Appeal in *Re Wingham, Andrews v. Wingham* (1) ([1948] 2 All E.R. 908). G H I

The facts of that case were widely different from the present, since they concerned an informal unattested will by a young airman who was about to go to Canada for training in operational flying duties. While he was there in 1943 he died in hospital following a flying accident. The circumstances were therefore

* See now the Army Act, 1955: 35 HALSBURY'S STATUTES (2nd Edn.) 443.

A different from those in the present case; first in *Re Wingham* (1) there was a world war in progress in which this country was involved, secondly at the time of his death the deceased was not engaged in operational duties but was training young airmen to fly. The matter came to the Court of Appeal on appeal from PILCHER, J., who had dismissed the motion on the ground that the deceased was not engaged on a campaign, or proceeding in readiness to join a campaign, or serving in a beleaguered fortress; or in a war base from which active offensive or defensive operations were being conducted. The Court of Appeal dealt with the general position as to the meaning of "actual military service". BUCKNILL, L.J., said this ([1948] 2 All E.R. at p. 911):

C "If the presence of danger arising from enemy activity is not essential in order that a man may be properly described as being on active military service, what is the test of such service? In my opinion, the tests are (a) Was the testator 'on military service'; (b) was such service 'active'? In my opinion, the adjective 'active' in this connexion confines military service to such service as is directly concerned with operations in a war which is or has been in progress or is imminent. If I apply these tests, then, in my opinion, the deceased was so engaged."

D I pause there for a moment to apply the test laid down by BUCKNILL, L.J. To the question "was the testator 'on military service'?" the answer must, of course, be "Yes". To the second question, "was such service 'active'?" I have to consider whether or not the service on which he was then engaged, namely, as a member of the occupying forces in Germany, was "directly concerned with operations in a war which is or has been in progress or is imminent". To the question whether the war was "in progress or is imminent" the answer must, of course, be "No"; but in my view the service on which the deceased was engaged was "directly concerned with operations in a war" which had been "in progress".

E It is true, as counsel for the next of kin rightly pointed out, that the end of hostilities with Germany had come in May, 1945, and that this will was said to have been executed almost precisely nine years later. The fact remains, however, that in 1954 Her Majesty's forces were there in direct consequence of the surrender of Germany in May, 1945, and were still there nine years after such surrender as an occupying force. Counsel for the next of kin called my attention to the decision in *In the Estate of Grey* (2) ([1922] P. 140). There HILL, J., I think with some regret, was unable to accept that a will made by an officer about to enter hospital was a valid soldier's will. The facts there were a good deal different, because the deceased had served in the 1914-18 war, had been a prisoner in Germany and had subsequently rejoined his regiment. Though his regiment was liable for service abroad and under orders to proceed to Ireland, he was in no immediate danger of going on actual military service. It is to be observed that in that case he was serving in London; he wrote out a will at his club just before he went into hospital and was not expecting to go abroad at that time; in fact he died in hospital a very few days after he had signed his will. HILL, J., said this (*ibid.*, at p. 143):

H ". . . for a soldier to be in actual military service it is not sufficient that there should be a state of war; . . . and . . . 'actual military service' refers to a state of fact, not to a date artificially fixed by Act of Parliament or Order in Council."

I I return for a moment to the judgment of DENNING, L.J., in *Re Wingham* (1). After discussing the origin of privileged wills for soldiers and sailors he concluded his judgment in this way ([1948] 2 All E.R. at p. 913):

"It also includes those members of the forces who, under stress of war, both work at their jobs and man the defences, such as the Home Guard."

After saying that it included not only fighting men but also the non-combatant members of the forces, like doctors, nurses, chaplains and Wrens, he added these words (*ibid.*, at p. 914):

“ It includes them, not only in time of war but also when war is imminent. After hostilities are ended, it may still include them, as, e.g., when they garrison the countries which we occupy, or when they are engaged in military operations overseas. In all these cases they are plainly ‘ in actual military service ’.”

In this case the testator was part of a force garrisoning a country occupied by our forces. I appreciate, as counsel for the next of kin rightly emphasised, that when the deceased purported to execute this will he was in fact in England and was not *inops concilii* because he had the advantage of a solicitor to guide him with his testamentary dispositions. But he was only on a fortnight's leave, and he knew that he was returning to his duties as a member of an occupying force. He did in fact so return and remained there for a few more months until he was demobilised.

This, so far as I know, is the first time in which this particular point has arisen, namely, whether or not a member of the British forces in Germany is entitled to make a privileged will. I desire to make it perfectly plain that I am dealing with this case on the facts as they were in May, 1954. Nothing which I have said concerns any changes subsequent to that time. I have come to the conclusion that this was a privileged will. It is right to say that this will has not, as I understand it, been the subject of any family dispute. The matter had to come before the court in the circumstances of the case. I am much obliged both to Mr. Beddington, who appeared for the mother of the deceased, and to Mr. Ormerod for the applicants for their careful arguments on the law. The motion succeeds, and I make the order in the terms of the motion, namely, that probate should be granted to the executors of the will of the deceased dated May 3, 1954. So far as costs are concerned I have indicated what I thought about the matter of the mother's position here, my view is that she should have her costs out of the estate.

Order accordingly.

Solicitors: *Field, Roscoe & Co.* (for the executors and the next of kin).

[*Reported by A. T. HOOLAHAN, Esq., Barrister-at-Law.*]

A

HICKS v. BRITISH TRANSPORT COMMISSION.

[COURT OF APPEAL (Lord Evershed, M.R., Parker and Sellers, L.J.J.), March 4, 5, 10, 11, 12, 1958.]

B

Railway—Statutory duty—Ground lever working point—Shunter caused to fall from step of locomotive by the lever—Whether breach of statutory duty—Whether lever negligently sited—Contributory negligence—Prevention of Accidents Rules, 1902 (S.R. & O. 1902 No. 616), r. 5.

C

The plaintiff was employed by the defendants as a shunter, and was experienced at his work. His job involved his arriving at station C. with a goods train, alighting at that station for information as to wagons awaiting collection, and rejoining the train which would then move forward towards a bridge, from which point shunting operations would begin. The line was disused except for the purpose of the shunting of the one coal train daily. Near the bridge was a hand-operated ground lever whereby it was possible to divert trains from the up main track to the down main track. The lever was of a vertical type, three feet one and a half inches high, and was situated between a spur or shunting line and the up main track, with which the shunting line was converging. The lever worked in a direction parallel to the main track. The distance between the shunting line and the up main track at the site of the lever was five feet eight and a half inches, and the lever was placed two feet six and three quarter inches from the up main track. The two lower steps of a passing locomotive would be eight inches from the lever. The lever had been sited at this place some four or five weeks before Feb. 1, 1955, and the plaintiff had been working at shunting on this line throughout this period. On Feb. 1, 1955, the plaintiff as usual alighted at station C., and, following his usual practice rejoined the train by standing on a lower step of the locomotive. The engine moved forward on the up main track and, apparently, the plaintiff came into contact with the ground lever. As a result he fell from the engine and was severely injured. No one saw the accident and the plaintiff could not recall what happened. Riding on the steps of engines by shunters was a practice recognised and accepted by the responsible officers of the railway. In an action by the plaintiff for negligence and for breach of statutory duty imposed by the Prevention of Accidents Rules, 1902, r. 5*, the plaintiff recovered damages for negligence and for breach of statutory duty, the judge finding that there was negligence in siting the lever and that this caused the accident. The judge further held that the defendants had not established contributory negligence on the part of the plaintiff. On appeal,

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Held: (i) the defendants were not in breach of statutory duty under r. 5 of the Prevention of Accidents Rules, 1902, for the following reasons—

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(a) the lever was in a position “parallel to the adjacent lines” within r. 5, as it moved in a plane parallel to the up line which was the relevant adjacent line in the circumstances of this case, and

(b) on the true construction of r. 5 the requirement that the lever should be “parallel to the adjacent lines” and the requirement expressed by the words “or in such other position and be of such form” were two require-

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* The terms of r. 5 of the Prevention of Accidents Rules, 1902 are as follows:—

“Where point rods and signal wires are in such position as to be a source of danger to persons employed on a railway whilst in execution of their duty, such point rods and signal wires must, within two years from the coming into operation of these rules, be sufficiently covered or otherwise guarded.

“Within the same period ground levers working points must be so placed that men when working them are clear of adjacent lines, and shall be placed in a position parallel to the adjacent lines, or in such other position and be of such form, as to cause as little obstruction as possible to persons employed on the railway whilst in the execution of their duty.”

ments alternative to each other, and since the first was satisfied the fact that the second was not satisfied did not constitute a breach of r. 5.

(ii) though the finding of the judge that the defendants were in breach of their duty of common law to take reasonable care for the plaintiff's safety should stand, yet the circumstances (having regard in particular to the small amount of traffic on this part of the line) pointed as clearly to the existence of contributory negligence on the plaintiff's part as they did to the defendants being in breach of their duty of care, and, as contributory negligence in this case was a matter of inference, the Court of Appeal would draw their own inference; accordingly contributory negligence on the part of the plaintiff was established and the damages recovered by the plaintiff would be reduced by fifty per cent.

Caswell v. Powell Duffryn Associated Collieries, Ltd. ([1939] 3 All E.R. 722) distinguished.

Appeal allowed in part.

[**Editorial Note.** The duty of the Court of Appeal to substitute their own inference of fact is stated by PARKER, L.J., at p. 50, letter I, post; compare *Benmax v. Austin Motor Co., Ltd.* ([1955] 1 All E.R. 326).]

As to the rules for prevention of accidents, see 27 HALSBURY'S LAWS (2nd Edn.) 281, para. 606, notes (c) (d).

As to contributory negligence, see 23 HALSBURY'S LAWS (2nd Edn.) 679-682, paras. 963, 964 (and Supp.); and for cases on the subject, see 36 DIGEST (Repl.) 170-173, 181, 182, 912-936, 971-981.

For the Railway Employment (Prevention of Accidents) Act, 1900, s. 1, see 19 HALSBURY'S STATUTES (2nd Edn.) 885.]

Cases referred to:

- (1) *Paris v. Stepney Borough Council*, [1951] 1 All E.R. 42; [1951] A.C. 367; 115 J.P. 22; 2nd Digest Supp.
- (2) *Flower v. Ebbw Vale Steel, Iron & Coal Co., Ltd.*, [1934] 2 K.B. 132; 103 L.J.K.B. 465; 151 L.T. 87; *revsd. on other grounds*, H.L., [1936] A.C. 206; 36 Digest (Repl.) 173, 929.
- (3) *Hutchinson v. London & North Eastern Ry. Co.*, [1942] 1 All E.R. 330; [1942] 1 K.B. 481; 111 L.J.K.B. 369; 166 L.T. 228; 36 Digest (Repl.) 114, 564.
- (4) *Smith v. Baker & Sons*, [1891] A.C. 325; 60 L.J.Q.B. 683; 65 L.T. 467; 55 J.P. 660; 36 Digest (Repl.) 154, 812.
- (5) *Caswell v. Powell Duffryn Associated Collieries, Ltd.*, [1939] 3 All E.R. 722; [1940] A.C. 152; 108 L.J.K.B. 779; 161 L.T. 374; 2nd Digest Supp.
- (6) *Staveley Iron & Chemical Co., Ltd. v. Jones*, [1956] 1 All E.R. 403; [1956] A.C. 627; 3rd Digest Supp.
- (7) *Richard Thomas & Baldwins, Ltd. v. Cummings*, [1955] 1 All E.R. 285; [1955] A.C. 321; *revsg. sub nom. Cummings v. Richard Thomas & Baldwins, Ltd.*, [1952] 2 All E.R. 43; [1953] 2 Q.B. 95; 3rd Digest Supp.
- (8) *Stimson v. Standard Telephones & Cables, Ltd.*, [1939] 4 All E.R. 225; 161 L.T. 387; *sub nom. Stimpson v. Standard Telephones & Cables, Ltd.*, [1940] 1 K.B. 342; 109 L.J.K.B. 315; 32 B.W.C.C. 253; 24 Digest (Repl.) 1050, 188.

Appeal.

This was an appeal by the defendants from a judgment of HAVERS, J., dated July 22, 1957, awarding the plaintiff £10,898 as damages for the defendants' breach of their duty imposed by the Prevention of Accidents Rules, 1902, r. 5, and negligence at common law, and from his decision that the defendants had not established contributory negligence on the part of the plaintiff. The case was tried before the judge without a jury. The facts appear in the judgment of LORD EVERSHED, M.R.

- A *N. R. Fox-Andrews, Q.C., W. G. Wingate and N. F. Irvine* for the plaintiff.
Marven Everett, Q.C., and Tudor Evans for the defendants.

B LORD EVERSHED, M.R.: The accident which has formed the subject-matter of these proceedings took place in the middle of the fine and clear day of Feb. 1, 1955. The scene of the accident is well illustrated for us on the plan, document No. 2, in our papers, and I will now, in describing the circumstances, refer to the plan and to the descriptions of the various objects as they are found in the plan. The scene is a section of railway belonging to the defendants which connects Muswell Hill and Highgate. Until the middle of 1954 the section of the line was used in the ordinary course for the conveyance of passengers as well as goods. The plan shows a station, now disused, but before July, 1954, used by passengers, and known as Cranley Gardens. In the middle of 1954 the decision was made to discontinue the use of this line for all purposes save one, viz., for the conveyance, once every day from Monday to Friday inclusive, of a train bringing, among other things, coal for which coal wagons would be deposited at various points on the route, but for the purposes of this present case at Cranley Gardens. The plan shows the main lines for the conveyance of passengers and goods indicated in yellow, the up line going westwards and the down line going eastwards. The plan shows that a short distance west of the old station there is a switch line which enables trains which have proceeded hitherto on the up line to be carried over to the down line and to be returned whence they had come. At a distance further west from the points operating that switch line, there is a bridge, and by the bridge there is, what is called, a ground lever whereby it is possible to divert trains on the up line to certain spurs or shunting lines. There were three such lines, called "Front Road", "Coal Road" and "Back Road", and their purpose was that wagons which were to be left at Cranley Gardens would be pushed by the train on to one or other of those three lines and left there, the train continuing either further westward or going back again to Muswell Hill. The train would also be able to pick up from one or other of these three lines, "Front Road", "Coal Road" or "Back Road", empty wagons which had been left there on previous occasions. In the more active days of this piece of railway line there had been, somewhat to the west of the station, a signal box, and from that signal box the points or other mechanical devices were worked which would operate to switch trains from the up line to the down line, and to switch trains to and from the three spurs I have mentioned; but when the use of the line became restricted, it was thought, no doubt very reasonably, no longer economic and sensible to keep the signal box in use with a man in it, and, therefore, it was closed. The means of switching trains from the up to the down lines or from the up line to the spurs thereafter was done by hand-operated point levers; and that had been the state of affairs for some four or five weeks before the accident with which we are concerned.

H Mr. Hicks, the plaintiff, was an experienced shunter. His job was this. He came with the train from Muswell Hill. The train paused at the up platform at Cranley Gardens and it was the plaintiff's function then to leave the train and go and acquaint himself with the situation on the "Front Road", "Coal Road" and "Back Road"—to see what empty wagons were to be picked up and so forth; he then rejoined the train, which moved forward to the bridge, from which point it would go backwards into the shunting area.

I It was proved quite clearly in evidence that men engaged in that sort of operation, shunters, notoriously, during the short space of time which elapses between the train moving forward to be shunted and the actual shunting, do not get into the cab of the engine or into the guard's van, but stand on the step or one of the steps of the locomotive itself. The photographs show those steps. The bottom step is wider than the upper step, and a man standing on either step necessarily protrudes somewhat away from the engine. I have

spoken already of the hand-operated point lever which was installed in 1954 for the purpose of switching trains from the up to the down line. It is with that point lever that we are directly concerned, and its position is indicated on the plan by reference to two letters "A". On a larger scale it is also illustrated at the bottom of the plan, and from that latter illustration the following facts emerge. The lever which operated these points, called a switch lever, was a vertical lever. The actual lever is in fact in court. Its height is 3 feet 1½ inches. It operates by means of a spring, so that if a man pulls the switch lever in the correct direction, the tie rod to which it is connected operates by way of the spring so as to make the tongue of the points come over into the position which will switch the train off the up line. At the point at which the switch lever was sited, the distance between the outside of the southern pair of the up lines and the outside of the northern spur of the shunting line is a distance of 5 feet 8½ inches. That distance is less, it appears, than the ordinary distance between two parallel sets of metal on an operating section of the railway. That latter distance is normally spoken of as "the six-foot", which indicates that 6 feet is the normal distance between the lines. It is also shown from the site plan of the lever that it was placed nearer to the southern rail of the up line than to the spur. It was 2 feet 6¾ inches from the up line and 3 feet 1¾ inches from the spur. It was not, in other words, midway between the two. In the position in which it had been placed it follows that as a locomotive passed the switch lever, the steps and the floor level of the engine cab were close to the lever. I can confine myself henceforward to the two steps which were each 8 inches—no more—from the lever. I dare say the position was not improved—though I do not think anything much can be made of it—by the circumstance that at this part of the railway there was a slight curve, the southern of the up lines being on the inside of the curve, and, therefore, the tendency certainly would be that trains coming round the curve would lean very slightly southerly from the strictly horizontal. No point was made of that; I merely mention it to show that it did not improve the situation.

From the figures that I have given it will be plain enough that a man riding on the step of an engine and passing the switch lever would pass extremely close to it. On the day I have mentioned, Feb. 1, 1955, the plaintiff admittedly got on to one or other of the steps of the locomotive to go to a point somewhere close to the bridge, and then the next thing that was known was that he had parted company with the locomotive. When he fell, most unhappily he so fell that his legs were crushed by the train, and he suffered a grievous injury resulting in the loss of both his legs. Although there was a guard on the train and an engine driver, and I assume a fireman too, it seems, to judge from the evidence that was given and what we have heard here, that nobody saw the actual fall of the plaintiff or could describe what exactly caused it. The plaintiff himself could throw no light on it, because, not unnaturally, having regard to the gravity of his accident, he had no recollection of the exact impact. The case was fought, however, from first to last on the assumption that what had happened was that, somehow or other, he had been knocked by the switch lever off what I can fittingly call his perch. Whether his heels or part of his feet struck the lever, whether some other part of his anatomy came in contact with it, or whether it was his clothes, we do not know; and it has been a persistent difficulty in the case that it has proceeded, no doubt very properly, on the assumption that the plaintiff was knocked off his perch (if I may repeat my phrase), but the assumption was in no sense more precise. That has, I think, a particular significance when I come to deal with the question of contributory negligence.

The damages which were awarded to the plaintiff amounted to £10,898, of which £10,500 was general damage, and there is no question before us as to the quantum of damages. I can, therefore, leave that aside.

A The claim in the action was based on common law negligence on the part of the defendants and also on breach of statutory duty. By way of defence the defendants claimed that if they were liable, then the plaintiff himself was guilty of contributory negligence. With each of those three points we have been concerned on the appeal. I will deal first with the second of them in order to dispose of it, viz., the question of statutory liability, since it has been fully argued before us.

B The liability is alleged to arise under the Prevention of Accidents Rules, 1902 (S.R. & O. 1902 No. 616), made pursuant to the Railway Employment (Prevention of Accidents) Act, 1900. By s. 1 (1) of that Act power was conferred on the Board of Trade to

C "make such rules as they think fit with respect to any of the subjects mentioned in the schedule to this Act, with the object of reducing or removing the dangers and risks incidental to railway service."

D In sub-s. (3) the rule-making power was expressed to comprehend a power to require the use of certain plant or alternatively to require the disuse of certain plant. The schedule to which reference is made in s. 1 (1) included, among other things, the following: "Protection of point rods and signal wires, and position of ground levers working points." It is not, I should say, in doubt that the thing that I have called the switch lever is a ground lever working point. The relevant rule of the Prevention of Accidents Rules, 1902, is r. 5, and it must be confessed that, looking at it now with the added wisdom given by time after the event, it is not happily drawn. It begins as follows:

E "Where point rods and signal wires are in such position as to be a source of danger to persons employed on a railway whilst in the execution of their duty, such point rods and signal wires must, within two years from the coming into operation of these rules, be sufficiently covered or otherwise guarded."

F I have read that paragraph because of the reference to "two years from the coming into operation of these rules"; for the second part of the rule inauspiciously opens with the phrase "Within the same period"—which presumably, as a matter of construction of the language, means "within two years from the coming into operation of these rules". It will be seen that that opening phrase creates at once a difficulty in this case, since the rules came into operation in 1902, whereas this point lever was installed, for the reasons I have stated, over half a century later. No point, however, has been made by counsel for the defendants on those words; he has not sought to say that, in the circumstances, the whole of the second part of the regulation is rendered futile and inoperative now. Rule 5 continues:

H "Within the same period ground levers working points must be so placed that men when working them are clear of adjacent lines, and shall be placed in a position parallel to the adjacent lines, or in such other position and be of such form, as to cause as little obstruction as possible to persons employed on the railway whilst in the execution of their duty."

I It will be seen that that paragraph contains more than one distinct obligation. The first is in the opening phrase—"points must be so placed that men when working them are clear of adjacent lines . . ." The question in this case arises on that part of the paragraph, which relates only to the men who actually work the points; but, as a distinct obligation, the paragraph goes on: "and shall be placed in a position parallel to the adjacent lines . . ."

My description of this switch point has been so far incomplete in that I have not indicated in what direction this upright lever moves when the man whose duty it is to make it work operates it. That is shown quite clearly on the plan to be in a place which, from the ordinary practical common-sense point of view, is beyond a peradventure "parallel" to the up line or up lines. That

being so, the words I have read would appear to be satisfied; the points were placed in a position parallel to the adjacent line, for I conceive that when dealing with points, that phrase "in a position parallel to . . ." means "in a position so that the lever moves in a plane parallel to . . ." If that is right, then *prima facie* the alternative which follows has no application. I will come back in a moment to deal with it; but counsel for the plaintiff had a point of some mathematical ingenuity, but (I hope he will forgive me for saying) not of any apparent appeal to common sense. He said that it does so happen that here the lever is placed at a point where what I call the spur is shortly to the west going to join the up line—in other words, the up line and the spur line are converging; and although it is plain that this handle may be "parallel to" the up line, it cannot be parallel at the same time with the other line, because the two lines themselves are not parallel to each other. Therefore counsel for the plaintiff's point is that where you have got converging lines, mathematically it is absolutely impossible to comply with the first part of this alternative. I cannot accept that view of the meaning of this paragraph. As PARKER, L.J., pointed out, carried to its proper logical conclusion, it would be fatal in the present case, that the lines here are on a slight curve, for the plane of the movement of the lever does not and could not follow the curve of the lines. But, construing the relevant words according to what I have called, and I hope justifiably, the common sense of them, it seems to me that the position of this lever was such that its plane of operation was parallel to the relevant adjacent line. It was in fact nearer to the up line than the spur line, but I do not rely on that. I think the relevant line was the up line, because it was the points for switching trains from the up line to the down line that this mechanism was erected to serve.

It seems to me, therefore, that the first part of this obligation covered by the words "and shall be placed in a position parallel to . . ." are satisfied. That is not quite the end of the matter, because the words which follow are: "or in such other position and be of such form as to cause . . ." In the court below it was conceded, as I gather, that although the parallel position may suffice to exclude the words "or in such other position", they do not exclude the obligation to be extracted from the next five words "and be of such form". That view of the matter is given some emphasis first by the use of the conjunction "and", and, more, by the insertion here of the verb "be". It does not read "and in such other position and of such form", but "or in such other position and be of such form"; and so it was said, awkward as the language is, that these words should be read as follows: "or in such other position and (in either alternative) shall be of such form as to cause . . .", making the words "as to cause as little obstruction" do a double duty applying to "the other position", in cases where that phrase operated, and to the words "and be of such form" in all cases.

It is a little tempting to think that such might have been the intention of the draftsman; but I have come to the conclusion that, as a matter of English (if this paragraph deserves such appellation) it is not really possible so to construe the words. One great difficulty is the use of the commas which I emphasised in reading. The words "or in such other position and be of such form" are, so to speak, enclosed by commas—preceded and followed by commas; and after the second comma come the words "as to cause as little obstruction", etc. It seems to me, therefore, that the inevitable meaning of this collocation of words is that the whole formula "or in such other position and be of such form" is intended as alternative and only alternative to the preceding part of the obligation "shall be placed in a position parallel", etc.; so that the provision that the lever must be in such other position and of such form as to cause as little obstruction, etc., only has to be considered in cases where the lever is not in a parallel position.

There are, to my mind, two circumstances which lend a little support to that view. The first is that if the handle is parallel, then I should be disposed to

- A think that the general nature of these things described as "ground levers working points" being well known, they would answer automatically any question as to form. It is only when these things are in an unusual position that their form as well as their position may have to be considered. Second, as was pointed out during the course of the argument, the schedule to the Act in terms limited the rule-making power to "the position of" the ground levers without
- B any reference to their form. I, therefore, conclude in the defendants' favour that the position here of this lever is such that there was no breach of the paragraph. The point which I have decided in their favour was not in fact taken, as I have said, below. It was taken in this court by our leave (though I think it was open to the defendants in any case); and, therefore, there is nothing in the learned judge's judgment to which I need allude.
- C There was another point on the paragraph of the rule on which counsel for the defendants sought to rely, if he were wrong on that with which I have tried to deal. He said that at the very end of the paragraph, the words "as to cause as little obstruction as possible to persons employed on the railway whilst in the execution of their duty" did not cover this case because the plaintiff, when riding as he was riding on the step of the locomotive, could not be said to be
- D acting in the execution of his duty. In the circumstances it is not, of course, necessary to deal with that point; but my present inclination is to say that on that point the learned judge rightly held that the plaintiff was acting in the execution of his duty; in other words, if it were necessary, as at present advised I should be disposed to determine that point adversely to the defendants.

- What I have so far said removes from the scene, so to speak, the claim raised
- E for breach of statutory duties. I now come to that which has been the main burden of the case, viz., the question of common law negligence, and, linked with it, the question of contributory negligence. I have already said that it is a feature of the case which is of real significance that the actual accident was observed by no one and there is no evidence as to its exact nature; but I apprehend that in cases of this kind, since it is conceded that the plaintiff did strike
- F the lever, the problem for the judge was one of determining as a matter of fact to what end on that assumption the probabilities of the case pointed; and I observe that he cited the well-known passage from *Paris v. Stepney Borough Council* (1) ([1951] 1 All E.R. 42), and in so doing it seems to me that no one could say that he had not properly directed himself as to the task in hand.

- If I may usefully anticipate my conclusion, it is in my judgment of this
- G nature: here was a section of the railway which had become disused save for the single purpose of acting as a place from which a few shunting operations daily took place, the object being to deliver certain goods to one or other of the spur lines and thence to remove the empty wagons. It was, therefore, of the essence of the case that the shunters employed would adopt habits and customs that shunters notoriously do adopt, and it has not been in dispute that, notwithstanding anything in the Book of Rules of 1950, shunters doing the sort of
- H job that the plaintiff was employed to do, travel from the station (the point where the train first stops) to the point where they operate the shunting levers by standing on the steps of the locomotive. That such a practice in certain circumstances may be dangerous is undoubtedly the fact, and the evidence was that in some cases the responsible officers of the British Transport Commission or the British Railway Executive take steps to prevent, as far as they
- I can, men exposing themselves to that sort of risk; but, apart from that limited class of case, we must proceed, I think beyond any doubt, on the view that the riding on the steps of engines on the part of shunters was a practice recognised and accepted by the responsible officers of the railway undertaking. It follows, therefore, as I think, that the duty of the defendants must be one related to the fact that some one riding on the steps of the engine would be put at peril if some obstruction were placed in a position in which it would be likely to hit him. So the really vital factor in this case is that the siting of this switch lever was

such that it left between himself and the up lines a space which was described by the adjective "meagre". In the context in which that phrase was used I am myself left in no doubt that the witnesses meant thereby to say that in this case there was unusually little room between the lever and the passing locomotive; and that is, I think, another way of saying that the margin of safety was extremely and unusually slight. A

[HIS LORDSHIP considered, in relation to the question of negligence of the defendants, the judgment of HAVERS, J., his review of the evidence, and passages in the evidence to which the Court of Appeal were referred and concluded that there was ample evidence to justify the finding at first instance on this issue. The finding of HAVERS, J., on this issue was that a prudent employer should have foreseen the danger and probability of an injury from accident if the lever were placed in the position in which it was and, adopting the standard of care stated in *Paris v. Stepney Borough Council* (1) ([1951] 1 All E.R. at p. 50, letter H), he held that the defendants were liable to the plaintiff for negligence. LORD EVERSHERD, M.R., continued:] Therefore, on this difficult question of fact, in a case in which, as I once more repeat, the exact circumstances of the accident were assumed and not precisely known, I feel that the learned judge's conclusion cannot properly be disturbed by this court—which must not, of course, be taken to indicate that I should, had I tried the case, have been disposed to come to any different conclusion. B C D

There remains the problem of contributory negligence. I have earlier said that the installation of this points lever took place some four or five weeks before the accident, so that when the accident occurred the plaintiff had on quite a number of occasions taken this journey, and taken it, as I assume, in the same way as he travelled on Feb. 1. It further will be borne in mind that this was not a busy shunting line with men working at pressure and against a background of noise and movement. The quiet of Cranley Gardens station was broken only once a day by the arrival of this coal train. There was no particular urgency: the whole of the rest of the day was available to complete the not very intricate operation of taking on the empty wagon, a wagon left before, and leaving behing the full wagon or a wagon which the train had brought. This accident happened on Feb. 1, 1955, but there had been the possibility of it happening on any of the days during the preceding five weeks. It is, therefore, not surprising that the learned judge concluded that it must have been something which the plaintiff himself omitted to do on Feb. 1 which had produced this unhappy result. After referring to a passage from *Flower v. Ebbw Vale Steel, Iron & Coal Co., Ltd.* (2) ([1936] A.C. 206), the learned judge said: E F G

"I bear these principles in mind when I apply myself to the question which I have to decide, whether or not the defendants have satisfied me that the plaintiff was, in the circumstances of this case, guilty of contributory negligence. I think it is an inescapable conclusion that, for some reason or other, at the critical time the plaintiff did not see this lever. I think it follows also that his failure to see the lever was a contributory cause of this accident; but, using the language of LORD GREENE, M.R., in the case to which I have referred*, the question I have to consider is: Have the defendants proved that in all the circumstances, whatever they may have been, the failure to see the lever was negligence? On the one hand, as I have said, the lever was 3 feet 6 inches high. It has been painted white on the sides and edges. The handle and the bottom had not been painted. No doubt there was, during the four to five weeks which had elapsed, some discoloration of that white from the ordinary incidence of the English climate in winter time; but this was about 1.30 p.m. on Feb. 1 when the visibility was good, and I do not think that there was anything in the background to make it more difficult to see this lever. I find, therefore, it was clearly visible H I

* *Hutchinson v. London & North Eastern Ry. Co.* (3) ([1942] 1 All E.R. 330 at p. 334).

A and could have been seen by the plaintiff. Also, there can be no doubt that, though it had not been there very long, between four and five weeks, its position was well known to the plaintiff. He had been shunting there during that period and, of course, he had had many opportunities of seeing it. In addition, the plaintiff told me that he had a conversation with Mr. Smith—he says a few months before the accident, but it cannot have been as long as that; some time before the accident—in which he said, after it had been erected, it was a bit dangerous and somebody would catch it one of these days. Mr. Smith did not remember this. Also, of course, I have to bear in mind r. 118 of the defendants' Rule Book, to which I have already referred, which says that staff riding on engines or vehicles, or when on the ground alongside vehicles, at converging points in sidings must take special care; also, the general duty to take care imposed by r. 11 (a) of the rules and, of course, the duty at common law which rests upon a workman to take reasonable care for his own safety in all the circumstances of the case. As counsel for the defendants has pointed out, this accident did not take place in a factory, with all its distraction of noise, confusion, moving machinery and men moving about, and perhaps in a somewhat narrow space.

D This man was engaged on a comparatively simple operation of helping shunting, an operation with which he was familiar. It was suggested by counsel for the defendants that while he was riding on this step of the engine he had nothing in the world to do except to look after his own safety. On the other hand, Mr. Stanley, the station master, gave the plaintiff a very good character. He said he was a good sensible, hard-working chap, and he said

E he would say that he was a careful workman. Counsel on his behalf has contended that it is not contributory negligence because on one occasion he did not see this lever, and he argued that a momentary period of inattention does not in itself constitute negligence on the part of the workman."

Then counsel for the plaintiff is quoted as having suggested that there might have been here some distraction of the plaintiff's attention.

F I have read that passage at some length because on this very difficult matter I well appreciate that it is said that no more should the court disturb the judge's conclusion of fact on the question of contributory negligence than it should in the case of negligence on the part of the defendants. The two questions are not, however, quite parallel. The learned judge has drawn the inference of fact that to a substantial extent, to say no more, a contributory cause of the accident

G was the plaintiff's own inattention, but he has gone on to conclude on the whole that the defendants have failed to prove that the inattention, the inadvertence, amounted to negligence.

I cannot help feeling that perhaps there has been an undue significance attached to the word "inadvertence", as though inadvertence was something necessarily distinct from negligence. The fact, of course, is that inadvertence may itself amount to negligence or it may not. As counsel for the plaintiff himself pointed out, the question on contributory negligence is, in essentials, the same as that on negligence by the defendants: in the circumstances of this case to what end does the reasonable balance of probabilities point? I have given my grounds for thinking that the reasonable balance of probabilities points to negligence on the part of the defendants, or, at least, to the view that we should not disturb the finding of the judge to that effect. But on the whole I have been unable to follow the judge in his conclusion in the passage which I have read acquitting the plaintiff of contributory negligence; for in my judgment the conclusion is not in truth consistent with the premises which preceded it. It is the fact here—the inescapable fact—that the plaintiff, riding as he was on the engine, knew perfectly well what the risks of such conduct were: and although I fully agree with his counsel that the rules in the defendants' Rule Book of 1950 which enshrine the two injunctions to which the learned judge referred, cannot be

regarded as part of the contract of employment, still it is sufficiently made clear (and indeed the plaintiff himself conceded the point) that if one does ride on the step of an engine, there are risks involved, and in this case the risks were perfectly well known to the plaintiff, since for four to five weeks he had done this journey. Not only that, but he knew, because he said that he told Mr. Smith so, that there was here precious little clearance; and if, contrary to the advice, though not contrary to the contract, he chose to ride on the step, he plainly had, I should have said, an enhanced duty to look after himself. I agree also with the point to which the judge refers, that, in the absence of any evidence of distraction, the plaintiff had, to use his own phrase, nothing in the world to do except to look out for himself. It may well be that something did distract him. Possibly some twinge of cramp upset his equilibrium. Those risks, however, the plaintiff thought it right to undertake when he rode on the step. I have felt forced in the end to the conclusion that, knowing the risks, knowing the special risk here involved because of the unusual siting of the lever, the assumed circumstances of the accident point as clearly to contributory negligence on the plaintiff's part as they point to negligence on the part of the defendants. I do not lose sight of the relevant circumstance that according to the station master the plaintiff was a careful, conscientious, hard-working chap, not a day-dreaming scatterbrained type at all; but it is unfortunate in accordance with ordinary human experience that sometimes, to our surprise, the most careful people do make mistakes.

I think that in all the circumstances, including the rules and the knowledge which the plaintiff as an experienced man had of the position of the lever, the plaintiff had at any rate a strong obligation to look after himself. The finding that the accident was due to the circumstance that the plaintiff on this occasion did not see the lever—an inescapable conclusion on the assumption made—leads to the view that the balance of probabilities must be that for some reason the plaintiff on this occasion departed from the proper standard of care which he owed to himself, and, if you will, through himself, to his employers.

There only remains, if I am right, the question of apportionment. Once more, but finally, I revert to the fact that the exact circumstances of the accident are not known but assumed. Against that background I feel that no conclusion can be really satisfactory, but that the least unsatisfactory conclusion must be one of equal liability. No one will for a moment fail to feel sympathy with the plaintiff, a conscientious worker who has suffered a most calamitous and grievous accident; but I have come to the conclusion that as to fifty per cent. he was the author of his own calamity and that therefore the damages he may recover must be reduced by fifty per cent. To that extent I would allow the appeal.

PARKER, L.J.: I agree and I can state my reasons very shortly. As regards the claim based on the alleged breach of statutory duty, namely, a breach of r. 5 of the Prevention of Accidents Rules, 1902, the learned judge said:

“ I hold that this lever was not in such other position and of such form as to cause as little obstruction as possible to persons employed on the railway whilst in the execution of their duty.”

I entirely agree with that, assuming that one ever gets as far as those words in r. 5. For the reasons given by my Lord it seems to me that in this case one never comes to consider those words, which are an alternative to what has gone before, and there was clearly, I think, compliance with the provisions that have gone before.

I come, therefore, to the question of a breach of the duty at common law. To quote the words of LORD HERSCHELL in *Smith v. Baker & Sons* (4) ([1891] A.C. 325 at p. 362):

- A " . . . the contract between employer and employed involves on the part of the former the duty of taking reasonable care . . . and so to carry on his operations as not to subject those employed by him to unnecessary risk."

Whether the risk is such that a prudent employer exercising reasonable care should take steps to guard against it depends on a number of considerations —certainly on three: first, whether such an employer could reasonably foresee the risk of accident to an employee; secondly, if so, the degree of injury likely to result; and, thirdly, the nature of the precautions necessary to guard against that risk. If no precautions can guard against the risk, then it cannot be said to be an unnecessary risk. Equally, if the precautions involve great expense, that is to be put into the scale and weighed with the other considerations.

- C Now here, to take those matters in order, I think that it is clear, that an 8-inch clearance between the vertical lever and the steps of the locomotive is such that any prudent employer must foresee the risk of injury to a person riding on the locomotive. Here it is proved beyond a shadow of doubt that it was the common practice of shunters to ride on the steps of locomotives. It was only if they were exposing themselves to some extreme danger that any steps were taken to reprimand them. It was a practice which, as my Lord has said, was tolerated by the defendants. Bearing in mind the position in which a man would have to stand if he was to hold the rails at the side of the entrance to the locomotive cab and bearing in mind the fact that he might be wearing an overcoat, there was clearly, I should have thought, a risk of injury. But the matter does not end there, because the witnesses for the defendants said perfectly clearly that in shunting yards the danger to men riding on the steps of locomotives was something to which they did pay regard. It seems to me that merely because there was only one train a day on this line and not a great many locomotives and a great many shunters riding on them, the employers are not excused from considering the risk.

- F As regards the second consideration, it does not require any hind-sight in this case to see that if an accident did occur, very serious injuries might result.

- G Lastly, in regard to the precautions, it is to be observed that the defendants are in this difficulty: nobody of those responsible, so far as the evidence was concerned, ever considered the question of safety at all. The learned judge pointed out that at any rate this lever could have been put in a position which was equidistant between the up line and the spur. It was not: it was nearer to the up lines. Further, though the evidence was not very satisfactory, it appears that they could have put the lever some distance to the east where the space, referred to as the six-foot way, widened out somewhat. For my part, even if it were necessary from an operational point of view to have had this lever where it was, I cannot think that if they had considered safety at all, they would not have installed what is referred to as a hinged type of lever which lies flat along the ground. It does not lie in their mouths to say that they could not do it; especially when the moment they did consider safety, namely, after this accident occurred, they had no difficulty in installing such a lever. Bearing those considerations in mind, I cannot see any ground for interfering with the learned judge's finding that the defendants were in breach of their duty; and, bearing in mind that it is conceded that this man was struck by the lever, that that breach of duty was a cause of this accident.

- I Finally there remains the question of contributory negligence. The learned judge found that this lever was visible and could have been seen by the plaintiff; that it was in a position well known to the plaintiff; that he had passed it on a number of occasions during the preceding five weeks; that he realised that it was a bit dangerous and has said that somebody would catch it one of these days; that he also had in mind the defendants' rules, and in particular r. 118 and r. 11 (a); and, finally, that the work on which he was engaged was a simple operation, there was no rush, and, of course, none of the atmosphere of a factory.



Pausing there, one would think that that was leading up to a finding of contributory negligence; but the learned judge went on to say that he had had evidence that this man was of very good character and was a careful man. Pausing there, one cannot say that such a consideration is irrelevant, but for my part comparatively little weight ought to be given to it because unfortunately the most careful men are guilty of inattention at times. And finally he went on to point out that all the facts of the case were not known, and in effect that for all one knows this man may have been guilty of momentary inattention or inadvertence. I quite agree that all the facts are not known in this case. Indeed they very seldom are in any case. But, just as the defendants' negligence must be judged on the probabilities of the case, so must questions of contributory negligence. As regards inadvertence, of course, it is a matter of degree. It is not every act of inadvertence which amounts to negligence. Equally, in certain circumstances inadvertence may well amount to negligence. It must depend on all the facts of the case.

The learned judge, I think, was clearly influenced by the well-known passages in *Caswell v. Powell Duffryn Associated Collieries, Ltd.* (5) ([1939] 3 All E.R. 722), and he took the view that this might well have been a matter of momentary inadvertence not amounting to negligence. *Caswell v. Powell Duffryn Associated Collieries, Ltd.* (5), however, was a case of breach of statutory duty occurring in all the noise and bustle of a factory, and, as was pointed out by the House of Lords in the recent case of *Staveley Iron & Chemical Co., Ltd. v. Jones* (6) ([1956] 1 All E.R. 403), different considerations may arise where there is no statute designed to protect a workman against himself and where the operation is divorced from the bustle, the noise and the repetition that occurs in a factory. Again I think the learned judge was influenced by passages in *Hutchinson v. London & North Eastern Ry. Co.* (3) ([1942] 1 All E.R. 330). That again was a claim based on a breach of statutory duty—indeed on r. 9 of the Prevention of Accidents Rules, which have been referred to in this case. The facts in that case were, however, wholly different; that was a case of gangers working on the main line between Newcastle and York with express trains passing every eight or ten minutes. They were engaged on raising the rails and putting ballast underneath—an operation on which they would be concentrating and not thinking or having the opportunity to think very much of their own safety. That seems to me to be a wholly different case from this. Here was a man riding for his own convenience on the step of a locomotive, having nothing to do at that particular moment other than keep a look-out for his own safety, assisted, as my Lord has said, by the added injunction in the defendants' rules. For my part, I feel that it is an irresistible conclusion that on the balance of probabilities this man was guilty of contributory negligence.

Finally, counsel for the plaintiff referred to the two cases of *Cummings v. Richard Thomas & Baldwins, Ltd.* (7) ([1952] 2 All E.R. 43), and also *Stimson v. Standard Telephones & Cables, Ltd.* (8) ([1939] 4 All E.R. 225), showing that this court is loath to interfere with an inference drawn by a trial judge who has seen and heard the witnesses. With that, of course, I entirely agree; but, at the same time, if this court is satisfied that the inference drawn is the wrong inference, then not only has it the power but it is its duty to substitute its own inference for that found by the learned judge. I have reluctantly come to the conclusion that this unfortunate man was guilty of contributory negligence, and, like my Lord, I would hold him fifty per cent. to blame.

SELLERS, L.J.: I agree. Although we are differing from the learned judge who tried this case on the question of contributory negligence, I hope it will not be thought to be in any way disrespectful to him and to his careful and

A reasoned judgment if I say that my views so much accord with those of both my Lords that I feel that I ought not to take time expressing them in my own words.

Appeal allowed in part: Leave to appeal to the House of Lords refused.

Solicitors: *Pattison & Brewer* (for the plaintiff); *M. H. B. Gilmour* (for the defendants).

[*Reported by F. GUTTMAN, Esq., Barrister-at-Law.*]

R. v. POTTER AND ANOTHER.

[LEICESTER ASSIZES (Paull, J.), January 31, 1958.]

D *Criminal Law—False pretences—Procuring delivery of chattel with intent to defraud—Impersonation at driving test in order to obtain driving certificate to enable another person to obtain driving licence—Larceny Act, 1916 (6 & 7 Geo. 5 c. 50), s. 32 (1).*

E *Criminal Law—Forgery—Signature on driving certificate—Signature in driving examiner's journal—Impersonation at driving test to enable another person to obtain driving licence—Forgery Act, 1913 (3 & 4 Geo. 5 c. 27), s. 1—Criminal Justice Act, 1925 (15 & 16 Geo. 5 c. 86), s. 35 (1).*

The defendants, W. and A., were brothers. W. was a qualified driver of motor vehicles and A. had only a provisional licence. A. having made an appointment to take a driving test on July 15, 1957, it was agreed between the defendants that W. should take the test in A.'s place. A. handed his appointment card to W., and on July 15 W. presented himself for the test, producing A.'s card, telling the driving examiner that he was A., and signing the examiner's journal in the name of A. After W. had taken and passed the test, he signed in A.'s name the certificate of competence in which the examiner had certified that A. had been examined and had passed the driving test. After receiving the certificate, W. handed it to A. On Sept. 11, 1957, A. was issued with a driving licence on presenting a completed application form together with the driving certificate and the fee. The defendants were charged on indictment with the following offences: count 1, conspiring together to procure the issue to W. of a driving certificate in the name of A. by means of W. impersonating A. during the driving test; count 2, procuring a driving certificate by false pretences, contrary to s. 32 (1)* of the Larceny Act, 1916; and count 3, procuring a driving licence by false pretences. W. was further charged with count 4, forging an entry in the driving examiner's journal, and count 5, forging an entry in the driving certificate; and A. was further charged with count 6, uttering the driving certificate knowing it to be forged and with intent to defraud. Under s. 35 of the Act of 1916, A., as an accessory, was charged as a principal on count 2, and W., as an accessory, was charged as a principal on count 3. Both defendants admitted the facts and pleaded guilty to count 1, but not guilty to the other counts and it was contended that these counts were bad in law.

Held: (i) (as regards counts 2 and 3) W. procured the driving certificate to be delivered to him for the use or benefit of himself within s. 32 (1) of the Larceny Act, 1916, since, having procured it, he could do what he liked with

* The terms of s. 32 (1) are printed at p. 53, letter I, post.

it, and he procured it with intent to defraud, because he intended to induce a course of conduct (viz., to induce the county council to grant a driving licence) by the deceit which enabled him to procure the certificate (*R. v. Bassey* (1931), 22 Cr. App. Rep. 160, applied); similar considerations applied to A.'s procuring the driving licence, and accordingly counts 2 and 3 were good in law.

(ii) (as regards counts 4 and 5) when W. signed the driving examiner's journal, and also when he signed the driving certificate, he made a false document (within s. 35 (1) of the Criminal Justice Act, 1925, explaining s. 1 of the Forgery Act, 1913) and he did so with intent to defraud; accordingly counts 4 and 5 were good in law.

(iii) in presenting the forged driving certificate in order to obtain a driving licence, A. uttered a forged document, and accordingly count 6 was good in law.

[As to the offence of obtaining property by false pretences, see 10 HALSBURY'S LAWS (3rd Edn.) 827, 828, para. 1597; and as to intent to defraud, see *ibid.*, p. 829, para. 1599.

As to the statutory offence of forgery, see 10 HALSBURY'S LAWS (3rd Edn.) 840, 841, paras. 1619, 1620.

For the Larceny Act, 1916, s. 32, s. 35, see 5 HALSBURY'S STATUTES (2nd Edn.) 1031, 1034.

For the Forgery Act, 1913, s. 1, see 5 HALSBURY'S STATUTES (2nd Edn.) 981; and for the Criminal Justice Act, 1925, s. 35, see 14 HALSBURY'S STATUTES (2nd Edn.) 956.]

Cases referred to:

- (1) *R. v. Kilham*, (1870), L.R. 1 C.C.R. 261; 39 L.J.M.C. 109; 22 L.T. 625; 34 J.P. 533; 15 Digest (Repl.) 1165, 11,763.
- (2) *R. v. Chapman*, (1910), 74 J.P. 360; 4 Cr. App. Rep. 276; 15 Digest (Repl.) 1164, 11,749.
- (3) *R. v. Bassey*, (1931), 22 Cr. App. Rep. 160; 14 Digest (Repl.) 129, 911.
- (4) *Re London & Globe Finance Corpn., Ltd.*, [1903] 1 Ch. 728; 72 L.J.Ch. 368; 88 L.T. 194; 15 Digest (Repl.) 1115, 11,078.

Trial on Indictment.

The defendants, Alan Frederick Potter and William Potter, were charged on an indictment containing six counts. The first three counts were against both defendants; the fourth and fifth counts were against William only, and the sixth count was against Alan only. The counts were as follows: 1. That both defendants on a day unknown between July 1 and July 15, 1957, conspired together to procure the issue to William in the name of Alan of a certificate of competence to drive certain groups of motor vehicles by means of William impersonating Alan during the test of competence held under the provisions of the Road Traffic Act, 1934. 2. That both defendants, on July 15, 1957 (the date on which the test took place), by falsely pretending that William was Alan with intent to defraud, procured to be delivered to William for the use of Alan a certificate certifying that Alan had been examined and had passed a test of competence to drive the said motor vehicles that were prescribed under the Road Traffic Acts, 1930 to 1934. 3. That both defendants on Sept. 11, 1957, by falsely pretending that a certificate certifying that Alan had been examined and had passed the test to drive motor vehicles was a valid certificate and properly issued to Alan with intent to defraud, procured to be delivered to Alan for his use and benefit a licence licensing him to drive certain motor vehicles. 4. That William on July 15, 1957, with intent to defraud, forged an entry in a certain document, namely, a driving examiner's journal, purporting to contain the signature of Alan. 5. That William on July 15, 1957, with intent to defraud, forged an entry in a certain document, namely, a certificate of competence to drive, purporting to contain the signature

A of Alan. 6. That Alan on Sept. 11, 1957, uttered a certain document, namely, a certificate of competence to drive, purporting to contain the signature of Alan, knowing such document to be forged and with intent to defraud. Under s. 35 of the Larceny Act, 1916, Alan was charged as a principal on count 2 and William as a principal on count 3.

The following facts were stated in the depositions and were not in dispute.

B The defendants were brothers. William, who was twenty-three years old, was a qualified driver. Alan, who was twenty years old, held only a provisional driving licence and made an appointment for a driving test to be held on July 15, 1957. At a meeting between the defendants on July 14 they agreed that William should take Alan's place in the test, and Alan handed to William his appointment card. On July 15 William presented himself to the driving examiner, produced the appointment card and said that he was Alan. On being asked to sign the examining driver's journal, he did so in the name of Alan. After William had taken and passed the test, the examiner wrote out a certificate, which was in a statutory form, certifying that Alan had been examined and had passed the test of competence to drive. Before handing the certificate to William, the examiner asked William to sign it. William signed the certificate in the name of Alan, and after receiving the certificate he met Alan and handed the certificate to him. On Sept. 11, 1957, Alan went to the motor taxation office in Leicester, presented an application for a licence to drive, together with the driving certificate and the fee of £1, and received a licence to drive vehicles of a certain group.

Both defendants pleaded guilty to count 1. They both pleaded not guilty to counts 2 and 3; William pleaded not guilty to counts 4 and 5; and Alan pleaded not guilty to count 6. After the pleas had been made, HIS LORDSHIP (PAULL, J.) drew the attention of counsel to the fact that, for the purposes of sentences, it was sufficient to accept the plea of guilty on count 1. The prosecution, however, were very anxious to obtain a decision whether counts 2, 3, 4, 5 and 6 were good in law. It was submitted by the defence, that, admitting the facts, these counts did not lie. The points of law were raised by the defence.

F before the jury were sworn, and it was agreed by counsel that, if the points of law were decided in favour of the defence, the prosecution would withdraw counts 2 to 6, and that, if they were decided against the defendants, counsel for the defence could accept the findings of law and advise the defendants to plead guilty, or, if the defendants desired to contest the matter, they would be at liberty to have the case tried by a jury. Both defendants accepted the facts stated in the depositions as being in evidence in the case.

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J. A. Grieves for the Crown.
E. M. L. Mallison for the defendant Alan Frederick Potter.
A. J. H. Morrison for the defendant William Potter.

H PAULL, J., after stating the charges against the defendants, their pleas to the counts, and the facts which appeared in the depositions and were admitted, continued: It, therefore, falls to me now to decide the points of law raised, and I shall do that by taking each of the counts, other than count 1 to which the defendants pleaded guilty, and I shall consider the points which have been raised before me in regard to each count.

I In count 2 the statement of offence is procuring a certificate by false pretences, contrary to s. 32 (1) of the Larceny Act, 1916. Section 32 reads:

"Every person who by any false pretence—(1) with intent to defraud, obtains from any other person any chattel, money, or valuable security, or causes or procures any money to be paid, or any chattel or valuable security to be delivered to himself or to any other person for the use or benefit or on account of himself or any other person . . . shall be guilty of [an offence]."

Counsel for the defence submitted that, before a person could be convicted under s. 32 (1), it was necessary for him to obtain the chattel, money or valuable security. Counsel referred me to *R. v. Kilham* (1) ((1870), L.R. 1 C.C.R. 261), in which it was held that the word "obtain" did not cover the case if all that the prisoner did was to obtain the loan of property. Counsel for the prosecution, however, pointed out to me that the second half of s. 32 (1) makes the offence proved if the prisoner "procures . . . any chattel . . . to be delivered to [him] . . . for the use or benefit . . . of himself . . ." He also pointed out that in *R. v. Chapman* (2) ((1910), 4 Cr. App. Rep. 276) it was held that a person could be indicted for obtaining a railway ticket by false pretences, although normally the railway ticket would be returned to the railway company at the end of the journey. I do not think that the point raised by counsel for the defendants is a good one. To begin with, in so far as it is for me to draw any inference of fact, I should say that the only inference of fact which could be drawn from the fact that the examiner handed over the certificate to William Potter on July 15 was that at that moment William Potter could do what he pleased with the certificate. If he desired to obtain a driving licence, he had to present the certificate to the authorities before they would issue a licence; but, as I see it, there would be nothing against William Potter, having obtained that certificate, putting it on the fire. True, he would not have got his driving licence, but circumstances may alter, and he might have changed his mind. I am, however, quite satisfied that, whether that inference of fact be true or not, this case comes within the Larceny Act, 1916, s. 32, because William Potter procured a chattel to be delivered to him—the chattel being the piece of paper on which appeared these words: "Mr. Alan Frederick Potter has been examined and has passed the test of competence to drive Group A"—and he obtained it for the use or benefit of himself in the sense that he desired that piece of paper in order to hand it over to his brother. Indeed, the section says ". . . for the use or benefit . . . of himself or any other person". William Potter well knew when he obtained that certificate that the intention of Alan Potter was to use it as though it were a certificate obtained by Alan. I hold that the point taken by the defence fails.

The second point taken by the defence is this. Counsel submitted that it could not be said that there was an intent to defraud; that there was no intent to defraud because nothing of any value was obtained by the deceit which was practised and nothing was done which turned the deceit into an intent to defraud. I am content so far as that is concerned to rely on the words of SWIFT, J., in *R. v. Bassey* (3) ((1931), 22 Cr. App. Rep. 160). In that case the appellant, a man called Bassey, had induced the Benchers of the Inner Temple to admit him as a student by furnishing the treasury office with forged documents, and the point was taken that the words "intent to defraud" were not fulfilled in such a case. SWIFT, J., said (*ibid.*, at p. 162):

"It was argued on behalf of the appellant that, as the Benchers had lost no money by his act, there was no evidence of any intent to defraud. It was contended that there was at most evidence of an intent to deceive. The distinction between the two intents was mentioned by BUCKLEY, J., in *Re London & Globe Finance Corp., Ltd.* (4) ([1903] 1 Ch. 728 at p. 732): 'To deceive is, I apprehend, to induce a man to believe that a thing is true which is false, and which the person practising the deceit knows or believes to be false. To defraud is to deprive by deceit: it is by deceit to induce a man to act to his injury. More tersely it may be put, that to deceive is by falsehood to induce a state of mind; to defraud is by deceit to induce a course of action.' In this case there was, in the opinion of this court, evidence on which the jury might properly say that, in making these forged documents and in subsequently uttering them, the appellant intended to defraud, because he intended to induce the Benchers to act to their injury in admitting

- A as a student a person whom, if they had known the true facts, it was not only their right, but also their duty, to exclude."

I think that those words can be applied to the present case. There was an intention here of using this document, which was obtained by William Potter pretending that he was Alan Frederick Potter, in order that Alan Potter might obtain a driving licence. It was to induce the county council to take a course of action which they would not otherwise have taken and which it was not only their right but their duty not to take if they had known the true facts. Moreover, if one may state another ground, it was to induce the county council to part with a chattel, to wit, a piece of paper (the driving licence) on which there was certain printing and certain statements, and I cannot see why that piece of paper is not quite sufficient in order to form a basis for this charge. The county council were induced to part with it and induced to hand it over so that it became the property of Alan Frederick Potter. Those are the two points which are taken with regard to count 2, and, as I have indicated, I find that that count is a true count in law on the facts which are admitted in this case.

I should add, that count 2 is against both defendants, and the way in which it is put against Alan Potter is that he was an accessory before the fact. He took the necessary steps of handing over the appointment card to William Potter so that William might produce the card to the examiner who was going to test the driving and Alan gave that card to William for the express purpose of William deceiving the examiner. That seems to me to be a perfectly good charge, and, as Alan would be an accessory before the fact, he may be charged as a principal* in the same way as if he had done the act himself. I, therefore, hold that the second count is a good count on the assumption that the facts in the depositions are proved.

Then we come to count 3, which is the procuring of the licence to drive. Count 2 is in respect of the certificate given for securing the licence, count 3 being in respect of the licence itself. Precisely the same points were taken on that count and I need say nothing more. As I find those points fail, count 3, in my judgment, is a good count.

Count 5 which again relates to the driving certificate, is a count against William Potter, and it is under s. 4 (1) of the Forgery Act, 1913, which reads:

"Forgery of any document, which is not made felony under this or any other statute for the time being in force, if committed with intent to defraud, shall be a misdemeanour and punishable with imprisonment . . ."

I have held that there was here an intent to defraud, so the only other question is: Was this a forgery? Counsel for the defence submitted that it was not a forgery because it does not come under s. 1 of the Act of 1913. The opening words of s. 1 (1) are: "For the purposes of this Act, forgery is the making of a false document in order that it may be used as genuine . . ." Was this then the making of a false document? Section 1 (2) sets out certain cases in which the document is to be deemed to be false; it starts with the words: "A document is false within the meaning of this Act if . . ." and then it sets out different requirements. If I were confined to s. 1 (2), I should not find that the driving certificate was a forgery, because I do not think that this document comes within any of the provisions of the sub-section, but the Criminal Justice Act, 1925, s. 35 (1), reads:

"For the purpose of removing doubts, it is hereby declared that a document may be a false document for the purposes of the Forgery Act, 1913, notwithstanding that it is not false in any such manner as is described in s. 1 (2) of that Act."

I am, therefore, not limited to the cases set out in s. 1 (2) of the Act of 1913 and I have to ask myself the simple question: Was the driving certificate made

* Under s. 35 of the Larceny Act, 1916.

a false document when William Potter put on the piece of paper the signature which represented the signature of his brother. I think that it is necessary to look a little carefully at that document. It is a document which is made under the Road Traffic Acts, 1930 to 1947. It is clearly issued by the county council in order that they may see that, before a driving licence is issued, the person to whom the licence is issued has duly passed his test for driving a motor vehicle. It is described as a certificate of passing a test of competence to drive. It is a document which came into existence after the driving test had been held. After a person has passed the driving test, the examiner fills in the name of the person who has passed that test and the group of vehicles for which the person was tested, and the examiner signs his name. This certificate was filled in with the name of Mr. Alan Frederick Potter, and the address, 98, Tudor Road, Leicester. There is no doubt that, when the examiner passed that document over to William Potter, he thought that he was passing it over to Alan Frederick Potter, and William Potter well knew that that was what the examiner thought. William Potter well knew that he was at that moment falsely pretending that he was his brother, Alan Potter. On the back of the document are the words:

“ This is not a licence to drive. Do not lose this certificate which must be taken or sent to your county or county borough council with your application for a driving licence. If you lose this form, a duplicate may be obtained from the supervising examiner of your traffic area on giving four days' notice and payment of 1s. The successful candidate must duly sign this form below in ink or in indelible pencil in the presence of the examiner who carried out the test.”

There is no dispute in this case but that William Potter well knew when he was putting the signature of “ A. F. Potter ” on that document that he was purporting to put that signature on the document in the pretence of himself being, in fact, Alan Frederick Potter. It was necessary for him to sign it in the presence of the examiner. He did so and he deceived the examiner. He made it possible for his brother, Alan Potter, to take the document to the authority and obtain a driving licence. He made it possible for his brother therefore to deceive the authority into thinking that he, Alan Frederick Potter, had passed the test. I ask myself this simple question: When William Potter put that signature on that document, was that document then a genuine document or a false document? I hold that it was a false document. It was a false document because it was falsely filled in. It was falsely filled in because William Potter knew that he had no right to fill it in; he knew that, in filling it in in the name of A. F. Potter, he was doing something to deceive, and he knew that he did that with intent that his brother could defraud. I hold, therefore, that it is a forgery because it was the making of a false document. That being so, in my judgment, count 5 is a good count.

So far as count 4 is concerned, it seems to me that the entry in the driving examiner's journal was equally false and for the same reasons as those which I have stated regarding the certificate of competence to drive. I do not think that I need add anything further in regard to that count.

Count 6 is against Alan Frederick Potter, and it is that he uttered a forged document*. The forged document is the certificate with which I have dealt under count 5. There is no doubt that Alan Frederick Potter used it, in other words uttered it, handed it across the counter to an official on the other side of the counter, well knowing that it was forged. That being so, in my judgment, these counts are good counts in law on the assumption that the facts which are in the depositions are true facts.

[The defendants then changed their pleas in respect of the counts to which they had previously pleaded not guilty. Each of the defendants was fined £25, to be

* Uttering a forged document is an offence under s. 6 of the Forgery Act, 1913.

A paid at the rate of £2 a week, and in default of payment was sentenced to two months' imprisonment.]

Solicitors: *Chapman & Goddard*, Leicester (for the Crown); *Herbert Simpson, Son & Bennett*, Leicester (for the defendant A. F. Potter); *Sawday, Wright & Co.*, Leicester (for the defendant W. Potter).

[Reported by GWYNEDD LEWIS, *Barrister-at-Law*.]

C

NOTE.

Re GREEN (a bankrupt), *Ex parte* THE TRUSTEE.

[COURT OF APPEAL (Jenkins, Romer and Ormerod, L.JJ.), March 10, 18, 1958.]

D

Court of Appeal—Hearing in camera—Application by trustee in bankruptcy for order for examination of person capable of giving information about debtor—Bankruptcy Act, 1914 (4 & 5 Geo. 5 c. 59), s. 25 (1)—R.S.C., Ord. 58, r. 13 (3).

E

Bankruptcy—Inquiry as to debtor's dealings and property—Summons to person capable of giving information to do so to the court—Application to Court of Appeal after refusal of registrar to grant summons—Hearing of application in camera—Bankruptcy Act, 1914 (4 & 5 Geo. 5 c. 59), s. 25 (1)—R.S.C., Ord. 58, r. 13 (3).

[As to the power of the Court of Appeal to sit in camera, see 9 HALSBURY'S LAWS (3rd Edn.) 345, para. 813; and for cases on the subject, see 16 DIGEST 128-130, 259-286.

F

As to applications for orders for private examinations in bankruptcy, see 2 HALSBURY'S LAWS (3rd Edn.) 406, paras. 815, 816, and as to appeals from the registrars' orders thereon, see *ibid.*, 580, para. 1164 and 582, para. 1167.

For the Bankruptcy Act, 1914, s. 25 (1), see 2 HALSBURY'S STATUTES (2nd Edn.) 352.]

Cases referred to:

G

(1) *Re Agricultural Industries, Ltd.*, [1952] 1 All E.R. 1188; 3rd Digest Supp.

(2) *Re A Debtor (No. 472 of 1950)*, [1958] 1 All E.R. 581.

(3) *Scott v. Scott*, [1913] A.C. 417; 82 L.J.P. 74; 109 L.T. 1; 16 Digest 130, 276.

Interlocutory Application to the Court of Appeal.

H

A trustee in bankruptcy applied to the registrar under s. 25 (1)* of the Bankruptcy Act, 1914, for the examination of a person he believed to be "capable of giving information respecting the debtor". The registrar refused this application. The trustee then applied *ex parte* to the Court of Appeal under R.S.C., Ord. 58, r. 13 (3)†, for a similar purpose to that of the application which had

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* Section 25 (1) provides: "The court may, on the application of the official receiver or trustee, at any time after a receiving order has been made against a debtor, summon before it the debtor or his wife, or any person known or suspected to have in his possession any of the estate or effects belonging to the debtor, or supposed to be indebted to the debtor, or any person whom the court may deem capable of giving information respecting the debtor, his dealings or property, and the court may require any such person to produce any documents in his custody or power relating to the debtor, his dealings or property."

† R.S.C., Ord. 58, r. 13 (3), provides: "Where an *ex parte* application has been refused by the court below, an application for a similar purpose may be made to the Court of Appeal *ex parte* within seven days from the date of the refusal."

been refused by the registrar, and alternatively applied for leave to appeal under *ibid.*, r. 13 (2). This application came on for hearing on Mar. 10, 1958; allegations of fraud were then made and the application was adjourned for the trustee to consider reasons of the registrar for his refusal which reasons had by then been put into writing. The newspapers gave considerable publicity to reports of this application, including the allegations that a transaction between the bankrupt and the proposed witness was fraudulent. As a result the proposed witness heard of the application, and was represented at the adjourned hearing, which took place on Mar. 18, 1958, when counsel for the trustee applied for the application to be heard in camera. The debtor also was represented*.

Muir Hunter for the trustee in bankruptcy.

T. M. Eastham for the proposed witness.

Harold Brown, Q.C., and *G. H. Rountree* for the debtor.

Muir Hunter for the trustee in bankruptcy, the applicant: This application necessarily involves a disclosure of the material which the trustee has and which the proposed witness is not allowed to see, and it also involves a reflection on the bankrupt.

JENKINS, L.J.: You have to satisfy us as to our jurisdiction to hear applications in camera. You will have to satisfy us that it is a proper course for this court to take.

Muir Hunter: (1) For the purpose of this application, if the Court of Appeal is exercising original jurisdiction, it is "the Bankruptcy Court," and as such it can sit in chambers. The jurisdiction of the Bankruptcy Court, unlike that of the general courts, may be conducted, apart from certain specified exceptions of which this is not one, wholly in chambers. *Re Agricultural Industries, Ltd.* (1) ([1952] 1 All E.R. 1188) where it was held that this court cannot sit in camera, is distinguishable, since that appeal concerned litigation between parties; private examinations are not litigation; see *Re A Debtor (No. 472 of 1950)* (2) ([1958] 1 All E.R. 581).

(2) This is a case where, in the words of VISCOUNT HALDANE, L.C., in *Scott v. Scott* (3) ([1913] A.C. 417 at p. 438) "by no other means than by such a hearing [i.e., in camera] can justice be done . . . the evidence can be effectively brought before the court in no other fashion." I refer also to the speeches of the EARL OF HALSBURY at p. 442 and of EARL LOREBURN at p. 446.

JENKINS, L.J.: We think that in the interests of justice this application is one which it is proper to hear in camera.

[The court then sat in camera, and allowed the application to examine the witness.]

Application allowed.

Solicitors: *Tringhams* (for the trustee in bankruptcy, the applicant); *Isadore Goldman & Son* (for the proposed witness); *Enever, Strong, Freeman & Co.* (for the debtor).

[Reported by HENRY SUMMERFIELD, ESQ., Barrister-at-Law.]

* It was intimated by ROMER, L.J., and accepted by counsel, that strictly he had no locus standi to address the court on this application.

A

AIREY v. AIREY.

[QUEEN'S BENCH DIVISION (Diplock, J.), March 27, 28, 1958.]

Limitation of Action—Negligence—Death of tortfeasor—Action brought after lapse of more than six years after accident but within six months of administration—Whether action against tortfeasor's administrator barred—Law Reform (Miscellaneous Provisions) Act, 1934 (24 & 25 Geo. 5 c. 41), s. 1 (3)—Limitation Act, 1939 (2 & 3 Geo. 6 c. 21), s. 2, s. 32.

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On Sept. 9, 1957, the plaintiff issued a writ claiming damages for negligence against the defendant (who was the administrator of the estate of the alleged tortfeasor who had died), in respect of an accident which took place on Feb. 24, 1951. The action was thus begun more than six years after the accident. The defendant had taken out letters of administration on Mar. 18, 1957, and the action was, therefore, begun within the six months' period allowed by s. 1 (3)* of the Law Reform (Miscellaneous Provisions) Act, 1934. The defendant pleaded that the action was barred by reason of the Limitation Act, 1939, s. 2, which imposed a period of limitation of six years from the date on which the cause of action accrued. The plaintiff contended that the action, being against the personal representative of a deceased tortfeasor, was an action in respect of which a period of limitation was prescribed by s. 1 (3) of the Act of 1934, which provided that no proceedings were maintainable in respect of a cause of action in tort surviving against the estate of a deceased person unless the cause of action arose not earlier than six months before the death of the deceased; and that the Limitation Act, 1939, did not apply because s. 32† of it provided that it should not apply to any action for which a period of limitation was prescribed by any other enactment.

Held: the action was not barred because it fell within the provisions of s. 1 (3) of the Act of 1934, and was thus an action for which a period of limitation was prescribed by another enactment within the meaning of s. 32 of the Act of 1939, so that s. 2 of the Act of 1939 did not apply.

SEMBLE: as a cause of action for negligence does not cease to exist because a limitation period has expired, an action for negligence causing personal injuries may be brought at the present day, if the tortfeasor has died, within six months after representation to his estate is taken out, however long ago the cause of action arose (compare p. 62, letters G and H, post).

[**Editorial Note.** So much of s. 1 (3) (b) of the Law Reform (Miscellaneous Provisions) Act, 1934, as provided that an action in tort should not be maintainable unless the cause of action arose within six months before the deceased's death was repealed by the Law Reform (Limitation of Actions, etc.) Act, 1954, s. 4. That Act also reduced the limitation period for actions of negligence causing personal injuries from six to three years; but this amendment was irrelevant to the present case because s. 7 (1), (3) of the Act of 1954 resulted in the six years' limitation period not being curtailed.

For the Law Reform (Miscellaneous Provisions) Act, 1934, s. 1, see 9 HALSBURY'S STATUTES (2nd Edn.) 792.

For the Limitation Act, 1939, s. 2 and s. 32, see 13 HALSBURY'S STATUTES (2nd Edn.) 1160, 1194.]

Preliminary point of law.

On Feb. 24, 1951, the plaintiff, Elizabeth Scott Airey, was injured in an accident involving a car in which she was a passenger. The car was being driven by Isaac Airey, who was killed. On Mar. 18, 1957, the defendant, John Calvert Airey, took out letters of administration in respect of the estate

* The terms of s. 1 (3) are set out at p. 60, letter I, to p. 61, letter A, post.

† The material terms of s. 32 are set out at p. 60, letter G, post.

of Isaac Airey. On Sept. 9, 1957, the plaintiff issued a writ against the defendant claiming damages in respect of injuries she alleged she had sustained in consequence of the negligence of Isaac Airey on Feb. 24, 1951. The defendant, by his defence, contended that the alleged cause of action accrued more than six years before the commencement of the proceedings and relied on the Limitation Act, 1939, s. 2. On Dec. 13, 1957, it was ordered by consent that this point be tried as a preliminary issue.

Roy Wilson, Q.C., and *Paul Curtis-Bennett* for the plaintiff.
E. W. Eveleigh for the defendant.

Cur. adv. vult.

Mar. 28. **DIPLOCK, J.**, read the following judgment: In this case, I have to decide, as a preliminary issue, a point of law raised on the pleadings in an action for damages for negligence brought against the administrator of the alleged tortfeasor. The alleged negligence, and the damage that it caused, took place on Feb. 24, 1951. The alleged tortfeasor is dead. The writ was issued on Sept. 9, 1957. That is more than six years after the act of negligence and the damage. The defendant relies on s. 2 of the Limitation Act, 1939. The sole question is whether that section applies to bar the action against the tortfeasor's administrator.

It does not appear on the pleadings at what date letters of administration were taken out by the defendant, although it is common ground that they were, in fact, taken out on Mar. 18, 1957, that is within six months of the issue of the writ. This, however, is irrelevant to the point of law which I have to decide.

The defendant submits that the action is one founded on tort, that the cause of action arose on Feb. 24, 1951, when the damage was sustained as the result of the negligent act of the deceased, that s. 2 of the Limitation Act, 1939, applies, and that the action is, accordingly, barred after the expiration of six years from Feb. 24, 1951. The Law Reform (Limitation of Actions, etc.) Act, 1954, can, for this purpose, be ignored, because the cause of action arose before the passing of the Act of 1954*.

The plaintiff, while not conceding—on somewhat metaphysical grounds—that the cause of action necessarily arose on Feb. 24, 1951, relies in the first place on the contention that, even if it did, this, being an action against the personal representative of a deceased tortfeasor, is an action in respect of which a period of limitation is prescribed by s. 1 (3) of the Law Reform (Miscellaneous Provisions) Act, 1934, and that, by virtue of s. 32 of the Limitation Act, 1939, the latter Act does not apply to it. Section 32 of the Limitation Act, 1939, so far as is relevant, is in the following terms:

“This Act shall not apply to any action . . . for which a period of limitation is prescribed by any other enactment . . .”

The short question of law is whether, on the true construction of this section, the present action is one for which a period of limitation is prescribed by the Law Reform (Miscellaneous Provisions) Act, 1934. The relevant provisions of that Act are sub-s. (1) and sub-s. (3) of s. 1, which are in the following terms. Sub-section (1) provides:

“Subject to the provisions of this section, on the death of any person after the commencement of this Act all causes of action subsisting against or vested in him shall survive against, or, as the case may be, for the benefit of, his estate. Provided that this sub-section shall not apply . . .”

to various causes of action. Sub-section (3) is as follows:

“No proceedings shall be maintainable in respect of a cause of action in tort which by virtue of this section has survived against the estate of a deceased

* June 4, 1954.

A person, unless either—(a) proceedings against him in respect of that cause of action were pending at the date of his death; or (b) the cause of action arose not earlier than six months before his death and proceedings are taken in respect thereof not later than six months after his personal representative took out representation.”

This Act must, of course, be construed in the light of the law as it existed in 1934 at the time that the Act was passed. At that date, the limitation period in respect of actions on the case was prescribed by the Limitation Act, 1623, s. 3, as six years next after the cause of action. But while an action of debt, including assumpsit—i.e., actions founded on simple contract—for which a similar limitation was prescribed by the same section, survived against the personal representative of a deceased person, an action founded on tort lapsed on the death of the tortfeasor by the application of the rule *actio personalis moritur cum persona*. Sub-section (1) of s. 1 of the Act of 1934 abolished this rule (except as regards actions for defamation, seduction or enticement). It assimilated causes of action founded on tort to causes of action founded on simple contract. To the latter, the limitation period laid down by the Act of 1623 had always applied irrespective of whether the action was brought against the original contractor or his personal representative; and, *prima facie*, there would seem no reason why any different rule should be applied to causes of action of tort which, by virtue of s. 1 (1) of the Act of 1934, were made to survive against the personal representative of the deceased tortfeasor.

While sub-s. (1) dealt with the survival of causes of action, sub-s. (3) dealt with proceedings in respect of such causes of action. It laid down certain alternative conditions which must be fulfilled if such proceedings were to be maintained. The first condition, contained in para. (a), was that proceedings against the deceased person should have been pending at the time of his death. In the case of actions where this condition was fulfilled, clearly the limitation period laid down in the Act of 1623 would apply. The second condition, contained in para. (b), which was alternative to the first, contained two elements: the first relating to the time when the cause of action arose, viz., it must have arisen not more than six months before the death of the tortfeasor; the second relating to the time when the action was started, viz., it must have been started within six months after his personal representative took out representation. Again, in the case of actions where this condition was fulfilled, I see no reason to exclude the application of the limitation period laid down in the Act of 1623.

At the date of the coming into operation of the Limitation Act, 1939*, therefore, I think that an action founded on tort brought against the personal representative of a deceased tortfeasor was one for which a period of limitation was prescribed by the Act of 1623, and, where commenced against a personal representative, was also (to use a neutral expression) subject to two further conditions, one of which related to the time within which the action must be started.

The Limitation Act, 1939, repealed part of the Act of 1623, s. 3 of which was replaced by s. 2 of the Act of 1939. The Act of 1934 was neither repealed nor amended, and, for the purpose of construing the Act of 1939, I can ignore the subsequent amendment to s. 1 (3) (b) of the Act of 1934 by the Law Reform (Limitation of Actions, etc.) Act, 1954.

I find it difficult to suppose that, when Parliament repealed s. 3 of the Act of 1623, which, in my view, plainly applied to an action commenced against the personal representative of a deceased tortfeasor, and re-enacted the repealed section in words which, on the face of them, would apply to such an action, it nevertheless intended, by s. 32, which appears to be a mere saving section, to change the existing limitation period for an action of this kind. But Parliament's intention can only be judged by the words of the statute, and I am bound, I

* July 1, 1940.

think, to hold that s. 2 does not apply to this action if the Act of 1934 is "an enactment by which a period of limitation is prescribed" for an action commenced against the personal representative of a deceased tortfeasor. I can find no escape from the conclusion that it is. A

A "period of limitation" means a period within which an action must be brought. In s. 1 of the Act of 1934, sub-s. (1) and sub-s. (3) deal with different subject-matters; sub-s. (1) with *causes of action*, and sub-s. (3) with *actions* brought in respect of causes of action already dealt with by sub-s. (1). Sub-section (3) deals with two categories of such actions; those commenced before the moment at which sub-s. (1) operates on the causes of action in respect of which they are brought, and those commenced after the moment at which sub-s. (1) operates on the causes of action in respect of which they are brought. As respects the latter category, it does two things: first, it enacts that only certain causes of action can form the subject-matter of an action, that is, those that arose not earlier than six months before the date of the death of the deceased person, and, secondly, it enacts that, in respect of such causes of action, the *action* must be brought not less than six months after his personal representative took out representation. It does, therefore, among other things, prescribe a period within which a particular class of action must be brought, namely, an action brought against the personal representative of a deceased person in respect of a cause of action which arose within six months before that person's death. An action which fell within that particular class was thus, in my view, at the time of the coming into operation of the Limitation Act, 1939, an action for which a period of limitation was prescribed by another enactment within the meaning of s. 32 of that Act, with the consequence that s. 2 does not apply to it. As this action falls within that particular class, I, accordingly, hold that it is not barred by s. 2 of that Act. B C D E

The conclusion which I have reached would not have had any very startling practical consequences in 1939. The condition that the cause of action sued on must have arisen not more than six months before the death of the deceased would, save in the most exceptional cases, have resulted in the limitation period prescribed by the Act of 1934 being shorter than the normal six years' limitation period, which also applied. But in 1954, s. 1 (3) of the Act of 1934 was amended so as to remove that condition, and it is no longer necessary that the cause of action should have arisen within six months of the death. Furthermore, the general limitation period for actions for damages for personal injuries has been reduced to three years. It would seem, therefore, that today, although so long as a tortfeasor lives no action can be brought against him for damages for personal injuries after three years have passed since the cause of action arose, the moment he dies, however long after the cause of action arose, an action can be brought for the tort against his personal representative, since the only limitation period for such an action is six months after the appointment of his personal representative. A cause of action does not cease to exist because a limitation period has expired, and the original cause of action would, therefore, be one subsisting against the tortfeasor at the time of his death and would survive against his estate by virtue of s. 1 (1) of the Act of 1934. But the fact that amendments to the Act of 1934 made since 1939 give rise to some very surprising consequences cannot influence the construction of the Limitation Act, 1939, which must be construed in the light of the law as it was at the time that that Act came into operation. Any remedy lies with Parliament, and not with the courts. F G H I

This decision which I have reached relieves me of the necessity—and deprives me of the pleasure—of dealing with various alternative arguments addressed to me by counsel for the plaintiff directed to showing that, on certain hypotheses of fact consistent with, though not expressly alleged in, the pleadings, no cause of action accrued until the personal representative of the deceased was appointed.

A Since, in this event, there would have been no cause of action subsisting against the deceased at the time of his death on which s. 1 of the Act of 1934 could operate, it is an interesting speculation as to what the cause of action against his personal representative could be. But this is a speculation which cannot be reserved to the judge at the trial of the action. It is one into which, not without regret, I refrain from entering.

B Solicitors: *Theodore Goddard & Co.*, agents for *Swinburne & Jackson*, Gatehead (for the plaintiff); *L. Bingham & Co.* (for the defendant).

[Reported by G. A. KIDNER, ESQ., Barrister-at-Law.]

C

NOTE.

BURGESS v. BURGESS.

D [PROBATE, DIVORCE AND ADMIRALTY DIVISION (Collingwood, J.), March 18, 1958.]

Divorce—Maintenance of wife—Evidence—Further evidence after conclusion of case—Defence of wife's adultery to be inferred from non-access of husband at time relevant to birth of child—Evidence discovered after cross-examination of wife tending to show adultery at time subsequent to that relevant to birth of child—Alleged inference of adultery at relevant time—Further evidence inadmissible.

E

[As to leave to call fresh evidence, see 15 HALSBURY'S LAWS (3rd Edn.) 446, para. 804, note (s); and as to what is meant by fresh evidence, see 12 HALSBURY'S LAWS (3rd Edn.) 492, para. 1091, note (j); and for cases on the question whether there should be a new trial on the discovery of fresh evidence, see 27 DIGEST (Repl.) 599, 600, 5606-5612.]

F

Case referred to:

(1) *Thexton v. Edmonston*, (1868), L.R. 5 Eq. 373.

Application.

G

This was an application by the husband after the conclusion of the evidence on a summons for maintenance under s. 23 of the Matrimonial Causes Act, 1950, but before judgment, for leave to adduce further evidence relating to an allegation of adultery raised by the husband in his affidavit in answer.

In 1944 the husband went to Kenya. The wife followed him there, they lived together and were married in December, 1952. Towards the end of 1954 the wife came to England. On Apr. 22, 1955, the husband came to England and remained here, living with his wife, until May 14, 1955, when he returned to Kenya. On Dec. 2, 1955, the wife gave birth to a child, and on Dec. 12, 1955, she wrote to the husband telling him of the birth and reminding him that her allowance had not arrived. On Jan. 11, 1956, the husband wrote to the wife telling her that her allowance would cease and he paid no more. The wife filed an application for maintenance under s. 23 of the Matrimonial Causes Act, 1950, and the husband filed an affidavit in answer alleging desertion by the wife and also adultery with a man unknown. The husband asked the court to infer that the child was not his, and relied on the facts that there was no intercourse between his wife and himself during 1955 before Apr. 23, that the child was born after a normal period of gestation and with no sign of prematurity, and that the wife must have committed adultery in February or March, 1955. The husband also stated in his affidavit that he reasonably believed that the wife had committed adultery.

I

At the hearing before COLLINGWOOD, J., the wife was cross-examined for two and a half days during which she stated that she had been for a holiday to Jersey. At the conclusion of the hearing of Feb. 28, 1958, COLLINGWOOD, J., reserved his judgment. The husband's advisers made inquiries concerning the wife's holiday in Jersey and the husband now applied for leave to adduce further evidence relating to the wife's alleged adultery and concerning her alleged activities in Jersey after the husband's return to Kenya on May 14, 1955. Counsel for the husband stated that it was possible now to allege adultery with a named man and that, although there was no direct evidence that the wife had committed adultery except in Jersey after the husband had returned to Kenya, there was only one possible inference—that she had committed adultery before then and that the proposed evidence was fresh evidence which the Court of Appeal would allow to be adduced. Counsel for the wife objected that this was an application to re-open the case; that the proposed evidence was not directly relevant to the issues raised in the husband's affidavit, and was not, therefore, "fresh evidence"; and he referred to PHIPSON ON EVIDENCE (9th Edn.), at p. 48, DANIELL'S CHANCERY PRACTICE (8th Edn.), Vol. 1, at p. 528 and to *Thexton v. Edmonston* (1) ((1868), L.R. 5 Eq. 373).

J. G. St. G. Syms and *A. B. Ewbank* for the husband.

R. J. A. Temple, Q.C., *D. Henderson* and *Kevin Winstain* for the wife.

COLLINGWOOD, J.: This is an application to call further evidence as to adultery. Quite shortly, the proposed evidence relates to the wife's alleged activities in Jersey after the return of the husband to Africa. That return was on May 14, 1955.

A proposed amendment to the husband's affidavit has been put in, giving further particulars of the alleged adultery by the wife, and that says:

"That from about a date commencing immediately after May 14, 1955, for a period of about ten days the [wife] frequently committed adultery with J.C. at a place not precisely known to the [husband] save that it was in or near Portinfer, Plemont, in the island of Jersey."

If one looks at the husband's defence it is quite clear that the case of adultery was based solely on the birth of the child on Dec. 2, coupled with the fact that no intercourse had taken place between himself and his wife save during the period from Apr. 23 to May 14, 1955, and coupled with a number of allegations as to the wife's coldness during the period, and the circumstances attending the arrangement for the birth of the child, and matters of that sort.

It is clear from that defence that an allegation of adultery from May 14 onwards is quite irrelevant. However, it is sought to bring the matter in by adding these words:

"The court will further be asked to infer that on divers occasions, the exact dates of which are unknown to the [husband] but prior to Apr. 22, 1955, the [wife] and the said J.C. at places unknown to the [husband] committed adultery together."

I think counsel for the wife is right in saying that an application of this kind is restricted to evidence relating to the issues in the case, and in my opinion this proposed amendment cannot be granted.

Order accordingly.

Solicitors: *Gordon, Dadds & Co.* (for the husband); *Bracewell & Leaver* (for the wife).

[Reported by A. T. HOOLAHAN, Esq., Barrister-at-Law.]

A

KORES MANUFACTURING CO., LTD. v. KOLOK MANUFACTURING CO., LTD.

[COURT OF APPEAL (Jenkins, Romer and Ormerod, L.JJ.), March 7, 10, 11, 31, 1958.]

B

Trade—Restraint of trade—Agreement in restraint of trade—Companies each agreeing not to employ persons employed by the other within previous five years—Reasonableness—Restriction on employees' freedom of choice of employment—Public policy.

C

The plaintiffs and the defendants were two companies who occupied adjoining premises in London and manufactured carbon papers, typewriter ribbons and similar articles. They entered into an agreement by correspondence, each company writing in substantially the same terms to the other that they would not without the written consent of the other "at any time employ any person who during the then past five years shall have been a servant of yours". The plaintiffs and the defendants were two of about twenty firms engaged in similar business, of whom about half were near London and five were within easy reach of the plaintiffs. A substantial proportion of the employees of both parties were unskilled manual workers and others who had no access to trade secrets or confidential information.

D

Held: even assuming (without deciding) that the agreement was impliedly terminable by six months' notice on either side, it was void and unenforceable because the reciprocal restraints imposed by the agreement were excessive and unreasonable in the interests of the parties to it, having regard particularly to the facts (a) that the agreement imposed the restraint in respect of all employees without distinction between those who were possessed of trade secrets or confidential information and others who were not so possessed, and (b) that, though the real reason for the agreement was the proximity of the two factories, there was no provision in it for limiting its duration to the period while the proximity continued.

E

F

Herbert Morris, Ltd. v. Saxelby ([1916] 1 A.C. 688) and observations in *Mineral Water Bottle Exchange & Trade Protection Society v. Booth* ((1887), 36 Ch.D., at pp. 471, 472) applied: observations of VISCOUNT HALDANE, L.C., in *North Western Salt Co., Ltd. v. Electrolytic Alkali Co., Ltd.* ([1914] A.C. at p. 471) considered.

G

Per CURIAM: an employer has no legitimate interest in preventing an employee, after leaving his service, from entering the service of a competitor merely on the ground that the new employer is a competitor . . . It seems to us to be open to question whether an agreement [such as the agreement in the present case] directed to preventing employees of the parties to the agreement from doing that which the employees could not by individual covenants with the respective employers validly have bound themselves not to do, should be accorded any greater validity than the individual covenants by the employees themselves would possess (see p. 74, letters C and F, post).

H

I

QUAERE: whether an agreement between employers, such as the agreement in the present case, if it were reasonable as between the parties to it, would be unenforceable, as being a restraint of trade that was contrary to the public interest, unless it created something in the nature of a monopoly of employment in the particular trade (see p. 75, letter I, post).

Decision of LLOYD-JACOB, J. ([1957] 3 All E.R. 158) affirmed.

[**Editorial Note.** Though the Court of Appeal assumed, in view of the concession of the parties, that the agreement was impliedly terminable by notice, yet the court's inclination was against such implication; in particular the five years'

period, which disqualified an employee of one contracting party from being employed by the other, was difficult to reconcile with the implication that the agreement was terminable on reasonable notice, such as a twelve months' or six months' notice (see p. 68, letter H, post).

As to the requisites of a valid restraint of trade by agreement, see 32 HALSBURY'S LAWS (2nd Edn.) 403, para. 674 et seq.; and for cases on the subject, see 43 DIGEST 21 et seq., 135 et seq.]

Cases referred to:

- (1) *Herbert Morris, Ltd. v. Sazelby*, [1916] 1 A.C. 688; 85 L.J.Ch. 210; 114 L.T. 618; 43 Digest 24, 154.
- (2) *Nordenfelt v. Maxim Nordenfelt Guns & Ammunition Co.*, [1894] A.C. 535; 63 L.J.Ch. 908; 71 L.T. 489; 43 Digest 22, 139.
- (3) *A.-G. of Commonwealth of Australia v. Adelaide S.S. Co., Ltd.*, [1913] A.C. 781; 83 L.J.P.C. 84; 109 L.T. 258; 43 Digest 12, 68.
- (4) *North Western Salt Co., Ltd. v. Electrolytic Alkali Co., Ltd.*, [1914] A.C. 461; 43 Digest 11, 52.
- (5) *McEllistrim v. Ballymacelligott Co-operative Agriculture & Dairy Society, Ltd.*, [1919] A.C. 548; 43 Digest 14, 1.
- (6) *Mineral Water Bottle Exchange & Trade Protection Society v. Booth*, (1887), 36 Ch.D. 465; 57 L.T. 573; 43 Digest 94, 980.
- (7) *Davies v. Thomas*, [1920] 1 Ch. 217; *affd.* C.A., [1920] 2 Ch. 189; 89 L.J.Ch. 338; 123 L.T. 456; 84 J.P. 201; 43 Digest 116, 1200.

Appeal.

The plaintiffs appealed from the decision of LLOYD-JACOB, J., dated July 26, 1957, and reported [1957] 3 All E.R. 158, dismissing their action against the defendants on the ground that the agreement which the plaintiffs sought to enforce was void as being in unreasonable restraint of trade. The facts appear in the judgment.

Charles Russell, Q.C., and *P. R. Oliver* for the plaintiffs.

F. W. Beney, Q.C., and *Robert S. Lazarus* for the defendants.

Cur. adv. vult.

Mar. 31. JENKINS, L.J.: The judgment that I am about to read is the judgment of the court in this case.

The action in which this appeal arises was brought by the appellants, Kores Manufacturing Co., Ltd. as plaintiffs against the respondents, Kolok Manufacturing Co., Ltd., as defendants, for a declaration that an agreement contained in letters passing between the plaintiffs and the defendants dated Aug. 30, 1934 and Sept. 3, 1934 was a valid and subsisting agreement, and for injunctions to restrain the defendants from committing breaches of it. The letters constituting the agreement sued on passed between the respective managing directors of the plaintiffs and defendants, and were in these terms. The first is addressed to the defendant company from the plaintiff company:

"Dear Sirs, In consideration of your agreeing not without our written consent to, at any time, employ any person who, during the then past five years, shall have been a servant of ours, we undertake not, without your written consent, to, at any time, employ any person who, during the then past five years, shall have been a servant of yours",

and that is signed by Mr. Lefebure, the managing director of Koreska (Great Britain) Ltd., which was the then name of the plaintiff company. The next letter dated Sept. 3, 1934, was in reply to that:

"Dear Mr. Lefebure, I went away for the weekend on Friday and did not have an opportunity of acknowledging the letter which you left with me on Thursday evening. I now send our agreement herewith, and am sure that this arrangement is a move in the right direction",

A and that is signed by Mr. O'Brien on behalf of the defendant company. The letter enclosed with the one I have just read was in these terms:

B "Dear Sirs, We acknowledge receipt of your letter of the 30th ultimo with reference to the employment of our respective employees. We welcome this suggestion, from which it is understood that your company and our own will refrain from engaging any person or persons who have been in the employ of either firm during the previous period of five years. As such an arrangement has our fullest support, we hereby agree to the terms of your letter of the above date. We are sure that this arrangement will prove to be of mutual benefit, and we shall be happy at any time to consider other proposals which have for their objects similar safeguards",

C and that was signed by Mr. O'Brien as managing director of the defendant company.

It will be seen that the agreement constituted by these letters was ex facie in restraint of trade in that it precluded either party from employing at any time, without the written consent of the other, any person who, during the then past five years, should have been in the employment of the other.

D The plaintiffs and the defendants are both engaged in the manufacture of carbon papers, typewriter ribbons and similar products, and the present dispute arose out of the threatened or intended employment by the defendants of Mr. Hugh Anthony O'Neill, who from the year 1948 onwards had been in the service of the plaintiffs as a chemist in their research and development branch under a contract of service terminable by three months' notice. In March, 1957, E Mr. O'Neill gave notice to the plaintiffs to terminate his employment with them on June 30 of that year. He gave this notice with a view to entering the employment of the defendants, with whom he was already in negotiation; and on Apr. 4, 1957, the defendants applied to the plaintiffs for information as to his character and ability. The plaintiffs objected to the proposed employment of Mr. O'Neill by the defendants as being in breach of the agreement of 1934, but F the defendants persisted in their intention to employ him, contending that the letters relied on as constituting the agreement of 1934 were not of contractual effect, and that, even if they were of contractual effect, the agreement so constituted had been abandoned by mutual consent, and was in any case void as contrary to public policy.

G In these circumstances, the plaintiffs issued their writ on May 3, 1957, and later in that month moved the court for an injunction to restrain the defendants from employing Mr. O'Neill. On this application an order dated May 28, 1957, was made by DANCKWERTS, J., with the consent of the parties, the effect of which was to provide for the action to be tried without pleadings on the issues formulated in the schedule to the order:

H "The plaintiffs and the defendants by their counsel stating that they have agreed that the issues between them in this action . . . are those formulated in the schedule hereto and that those are the only issues between them in this action".

The issues scheduled to the order were these:

I "(1) Whether (as the plaintiffs contend and the defendants deny) the letters mentioned in the indorsement on the writ of summons were of contractual effect. (2) If the answer to (1) be Yes whether (as the defendants contend and the plaintiffs deny) such contract was and is void as being in unreasonable restraint of trade and contrary to public policy. (3) If the answer to (2) be No whether (as the defendants contend and the plaintiffs deny) such contract was terminated by the tacit mutual consent of the plaintiffs and the defendants in or about 1941 or alternatively in or about June, 1955. (4) If the answer to (3) be No whether (as the defendants contend and the plaintiffs deny) such contract contains an implied term that

the same is terminable by reasonable notice given by either party to the other and that six months' notice is reasonable." A

It is not now disputed that the letters constituting the agreement of 1934 were of contractual effect, and that the agreement of 1934 was not at any time terminated by the tacit consent of the plaintiffs and the defendants. The first and third issues are thus eliminated. On the second issue, LLOYD-JACOB, J., by whom the action was tried, held that the agreement of 1934 was void as being in unreasonable restraint of trade, and contrary to public policy; while on the fourth issue he held that the agreement of 1934 did contain an implied term making it terminable by reasonable notice by either party, but that the reasonable period to be allowed was twelve months, and not six months as claimed by the defendants. In conformity with his finding to the effect that the agreement of 1934 was void as being in unreasonable restraint of trade and contrary to public policy, the learned judge by his order dated July 26, 1957, dismissed the action with costs, and from that order the plaintiffs now appeal to this court. B C

As to the fourth issue—that is to say, the terminability of the agreement of 1934 by reasonable notice—both parties accept the view that it was so terminable, and that the length of notice to be regarded as reasonable must be assessed by reference to the circumstances existing at the time when any purported notice of determination is given or proposed. The plaintiffs further accept the learned judge's assessment of twelve months as the reasonable period of notice. On the other hand, the defendants, who have in fact given (or purported to give) six months' notice which expired on Nov. 24, 1957, to terminate the agreement on that date, adhere to the contention raised by them on the fourth issue to the effect that the reasonable period of notice was and is no more than six months. Accordingly, the defendants served a respondents' notice of their intention to contend, in the event of the appeal being allowed, that the learned judge ought to have held six months' notice to be reasonable for the purpose of determining the agreement of 1934. D E

If the point was before us for decision, we would, as at present advised, have some difficulty in collecting from the terms of the 1934 agreement any implication of an intention that it should be terminable by reasonable notice. The agreement expressly imposes an obligation on either party not to employ at any time any person who, during the then past five years, shall have been a servant of the other, the then past five years clearly meaning the period of five years immediately preceding the date on which the question of engaging the person concerned comes under consideration. That surely means that any person at any time leaving the employment of one of the contracting parties is to be disqualified for the period of five years certain commencing on that date from entering the service of the other of them. We find it hard to reconcile the express application of the five years' period of disqualification to every employee leaving the service of either of the contracting parties with an implied condition for determination of the agreement by reasonable notice, for example, six or twelve months, which, as it seems to us, might well be regarded as inconsistent with its express terms. F G H

Be that as it may, we must take the case as we find it, and accordingly, in considering the second issue—that is to say, the question whether the agreement of 1934 is void as being in unreasonable restraint of trade and contrary to public policy—we must assume that it was from its inception subject to an implied provision for its determination on reasonable notice. In doing so, however, we think it must be right to make the further assumption that the period to be regarded as reasonable notice in 1934 could be no shorter than the period of six or twelve months, as the case may be, to be regarded as reasonable in 1957. I

In their notice of appeal, the plaintiffs relied on two grounds of appeal, the first being to the effect that the learned judge was wrong in holding that the

A agreement of 1934 was and is void as being in unreasonable restraint of trade and contrary to public policy; and the second being to the effect that the agreement of 1934 constituted a trade union as defined by s. 16 of the Trade Union Act Amendment Act, 1876, and was a valid and subsisting agreement by reason of the provisions of the Trade Union Act, 1871. Counsel for the defendants objected to this second ground as not being open to the plaintiffs on the issues as formulated in the schedule to the order of May 28, 1957, and as being a ground which was not relied on below. We upheld this objection, and accordingly counsel for the plaintiffs confined his submissions to the first ground of appeal.

B In the course of the argument on this issue, we were referred to many of the long array of decisions bearing on the tests to be applied in determining whether a contract which is in restraint of trade, and therefore prima facie void, should nevertheless be upheld as a valid and enforceable contract. We do not propose to cite these authorities at any great length. The general principles to be applied are not in doubt; the difficulty lies in their application to the facts of particular cases.

C As to the general principles, it will suffice to refer to the following well-known passages. In *Herbert Morris, Ltd. v. Saxelby* (1) ([1916] 1 A.C. 688) LORD PARKER OF WADDINGTON, after referring (*ibid.*, at p. 706) to the speech of LORD MACNAGHTEN in *Nordenfelt v. Maxim Nordenfelt Guns & Ammunition Co.* (2) ([1894] A.C. 535) and to *A.-G. of Commonwealth of Australia v. Adelaide S.S. Co., Ltd.* (3) ([1913] A.C. 781) continued ([1916] 1 A.C. at p. 707) as follows:

D "It will be observed that in LORD MACNAGHTEN's opinion two conditions must be fulfilled if the restraint is to be held valid. First, it must be reasonable in the interests of the contracting parties, and, secondly, it must be reasonable in the interests of the public. In the case of each condition he lays down a test of reasonableness. To be reasonable in the interests of the parties the restraint must afford adequate protection to the party in whose favour it is imposed; to be reasonable in the interests of the public it must be in no way injurious to the public. With regard to the former test, I think it clear that what is meant is that for a restraint to be reasonable in the interests of the parties it must afford *no more than* adequate protection to the party in whose favour it is imposed."

E LORD PARKER later said (*ibid.*, at p. 708):

F "My Lords, it appears to me that LORD MACNAGHTEN's statement of the law requires amplification in another respect. If the restraint is to secure no more than 'adequate protection' to the party in whose favour it is imposed, it becomes necessary to consider in each particular case what it is for which and what it is against which protection is required. Otherwise it would be impossible to pass any opinion on the adequacy of the protection."

G He went on to draw the well-known distinction between a covenant against competition entered into by the vendor with the purchaser of the goodwill of a business, which will be upheld as necessary to protect the subject-matter of the sale provided that it is confined to the area within which competition on the part of the vendor would be likely to injure the purchaser in his enjoyment of the goodwill he has bought; and a covenant between master and servant designed to prevent competition by the servant with the master after the termination of his contract of service. With respect to such restrictive covenants between master and servant LORD PARKER said this (*ibid.*, at p. 709):

H "The employer in such a case is not endeavouring to protect what he has, but to gain a special advantage which he could not otherwise secure. I cannot find any case in which a covenant against competition by a servant or apprentice has, as such, ever been upheld by the court. Wherever such covenants have been upheld it has been on the ground, not that the servant or apprentice would, by reason of his employment or training, obtain the skill and

knowledge necessary to equip him as a possible competitor in the trade, but that he might obtain such personal knowledge of and influence over the customers of his employer, or such an acquaintance with his employer's trade secrets as would enable him, if competition were allowed, to take advantage of his employer's trade connexion or utilize information confidentially obtained."

In *North Western Salt Co., Ltd. v. Electrolytic Alkali Co., Ltd.* (4) ([1914] A.C. 461) VISCOUNT HALDANE, L.C., said this (*ibid.*, at p. 471):

"My Lords, when the controversy is as to the validity of an agreement, say for service, by which some one who has little opportunity of choice has precluded himself from earning his living by the exercise of his calling after the period of service is over, the law looks jealously at the bargain; but when the question is one of the validity of a commercial agreement for regulating their trade relations, entered into between two firms or companies, the law adopts a somewhat different attitude—it still looks carefully to the interest of the public, but it regards the parties as the best judges of what is reasonable as between themselves. In the present case I see no reason for doubting that in entering into the contract on which this action was brought the respondents were probably acting in their own best interest. It may well be that such a contract was, in view of the powerful position of the appellants, the respondents' best way of securing a market and adequate prices. And if this be once conceded I find nothing else in the detailed provisions of the contract excepting machinery for working out the bargain. If the general object was lawful, then these provisions were, in my opinion, free from objection on the score of illegality. Nor do I find that the public interest was necessarily or even probably injured."

That case was concerned with a third type of restraint, not between master and servant, nor between the vendor and purchaser of the goodwill of a business, but between traders for the purpose of regulating their trade to their mutual advantage. On LORD PARKER's principle, that for which protection was required would, we suppose, be the trade of the parties, and that against which protection was sought would, we suppose, be injury to their trade through fluctuations in supplies and prices. In *McEllistrim v. Ballymacelligott Co-operative Agriculture & Dairy Society, Ltd.* (5) ([1919] A.C. 548) LORD BIRKENHEAD, L.C., said (*ibid.*, at p. 562):

"A contract which is in restraint of trade cannot be enforced unless (a) it is reasonable as between the parties; (b) it is consistent with the interests of the public. Your Lordships have recently laid down rules as to where the onus lies in these matters. Such considerations however do not arise in the present case. Every contract therefore which is impeached as being in restraint of trade must submit itself to the two standards indicated. Both still survive. The observation made by the Judicial Committee in *A.G. of Commonwealth of Australia v. Adelaide S.S. Co., Ltd.* (3) ([1913] A.C. at p. 795): 'Their Lordships are not aware of any case in which a restraint though reasonable in the interests of the parties has been held unenforceable because it involved some injury to the public'; is not, in my view, to be construed as if both the tests indicated were not still in existence. It is indeed not difficult to conceive of a case in which a contract in restraint of trade might be adjusted to safeguard the reasonable interests of the contracting parties, and yet might be opposed to the public interest."

The onus of showing that a contract in restraint of trade is reasonable as between the parties lies on the party alleging it to be such (see *North Western Salt Co., Ltd. v. Electrolytic Alkali Co., Ltd.* (4) quoted per LORD HALDANE, L.C., [1914] A.C. at p. 470). The onus of showing that a contract in restraint of trade

A is injurious to the public interest similarly lies on the party alleging it to be such; and

“... if once the court is satisfied that the restraint is reasonable as between the parties this onus will be no light one”;

(see *A.-G. of Australia v. Adelaide S.S. Co., Ltd.* (3) per LORD PARKER, [1913] A.C. at p. 797).

B “... the question whether a restraint of trade is reasonable either in the interest of the parties or in the interest of the public is a question for the court, to be determined after construing the contract and considering the circumstances existing when it was made. It is really a question of public policy and not a question of fact upon which evidence of the actual or probable consequences, if the contract be carried into effect, is admissible”

C (see *A.-G. of Australia v. Adelaide S.S. Co., Ltd.* (3) per LORD PARKER, [1913] A.C. at p. 797).

We should next endeavour to apply these general principles to the facts of the present case. The facts relevant to this issue are in small compass. Down to the date of the agreement of 1934 the plaintiffs had been carrying on their business in Britannia Street, City Road, Hoxton, London, N.1, while the defendants were carrying on their business at a factory in Tariff Road, Tottenham, London (about five miles away) where they have since remained. The plaintiffs were, however, at the date of the agreement of 1934 in the course of moving to a factory in Tottenham adjoining the defendants' factory. The plaintiffs' move to Tottenham was duly completed, and they remained at their Tottenham factory until 1955, when they moved to Harlow in Essex, perhaps twenty miles away from Tottenham. The proximity of the two factories at Tottenham would obviously make it easy for the staff of either party, of whatever grade, to pass from the employment of one into that of the other under the lure of higher wages or better working conditions. If no obstacle to such transfers was provided, the parties might well find themselves involved in a competition for staff to the detriment of both, and with undesirable effects on the discipline and stability of their respective complements of employees. Moreover, the business of manufacturing carbon paper, typewriter ribbons and kindred products in which the plaintiffs and defendants were both engaged involved chemical processes in relation to which their respective technical employees might, in the course of their employment, become possessed of confidential information and trade secrets. The unrestricted transferability of technical staff would thus entail the risk of trade secrets and confidential information gained in the service of one party being divulged to the other. It should be added that the chemical processes included exceedingly dirty work for which it was not always easy to find staff, and any scarcity of employees prepared to undertake this dirty work would make competition for their services all the more likely, and accentuate its undesirable consequences.

H At the date of the 1934 agreement the plaintiffs had in their employment one hundred persons of whom forty-seven were unskilled manual workers, fourteen were semi-skilled and skilled manual workers, seven were technical staff consisting of departmental managers and foremen, twelve were executive, administrative and sales staff, and twenty were clerical staff. Figures were also produced for 1955 and 1957 showing totals of four hundred and twenty-four and four hundred and eight respectively, with two hundred and thirty-two unskilled manual workers in 1955, and two hundred and twenty-one in 1957. At the date of the 1934 agreement the defendants had in their employment one hundred and twenty-eight persons, but this total is classified by departments without showing separately the numbers of unskilled, semi-skilled and skilled manual workers. It is, however, legitimate to assume that a substantial proportion of the entire complement of employees consisted of unskilled manual workers and others who had no access to trade secrets or confidential information.

In 1957 the total number of persons in the employment of the defendants had risen to three hundred and forty-seven, to which complement the same observation applies. A

In 1957 there were throughout this country (in addition to the defendants) some twenty concerns manufacturing carbons and ribbons. About half of them are in or near London, and above five may be described as being within easy reach of Tottenham. It is not clear from the evidence how far, if at all, the risk of trade secrets or confidential information gained by an employee in the service of one of the parties being divulged by that employee to the other party on his passing into the service of the latter, as distinct from the more general risk of competition arising between the parties for the services of employees of any grade, was a matter to which the agreement of 1934 was consciously directed, but its terms are, of course, such as to extend to all employees of every grade, whether or not possessed of trade secrets or confidential information. B C

Such being the circumstances in which the agreement of 1934 was made, we must next, in accordance with LORD PARKER's principle, ask and endeavour to answer the two questions (1) what was it for which protection was required; and (2) what was it against which protection was required?

As to the first question, we take the answer to be that protection was required by both parties for (a) the adequacy and stability of their respective complements of employees; and (b) as we are prepared to assume, trade secrets and confidential information of which any of their respective employees might have become, or might thereafter become, possessed in the course of their employment. As to the second question, we take the answer to be that the dangers against which protection were required were (a) the unimpeded secession of employees of any grade from the employment of either of the parties to that of the other of them in the competing concern next door under the inducement of higher wages or better working conditions, or merely for the sake of change; and (b) the divulging to their new employer by employees so seceding of any trade secrets or confidential information of which they might have become possessed in the course of their employment with the other party. D E F

These being the matters for which protection was required, and the dangers against which they required protection, were the reciprocal restraints imposed by the agreement of 1934 reasonable as between the parties, or in other words did the restraint imposed on the defendants by the agreement of 1934 in the words of LORD PARKER "afford no more than adequate protection" to the plaintiffs, and vice versa? We propose in the first instance to consider this question without regard to the effect of the assumption that the agreement of 1934 was impliedly terminable on reasonable notice. G

Counsel for the plaintiffs points out that the agreement of 1934 was an agreement between two employers, and not between employer and employee. He submits that where, as here, two employers, dealing at arms length and on equal terms, choose to agree, for reasons which seem to them sufficient, to subject themselves to reciprocal restraints on their business activities, then the parties themselves are to be regarded as the best judges of what is reasonable in their interests; see, for example, the passage already quoted from the speech of LORD HALDANE in *North Western Salt Co., Ltd. v. Electrolytic Alkali Co., Ltd.* (4) ([1914] A.C. at p. 471). It is only in exceptional cases, says counsel for the plaintiffs, that the court would be justified in overruling the parties' own judgment of what is reasonable where agreements of this type are concerned, and there is no sufficient ground for treating the present case as an exception from the general rule. He seeks to surmount the difficulty that under the agreement of 1934 the five years' period of disqualification applies to every employee of whatever grade, however long or however short his service with the plaintiffs or defendants may have been, and whether or not he has in the course of such service become possessed of trade secrets or confidential information, by an H I

- A argument to the effect that the parties wished to give each other complete protection in all cases, and took five years as an adequate period of disqualification in the case of an employee of the highest grade, with perhaps most important trade secrets or confidential information in his possession, and for the sake of simplicity applied the same period to all employees without exception on the footing that it was too difficult to fix different periods for different categories
- B of employees, and that all cases would be covered by what he termed a "blanket" if the period considered appropriate in the highest case was applied indiscriminately to all.

We cannot accept these arguments. It is for the court to judge whether an agreement in restraint of trade is reasonable in the interests of the parties. We agree that where traders dealing on equal terms have become parties to (for

C example) a scheme for maintaining prices or for central selling, and there is nothing in its provisions which is obviously unreasonable in the interests of the parties, the court will be slow to set it aside at the instance of a party who has freely agreed to it. But the mere fact that parties dealing on equal terms have entered into an agreement subjecting themselves to restraints of trade does not preclude the court from holding the agreement bad where the restraints are

D clearly unreasonable in the interests of the parties. In the present case, the restraint reciprocally imposed on the plaintiffs and the defendants by the agreement of 1934 was such as to preclude the plaintiffs from employing at any time any person who had, during the then past five years, been a servant of the defendants, and vice versa.

- To put the matter from the defendants' point of view, since they are asserting
- E the invalidity of the agreement of 1934, they placed it out of their power to take into their service any person who had during the preceding five years been in the service of the plaintiffs for any period however short, and in any capacity however humble. The five years' ban was equally applicable to an unskilled manual labourer who had been for a single day in the employment of the plaintiffs, and to a chief chemist with many years' service. It would also, so far as we can
- F see, be just as much applicable to a person whom the plaintiffs had dismissed from their service as to a person who had left their service of his own accord. There is no doubt that the real *raison d'être* of the agreement of 1934 was the proximity of the two factories owing to the plaintiffs' removal to Tottenham. Yet there was no provision limiting its duration to the period during which such proximity might continue. The agreement of 1934 is in terms applicable to
- G all employees without exception, and without any distinction between employees possessed of trade secrets or confidential information, and employees not so possessed, and not in the remotest degree likely to be so possessed. It is, therefore, quite obviously impossible to sever the agreement of 1934 in an attempt to uphold it as regards employees likely to be possessed of trade secrets or confidential information even though bad as regards employees not in that category.
- H Stating the matter again from the defendants' point of view, though, of course, the converse applies equally to the plaintiffs, it appears to us that the restraint to which the defendants subjected themselves by the agreement of 1934 was grossly in excess of what was adequate to protect that for which the plaintiffs required protection from the dangers against which protection was required.

- Accordingly, for the reasons that we have endeavoured to state, we are of
- I opinion that (apart from the effect of the assumption that it was impliedly terminable by reasonable notice) the reciprocal restraints imposed by the agreement of 1934 were unreasonable in the interests of the parties to it, and that the agreement accordingly failed to satisfy the first of the two conditions which a contract in restraint of trade must satisfy in order to be held valid, and was, therefore, void and unenforceable.

We would add this. It is true that the agreement of 1934 was between two employers, and not between employer and employee. Nevertheless, it was wholly

and solely directed to preventing the employees of either contracting party, on ceasing to be employed by them, from entering the employment of the other contracting party. Apart from the question of trade secrets and confidential information, we have described the matter requiring protection as being the adequacy and stability of the plaintiffs' and defendants' respective complements of employees. That, no doubt, is an interest which employers are entitled to protect by all legitimate means, as by paying good wages and making their employment attractive. We have further described the danger against which that interest required protection as being the unimpeded secession of employees of either of the parties to that of the other of them under the inducement of higher wages or better working conditions. But an employer has no legitimate interest in preventing an employee, after leaving his service, from entering the service of a competitor merely on the ground that the new employer is a competitor. The danger of the adequacy and stability of his complement of employees being impaired through employees leaving his service and entering that of a rival is not a danger against which he is entitled to protect himself by exacting from his employees covenants that they will not, after leaving his service, enter the service of any competing concern. If in the present case the plaintiffs had taken a covenant from each of their employees that he would not enter the service of the defendants at any time during the five years next following the termination of his service with the plaintiffs, and the defendants had taken from their employees covenants restraining them in similar terms from entering the employment of the plaintiffs, we should have thought that (save possibly in very exceptional cases involving trade secrets, confidential information and the like) all such covenants would on the face of them be bad as involving a restraint of trade which was unreasonable as between the parties. Here the plaintiffs and the defendants have, as it seems to us, sought to do indirectly that which they could not do directly, by reciprocal undertakings between themselves not to employ each other's former employees, entered into over the heads of their respective employees, and without their knowledge. It seems to us to be open to question whether an agreement such as that, directed to preventing employees of the parties from doing that which they could not by individual covenants with their respective employers validly bind themselves not to do, should be accorded any greater validity than individual covenants by the employees themselves would possess. We prefer, however, to leave that question open, and to found our conclusions as to the invalidity of the agreement of 1934 on the reasons given earlier in this judgment.

There appears to be no case in the books exactly comparable to this one. The nearest in point is, we think, *Mineral Water Bottle Exchange & Trade Protection Society v. Booth* (6) ((1887), 36 Ch.D. 465). In that case, to quote the headnote:

"A society established for the protection of a particular trade contained a rule that no member should employ any traveller, carman, or outdoor employé who had left the service of another member without the consent in writing of his late employer till after the expiration of two years."

It was held by this court, affirming the decision of CHITTY, J., "that the rule was unreasonable, in restraint of trade, and void". In the Court of Appeal it was argued for the appellants (inter alia) that the covenant did not go beyond what was reasonable for the mutual protection of the members. COTTON, L.J., said this (*ibid.*, at p. 471):

"The 44th article of the association provides that 'No member shall employ any traveller, carman, or outdoor employé who has left the service of another member, without the consent in writing of his late employer, until after the expiration of two years from his leaving such service'. That is perfectly general. It is not even limited in its application to any particular employés who, from their position, might have confidentially acquired any knowledge in their employment. It is not confined to servants who, having

A been put in places of confidence, have been long enough in the service to obtain any information which they ought not to disclose, and which might be used to the detriment of their employer. So that generally if any outdoor employé were in the service of any member of this society even for a week and then left he could not be employed, if this covenant is a good one, by any other member of the association. That of itself might be used most
B oppressively, and although in the present case (we have not heard the circumstances) it might be proper, if the covenant were aptly framed, to restrain the defendants from employing a particular individual so as to prejudice his late employer by using knowledge he had got confidentially, yet there is no restriction or limitation in this covenant at all."

C FRY, L.J., said this (*ibid.*, at p. 472):

"I am entirely of the same opinion. It appears to me that a covenant might have been framed which possibly might have been good, that is to say, that the masters might have contracted not to use in competition with one another knowledge confidentially obtained. It is said the object of this clause is to give effect to that intention. But it has gone far beyond it
D because it applies to every traveller, every carman, and every outdoor employé, whether they have or have not acquired such knowledge. It applies to those who may have acquired knowledge although they may have been employed in distant localities where their knowledge is of no avail. I think therefore the restraint of trade and of the liberty of Her Majesty's subjects in gaining employment is far in excess of any legitimate purpose of the contracting parties."

E That case turned to some extent on the widespread character of the society whose members numbering a hundred and seventy-nine (with a possibility of increase) covered a great part of the country, which made the restraint there in question very much more oppressive from the point of view of the employees than the restraint in the present case, concerning, as it does, only two manufacturers
F of carbons and ribbons out of a total of twenty or thereabouts; and the court appears to have regarded that degree of oppression as sufficing to make the agreement void as contrary to public policy. But the observations that we have quoted also have a bearing on the question of reasonableness between the parties, and do, we think, afford some support to the conclusion to which we have come on that aspect of the present case; see also *Davies v. Thomas* (7) ([1920] 1 Ch. 217; and in the Court of Appeal, [1920] 2 Ch. 189).

G The view which we have formed on the question of reasonableness between the parties makes it unnecessary for us to form any conclusion on the question of reasonableness in the public interest. Counsel for the plaintiffs points out that the effect of the agreement here was only to prevent employees of the plaintiffs from finding employment with the defendants, and vice versa; that is to say,
H one factory only out of twenty was closed to employees of either. Moreover, he says that the presence within easy reach of Tottenham of five of the other factories makes it improbable that the living or travelling arrangements of any employee would be interfered with if, having left the employment of one of the parties, he found that he could not be accepted for employment with the other, and consequently had to go elsewhere. He says that to be contrary to the public interest
I an agreement such as the agreement of 1934 in the present case must create something in the nature of a monopoly of employment in the particular trade, as the agreement in *Mineral Water Bottle Exchange & Trade Protection Society v. Booth* (6) may be said to have done. We are not wholly convinced by this argument; but in view of our conclusion to the effect that the agreement of 1934 was unreasonable in the interests of the parties, we prefer to pass no opinion on it.

As to the effect of the assumption that the agreement of 1934 was impliedly terminable by reasonable notice, we have already expressed our doubts as to the

validity of that assumption. Accepting it, as we must, as well-founded, we feel A
 difficulty in forming any reasoned preference for twelve months rather than
 six months, or six months rather than twelve months, as the reasonable period.
 However, in the view that we take, the agreement of 1934 would still be un-
 reasonable in the interests of the parties even if terminable by six months' B
 notice on either side. In other words, to put this aspect of the case in the form
 most favourable to the plaintiffs, we think that even if six months had been
 substituted for five years as the period of disqualification provided for in the
 agreement of 1934, that agreement would still be unreasonable in the interests of
 the parties. It must be remembered that the agreement spreads its "blanket"
 (in the phrase of counsel for the plaintiffs) without exception over all employees of
 either party, irrespective of the nature and terms of their employment, or the C
 circumstances in which they left the service of the party by whom they were
 employed. In some cases and some circumstances six months might be reason-
 able; in others it might be wholly excessive, while in others again there might be
 no warrant for any period of disqualification at all.

For these reasons, we would dismiss this appeal.

Appeal dismissed.

Solicitors: *Hardman, Phillips & Mann* (for the plaintiffs); *Richards, Butler*
& Co. (for the defendants). D

[*Reported by* HENRY SUMMERFIELD, Esq., *Barrister-at-Law.*]

B. (otherwise S.) v. B.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Barnard, J.), February 12, 13,
 1958.]

Nullity—Impotence—Husband's incapacity—Failure to consummate after
reasonable time—Seven days' cohabitation—Husband giving false reasons
for failure to attempt intercourse. G

The wife was German by birth and the parties met in Germany while the
 husband was stationed there. The husband was a widower. They were
 married on June 1, 1956, and lived together for seven days. The wife
 sought a decree of nullity on the ground that the marriage had not been
 consummated owing to the husband's incapacity, her evidence being that H
 there had been unsuccessful attempts on the first three nights after marriage.
 The medical evidence was that there was no impediment to the consumma-
 tion of the marriage. The court found that the husband was not a witness
 of truth. The husband contended that a week was not long enough time
 to enable it to be determined whether the marriage could be consummated.

Held: the wife was entitled to a decree since the marriage had not been I
 consummated owing to the husband's incapacity which no amount of time
 would remedy.

Observations of LORD PENZANCE in *G— v. G—*, ((1871), L.R. 2 P. & D.
 at p. 291) applied.

[As to failure to consummate a marriage after a reasonable time, see 12
 HALSBURY'S LAWS (3rd Edn.) 230, para. 430, note (p); and for cases on the
 subject, see 27 DIGEST (Repl.) 276-279, 2214-2236.]

A Cases referred to:

(1) *S— (falsely called E—) v. E—*, (1863), 3 Sw. & Tr. 240; 164 E.R. 1266; sub nom. *Stagg (falsely called Edgecombe) v. Edgecombe*, 32 L.J.P.M. & A. 153; 8 L.T. 643; 27 Digest (Repl.) 273, 2188.

(2) *C. v. C. (otherwise H.)*, (1911), 27 T.L.R. 421; 27 Digest (Repl.) 276, 2207.

(3) *F. v. P. (otherwise F.)*, (1911), 27 T.L.R. 429; 27 Digest (Repl.) 275, 2203.

B (4) *G— v. G—*, (1871), L.R. 2 P. & D. 287; 40 L.J.P. & M. 83; 25 L.T. 510; 27 Digest (Repl.) 270, 2162.

Petition.

In this case the wife petitioned for a decree of nullity on the ground that the marriage had not been consummated due to the incapacity of the husband.

C The wife was born in Germany and met the husband when he was serving with the Royal Air Force in Germany. They became engaged in 1955. In 1956 they both came to England when the husband obtained leave and were married on June 1, 1956, at the Hanworth Register Office, Yorkshire. They lived together for seven days at the home of the husband's brother, and the wife then returned to Germany. The wife's evidence on the question of consummation was that on the first night the husband, although she tried to stimulate him, could not attain erection, penetration or emission, that on the second and third nights equally unsuccessful attempts were made and that thereafter there was no further attempt on his part to consummate the marriage. The husband returned to Germany shortly afterwards. It had been arranged that when the husband obtained married quarters the wife would join him, but immediately on her arrival in Germany the wife wrote to the husband an indignant letter saying that she was going to get the marriage annulled, that he had married her under false pretences, and that "You are impotent and cannot complete the marriage". In reply the husband apologised and said that six days and six nights was not a sufficient time to prove that he was impotent. The parties never resumed cohabitation and on Sept. 11, 1956, the wife presented her petition. The husband by his answer denied that the marriage had not been consummated and denied that he was incapable of consummating the marriage.

F The husband stated in evidence that the marriage had been consummated on the first night, although there had been no emission, but that there had been no further sexual intercourse because for the rest of the week they continued celebrating and he drank too much beer. The medical inspector's report G showed that the wife was not a virgin and that there was no impediment on her part, and that the husband was normally formed and apparently capable. The wife admitted in evidence that in 1952 and again in 1955 she had had affairs with two different men.

F. S. Bresler for the wife.

C. A. Marshall-Reynolds for the husband.

H BARNARD, J., stated the facts and said that he believed the wife's story and not the husband's, and accordingly found that the marriage had not been consummated. His LORDSHIP continued: The next question is—Was it due to the incapacity of the husband? Here, of course, I have to consider the time element. In the old ecclesiastical courts a triennial cohabitation was insisted on, but that has not been the law for the last hundred years. Counsel I for the husband referred me to a case (*S— (falsely called E—) v. E—*) (1) (1863), 3 Sw. & Tr. 240, in which the court did not think, on the facts of that particular case, that three months was enough. Counsel for the wife referred me to two undefended cases (*C. v. C. (otherwise H.)*) (2) (1911), 27 T.L.R. 421, and *F. v. P. (otherwise F.)* (3) (1911), 27 T.L.R. 429, tried by BARGRAVE DEANE, J. In *C. v. C. (otherwise H.)* (2) the parties never lived together at all. On the facts of that case, he was prepared to infer incapacity on the part of the wife because of her absolute refusal to live with her husband. In *F. v. P. (otherwise F.)* (3)

there was one attempt made by the husband during the daytime. The wife A
was hysterical. They never spent a night in the same room, and on the
facts of that particular case the judge was prepared to infer incapacity. It
really comes to this, however: you cannot lay down any particular time. Time
must be considered as a factor in each case.

Now if the husband in the present case had told me that he was suffering B
from ill health and had not been given a fair chance, it might well be that I
should have come to the conclusion that I could not infer incapacity although
I was satisfied that the marriage had not been consummated. But that is not
the husband's case here at all. He has not told me the truth. All that he has
done is to try to make this beer-drinking an excuse for not having any further
sexual intercourse because he realised that, although he might be able to pene- C
trate his wife, he would not be able to have an emission; and I understand from
the medical evidence that that is possible.

I have come to the conclusion that he really put this forward as an excuse, and I must not only consider these seven days but what the wife told me happened some two or three years before she went through the ceremony with her husband. She told me that when she was getting friendly with the husband, they went out together for a walk in the woods one day—the husband does not D
deny this—and then she told me how he took off his coat and put it on the ground and suggested that they should lie down, and then he attempted to have intercourse with her. But exactly the same thing happened as happened during the first three nights, according to the wife. She says that she was perfectly willing that he should have intercourse with her; and that fits in with the whole history of this case as to how she behaved with two other men of whom E
she was apparently fond; but that the husband was quite unable to penetrate her, and then he made some excuse that he had been drinking a lot of beer the day before. The husband would have me believe that the only reason he failed to have intercourse with her was because the wife physically resisted him and he at once gave it up. I do not believe that. I think that the wife was telling the truth and therefore I do not rely on this. F

What LORD PENZANCE said in *G— v. G—* (4) ((1871), L.R. 2 P. & D. 287 at p. 291) is really the guide to this sort of case. It is an old case, and for some time, of course, it was difficult to obtain an annulment of marriage without proof of a structural defect. He is to some extent dealing with that. He says:

“The invalidity of the marriage, if it cannot be consummated on account G
of some structural difficulty, is undoubted; but the basis of the interference of the court is not the structural defect, but the impracticability of consummation. If, therefore, a case presents itself involving the impracticability (although it may not arise from a structural defect) the reason for the interference of the court arises.”

I have come to the conclusion, on the evidence put before me, that no amount H
of time would help this marriage to be consummated. The husband had ample time during the seven days of the honeymoon to consummate the marriage and he was unable to do it, and I do not think that it would help the matter if he were given any further time. It is not as if I were dealing with a young inexperienced man; he was a widower, he had been married before and his wife died in 1949. I am therefore prepared, on the evidence, to find that this I
marriage never was consummated, and that it was due to the incapacity of the husband. Therefore the wife is entitled to a decree.

Decree nisi.

Solicitors: *Cardew-Smith & Ross* (for the wife); *James & Charles Dodd* (for the husband).

[Reported by A. T. HOOLAHAN, Esq., Barrister-at-Law.]

A

BROWN v. RAPHAEL.

[COURT OF APPEAL (Lord Evershed, M.R., Romer and Ormerod, L.JJ.), October 2, 3, 1957.]

Misrepresentation—Innocent misrepresentation—Sale of reversion in trust fund set aside to pay an annuity—Statement, in particulars of sale, that annuitant was believed to have no aggregable estate—No reasonable ground for belief—Rescission of contract.

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At an auction a vendor (the trustee in bankruptcy of the owner) offered for sale, subject to a reserve price, the absolute reversion in a trust fund which had been set aside to pay an annuity to a lady who was then sixty-nine years old. The reversion was offered subject to all death duties which might become payable. The particulars of sale stated that estate duty would be payable on the death of the annuitant "who is believed to have no aggregable estate". The conditions of sale stated that the information regarding duty was believed to be correct, but the (vendor accepted no responsibility as to what duties would become payable or the amount thereof.) At the end of these conditions of sale the firm name of the vendor's solicitors appeared. Inquiries had been made on behalf of the vendor concerning the annuitant's estate, (but no information justifying a belief that she had no aggregable estate had been forthcoming.) That statement of belief was inserted in the particulars mistakenly, but honestly. The purchaser sought rescission of the contract on the ground that he had been induced to enter into it by misrepresentation.)

Held: the purchaser was entitled to rescind the contract for (innocent misrepresentation because (i) in the circumstances of this case (viz., that the vendor's knowledge of facts relevant to the estate of the annuitant was superior to that of the purchaser and the name of the solicitors of the vendor appeared on the conditions of sale) the words "is believed to have no aggregable estate" impliedly represented that there were reasonable grounds for that belief, and (ii) this implied representation was of a most material fact, was untrue (though innocently made) and induced the purchaser to enter into the contract.

Dictum of BOWEN, L.J., in *Smith v. Land & House Property Corpn.* ((1884), 28 Ch.D. at p. 15) applied.

Appeal dismissed.

H

[**Editorial Note.** A statement of opinion or belief is in form a subjective statement, and the question whether such a statement has also any objective connotation has been much disputed in other fields than the law of misrepresentation. A recent example of the construction of words predicating the existence of a particular state of mind, and some indication of a possible limit to a subjective construction, will be found in *Ross-Clunis v. Papadopoulos*, at p. 24, letter C, ante.

As to an implied representation of the existence of a belief held by the representor, see 23 HALSBURY'S LAWS (2nd Edn.) 14, paras. 17, 18.]

Case referred to:

I

(1) *Smith v. Land & House Property Corpn.*, (1884), 28 Ch.D. 7; 51 L.T. 718; 49 J.P. 182; 35 Digest 10, 27.

Appeal.

This was an appeal by the defendant, the vendor, from a judgment of UPJOHN, J., dated May 3, 1957, in an action by the plaintiff, the purchaser, claiming, among other relief, rescission of a contract of sale by auction on the ground of a fraudulent misrepresentation contained in the particulars of sale. UPJOHN, J., held that there was an innocent material misrepresentation and granted the relief claimed with costs. A counterclaim by the defendant to enforce the

contract was dismissed. The facts appear in the judgment of LORD EVERSHED, A M.R.

I. J. Lindner, Q.C., and T. M. Eastham for the defendant, the vendor.

C. Montgomery White, Q.C., and E. I. Goulding for the plaintiff, the purchaser.

LORD EVERSHED, M.R.: The present action and appeal arise out of a sale at an auction on Feb. 17, 1955, of an absolute reversion in a trust fund. Because much in the case depends on the exact nature of the subject-matter of the sale as stated in the particulars, I shall read what was described as "Lot 11" more or less fully. It is stated thus:

"Lot 11. The absolute reversion receivable on the decease of a lady aged sixty-nine (born Dec. 30, 1885) to the whole of a trust fund now represented by £8,000 2½ per cent. consols, of estimated value £5,210."

Then, in italics, appear these three sentences:

"This sum has been set aside to pay an annuity of £200 per annum to the lady mentioned above. The trustee is the Public Trustee. Estate duty will be payable on the death of the annuitant who is believed to have no aggregable estate."

Then appear additional conditions of sale as to lot 11. Condition 1 states that the reversion is derived under a will bearing a particular date and that the probate of the will is to constitute the root of title. Conditions 2 and 3 read:

"2. The vendor sells as the trustee in bankruptcy of the beneficial owner. 3. The reversion is sold subject to all death and other duties which may be or become payable in respect thereof. The above information regarding duty so payable is believed to be correct, but the vendor accepts no responsibility as to what duties will in fact become payable nor as to the amount which will become payable and no compensation shall be paid or allowed in respect of any error as to duties."

Condition 4 states where completion is to take place. Condition 5 is that the particulars of the investment are as provided by the Public Trustee Office on a particular date

"... and are believed to be correct and the reversion is sold subject to such variation as may occur therein before completion of sale. The vendor accepts no responsibility for the estimated value of the investment."

Condition 6 relates to expenses, and condition 7 relates to requisitions on title. Condition 8 says that the sale is subject to a reserve price. Condition 9 provides:

"These additional conditions shall prevail notwithstanding anything inconsistent with or contrary thereto in the general conditions which (in so far as they are not varied by these conditions) shall apply to the sale of this lot."

Then appears in heavy leaded type: "Solicitors as to lot 11—Messrs. Oscar Mason & Co., Cliffords Inn, Fleet Street, E.C.4".

That subject-matter having been put up for auction on Feb. 17, 1955, the plaintiff entered into a contract to purchase the reversion for the sum of £2,825, but the contract was not completed by January, 1956. In the end the plaintiff stated that he had been misled by the representation which he said was to be found in the third sentence of the passage in italics in the particulars, the words "who is believed to have no aggregable estate". He, therefore, sought rescission of the contract. The defendant, the trustee in bankruptcy of the reversioneer, repudiated that claim and, by counterclaim, sought to enforce the contract.

The statement of claim in the action places the main emphasis on an allegation that the alleged representation was not only untrue but was made dishonestly. The learned judge acquitted the defendant and his agents and representatives of dishonesty, but he held the plaintiff entitled to relief on the basis of an innocent

A material misrepresentation on which the plaintiff had acted. At an early stage in this appeal the question arose whether, on the pleadings, if fraud was rejected, it remained open to the plaintiff to proceed on the ground of innocent misrepresentation, and we came to the conclusion that he was so entitled. No question now arises as to dishonesty, so that we must now consider the case on the footing that it is open to the plaintiff to proceed on the basis of innocent misrepresentation. In order that the plaintiff may succeed on such a ground it is necessary that three things should be established: (i) he must show that the language relied on imports or contains a representation of some material fact; (ii) he must show that the representation is untrue; and (iii) he must show that, in entering into the contract, he was induced so to do in reliance on it. The learned judge concluded all those three matters in the plaintiff's favour, and he, therefore, gave to the plaintiff the necessary relief in the action and dismissed the counterclaim. Although counsel for the defendant put all the points forcibly and attractively before us, in my judgment there is no ground shown for this court to disturb the learned judge's conclusions. I will, therefore, deal with each of the three essential points in turn.

The first point is, to my mind, the most significant and perhaps the most difficult: Is there here a representation of a material fact? The essential words are those which I have already read: "who [the annuitant] is believed to have no aggregable estate". At first sight, therefore, this is a statement of an opinion; but a statement of opinion is always a statement of fact to the extent that it is an assertion that the vendor does, in fact, hold the opinion which he states. If, however, that was all that there was in the matter, plainly the defendant would succeed on the judge's finding; for the judge held that there was no dishonesty on the part of the defendant or his agent; in other words, he held that the defendant through his agent did believe that the annuitant had no aggregable estate. The question therefore arises: Is that all that these few words import? On that, there is some considerable guidance for us in *Smith v. Land & House Property Corpn.* (1) ((1884), 28 Ch.D. 7), a decision of this court. The contract in that case was one for the sale of a hotel at Walton-on-the-Naze, which at that time, according to what is said in the report, was apparently regarded as being in the "last stage of decay". The question which arose in that case emerged from a reference in the particulars to the effect that the tenant of the hotel was regarded by the vendor as a most desirable tenant. It turned out, in fact, that those words were singularly inappropriate to him, since he was habitually in arrear with his rent, and the business which he was able to do in the decaying town was regarded as quite inadequate to support the rent for the hotel. Those are matters of fact, however, peculiar to that case. For present purposes the guidance which I seek is to be found in the language of BOWEN, L.J., where he said (28 Ch.D. at p. 15):

"In considering whether there was a misrepresentation, I will first deal with the argument that the particulars only contain a statement of opinion about the tenant. It is material to observe that it is often fallaciously assumed that a statement of opinion cannot involve the statement of a fact. In a case where the facts are equally well known to both parties, what one of them says to the other is frequently nothing but an expression of opinion. The statement of such opinion is in a sense a statement of a fact, about the condition of the man's own mind, but only of an irrelevant fact, for it is of no consequence what the opinion is. But if the facts are not equally known to both sides, then a statement of opinion by the one who knows the facts best involves very often a statement of a material fact, for he impliedly states that he knows facts which justify his opinion."

It is that last sentence which is particularly pregnant for present purposes. I observe two things; first, that the learned lord justice is not laying down a universal rule. His language is: "a statement of opinion . . . involves very

often a statement of a material fact". Secondly, he says that, for that possibility to arise, one party must know the facts better than the other. He is not saying that one party must know all the facts; it suffices for the application of the principle if it appears that, between the two parties, one is better equipped with information or the means of information than the other is.

It is often and truly said that each case must depend on its own facts; and I apprehend that the real question for the court is to say, on the basis of the facts and in the context of this case, whether this is an instance in which the representation that the vendor has reasonable grounds for his belief ought to be imported. Counsel for the defendant contended that to hold, as the judge did, affirmatively on that point was to lay down the principle that, wherever it is stated that one party entertains a particular belief, then it must follow that there is a representation that he has grounds reasonably supporting his belief. I lay down no such general proposition. The question here is whether in this case, and in the context of the particulars concerning lot 11, such a representation of reasonable grounds to support the belief ought to emerge; and, as the judge held, I think that in this case the answer is in the affirmative.

First, it is to be noted that the subject-matter of the sale was a reversion to a sum of consols under a will. Anybody seeking to buy such a property must obviously first consider when the subject-matter is likely to come to hand. The age, therefore, of the annuitant on the determination of whose life the reversion falls in is of vital importance. It is, however, no less important to the purchaser to know how much will be left of the capital fund when duties have been paid at the death of the annuitant. Therefore, it is of the utmost importance to a purchaser to know (if he can find out, which he may or may not be able to do) whether the impost of estate duty will be limited to the appropriate rate for the sum of the reversion alone or whether the rate will be affected by the circumstance that the annuitant has other considerable means, disposable capital of his or her own, which, for duty purposes, will be aggregated* with the sum providing the annuity. Therefore, the statement "who is believed to have no aggregable estate" is one obviously and vitally affecting the subject-matter being offered. As the learned judge pointed out, anybody who has any experience in dealing with properties of this kind must be very much alive to that point.

The next thing to notice about the particulars is the item at the end: "Solicitors as to lot 11, Messrs. Oscar Mason & Co."—a well known firm of solicitors of standing and repute. What would be the effect of this language on the mind of a possible purchaser. Clearly, I should have thought, it would flow from the language used, and would be intended to be understood by a reader of the particulars, that persons who knew the significance of this matter, and who were experienced and competent to look into it, were expressing a belief founded on substantial and reasonable grounds. As between the vendor and the prospective purchaser, it is quite plain that this is a case within the category stated by BOWEN, L.J., namely, a case where the vendor's knowledge or means of knowledge is far superior to that of the purchaser. The purchaser can know nothing whatever which could guide him on this point. He does not know the annuitant's name and he knows nothing about the will except the date. On reading the particulars, he has no possible means of knowing whether the annuitant is, or is not, a woman of means. It is, no doubt, possible that a purchaser might find out. He could communicate with the Public Trustee, just as the purchaser in *Smith v. Land & House Property Corpn.* (1) could have made inquiries about the desirability of the tenant; but in this case it is far less likely even than in *Smith v. Land & House Property Corpn.* (1) that a purchaser could have found the answer. The Public Trustee would probably have been unable to tell him anything. It is very doubtful whether the will in question could have been

* Under the Finance Act, 1894, s. 4.

- A successfully identified. On the other hand, the vendor, the defendant, is the beneficial owner of the reversion by virtue of the bankruptcy of the reversioner. A considerable amount of fact which would be quite unknown to a purchaser is, therefore, available to him, and there is also available to him the means of information and inquiry. He could inquire of the annuitant or of other persons about the circumstances relevant to this matter of aggregable estate. I observe
- B that the sale was subject to a reserve price. A purchaser would note that and would obviously assume that the reserve price would have been fixed with due regard to this matter of aggregability.

I am, therefore, entirely of the same opinion as was the learned judge, namely, that this is a case in which there was not merely the representation that the defendant entertained the belief, but also, inescapably, the further representation

C that he, being competently advised, had reasonable grounds for supporting that belief. The learned judge put the matter thus in his judgment. He first observed that, if the purchaser was not entitled to suppose that the vendor was in possession of facts which enabled him to express an opinion which was based on reasonable grounds, that would, he thought (and I agree with him) make business dealings, certainly in this class of business, almost impossible. He said:

- D "It must be remembered that in this case the purchaser going to the auction had no means whatever of finding out anything about the annuitant's means. When the contract was signed, the purchaser did not even know the name of the annuitant. On the other hand, the vendor must be expected to be in possession of facts unavailable to the purchaser and the purchaser is entitled to suppose that he is in possession of facts which enable him to express an opinion which is based on reasonable grounds. As I have already said, if that is not so, business relationships become quite impossible. It may be different where the facts on which the opinion is expressed are equally available to both parties. Then the opinion may be no more than an expression of opinion, but, where the opinion is expressed on facts assumed to be available to the vendor, which certainly are not available to the purchaser, and that opinion is expressed to induce the contract, in my judgment the purchaser is entitled to expect that the opinion is expressed on reasonable grounds."
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The learned judge, using that general language in relation to this case, was reflecting the language of BOWEN, L.J., which he then proceeded to quote in the next paragraph of his judgment. I, therefore, am satisfied that the relevant language in the present case involved the representation that there were reasonable grounds for the belief, and certainly that was a representation of a most material fact.

G

- The next question, then, is: Was that representation true? On that, counsel for the defendant did not argue with very great strenuousness, and, indeed, I think that he would have had difficulty in doing so. The grounds on which the belief was expressed are set out in summary by the learned judge in his judgment. The sources of information which were tapped consisted of the bankrupt herself, of the bankrupt's mother, and, at her suggestion, of another lady, a Mrs. Gould. A communication was also addressed to the annuitant herself, who was a half-sister of the bankrupt. The bankrupt's father, who was also the father of the annuitant, had married twice, and it appears that the issue of the first marriage and the issue of the second marriage were not entirely friendly. It is quite plain, that, when inquiries were made about the annuitant, the first thing that emerged was that the persons consulted knew very little about her. Mrs. Gould said that she had had no direct contact with the annuitant for some time, but added the somewhat significant piece of information that the annuitant spent some part of her time at Nice. Since the amount of the annuity was £200 sterling per annum, it might have been thought that that piece of information at any rate carried a certain element of caution with it. The bankrupt herself could
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add little more, although it is fair to say that both she and Mrs. Gould indicated that they did not think that the annuitant would probably leave very much. The annuitant passed on to her brother the letter of inquiry which she received, and the inquirer was told, in effect, that it was none of his business, and no information was given.

The question then arises: Was that information such as to justify a reasonable person, who had any awareness of the significance of the matter, asserting as an inducement to a possible purchaser that the annuitant was believed to have no aggregable estate? I think the question has only to be put to be answered. It is quite plain that that very meagre information formed no basis whatever on which a responsible person could put forward that view as an inducement for somebody to buy the reversion. The inquiry was made, as one would expect, by a representative of the firm of solicitors whose concern in the matter was stated in heavy leaded type in the particulars. The learned judge was obviously somewhat troubled by the extraordinary fact that any responsible member of a well-established firm of solicitors could possibly have asserted a belief on such flimsy grounds. That was a consideration which was in his mind when he had to consider, on the question of costs, the justification of the allegation of fraud, including that of recklessness; but the judge had the advantage of seeing the managing clerk concerned and he was satisfied that the managing clerk, although in this respect, unhappily, quite inept, was, none the less, honest. He was inept because this subject-matter was far outside the ordinary scope of his professional duties, he being a litigation clerk; and it became quite manifest that he himself had no comprehension at all, when he started dealing with this matter, of the meaning of the words "aggregable estate" and certainly never comprehended at any stage the importance of the alleged belief to a would-be purchaser of a reversion.

At this stage I will deal with another point raised by counsel for the defendant. From what I have said it will be appreciated that the inquiries were made by, and the whole preparation of these particulars was in the hands of, the firm of solicitors whose name I have mentioned. The defendant, very naturally and properly, left the matter to the solicitors to do the work for him. The draft form of particulars sent by the auctioneers was amended by the solicitors and returned to them; and the defendant naturally and properly relied on it. Counsel for the defendant put forward the argument that this question of belief and grounds of belief in a context such as this has a subjective quality about it, so that, even if it were wholly unreasonable for the solicitors concerned to have put forward a belief about there being no aggregability, it was quite otherwise in the case of the defendant, who was said to be an accountant. It was said that it would suffice for the defendant to say: "I made no inquiries myself. I relied, as I submit that I am entitled to do, on a competent firm of solicitors, and, I having so relied and they having prepared this draft for me, I, reasonably, accepted it". I am bound to say, after hearing the argument, that I am still, for my part, quite unable to apprehend it at all. The defendant, as the trustee in bankruptcy, is the vendor who asserts the belief. He did not give evidence; there was no reason why he should; but the evidence in his case proved that the belief was put forward founded on inquiries which were made by the solicitors and which produced results quite incapable reasonably of supporting the belief. The defendant accepted and ratified what had been done by his agents, as he was entitled to do; but he must abide by the consequences. All that they put forward he must be treated as having put forward himself. The extravagance of the argument, if I may so describe it, is revealed by this. I put to counsel for the defendant the suggestion that, if his argument were right, it would follow that, if the solicitors, having made an inquiry, were then informed that the annuitant was in fact possessed of a quarter of a million pounds of her own money, but, owing to some mental aberration on their part, the solicitors thought that it did not matter

A and that that money was not aggregable, still, apparently, the defendant would be able to say that he reasonably entertained the belief put forward by way of inducement merely because the solicitors asserted it. I think that the proposition, so illustrated, has really only to be stated to be rejected.

There remains the third necessary condition essential to the plaintiff's case, namely, that he relied on the representation which, I hold, was implicit and was untrue. On that, we have not really had any argument. The learned judge heard the plaintiff and was quite satisfied that the plaintiff did, in fact, rely on this representation. That, therefore, is the end of the matter.

Some other subsidiary points were indicated, but, in my judgment, none of them contained any substance. It was said that the implied representation as to grounds of belief was in some sense subsidiary; from which it was sought to say that, once the belief put forward was held to be honest, however incredibly, that was the end of the matter. I can find no basis in authority or good sense for that view, and I reject it.

Another point was made on condition 3 of the conditions of sale. That condition, which I read, stated among other things that

“ . . . the vendor accepts no responsibility as to what duties will in fact become payable nor as to the amount which will become payable . . . ”

It was suggested that, somehow or other, that statement so qualified the effect of the preceding representation as to make it ineffective for the purposes of this action. I am quite unable to accept that argument. I observe that condition 3, for one thing, repeats the representation, for it says: “ The above information regarding duty so payable is believed to be correct . . . ” What condition 3 is concerned with is to say that, whatever be the position today, when the annuitant dies, which may be ten or fifteen years hence, the vendor is not himself to be responsible at all for or in respect of the payment of any duty. In other words, the condition seems to me to deal with an entirely different point and cannot, in my judgment, in the least qualify the representation which, I hold, was earlier made as an inducement and, in fact, relied on by the plaintiff.

The last matter on which I would say a few words is that of costs. It was said to be a hard thing for the defendant to have to pay all the costs, seeing that the charge of fraud, which played so prominent a part in the statement of claim, failed entirely. I feel some sympathy with the defendant on that matter. He goes from this case without the smallest imputation having been made on his personal honesty; but the learned judge considered the matter and thought, when he looked at the correspondence, that it contained at any rate some justification for a charge of recklessness. I have already said that that charge might well have succeeded, had it not been for the managing clerk of the solicitors satisfying the court that he was able to entertain this very astonishing belief owing to his entire ignorance of the subject-matter with which he was dealing. The judge, having considered the whole matter, directed in his discretion that the costs of the action and of the counterclaim should be paid by the unsuccessful defendant. It would be a difficult matter in any case on costs alone to disturb the judge's discretion; but no basis for such a disturbance has really been put forward, and in any case (and this is conclusive of the matter) the point is not raised on the notice of appeal. For the reasons which I have given, I think that the appeal fails and must be dismissed.

I **ROMER, L.J.:** I entirely agree with every thing which my Lord has said. In the course of the passage from the learned judge's judgment which LORD EVERSHED, M.R., read, the learned judge, after pointing out that the statement of belief in the particulars that the annuitant was believed to have no aggregable estate was made with a view to inducing the contract, expressed the view that the plaintiff, as purchaser, was entitled to expect that the opinion was founded on reasonable grounds. It appears to me that the real point in this case is whether the learned judge was right or whether he was wrong in that view. Counsel for

the defendant submitted that he was wrong, but I am abundantly satisfied that he was perfectly right. In the first place, one has to remember that the plaintiff (knew practically nothing whatever about the subject-matter of the sale or the title from which it derived or the circumstances which affected its value.) All he knew about it was that which was stated in the particulars, namely, that it was a reversionary interest then represented by a sum of £8,000 consols receivable on the death of a lady aged sixty-nine,) that the reversion derived under a will dated Mar. 13, 1916, which was proved in December, 1917, and that the trustee of that will was the Public Trustee. (That really is all that the plaintiff knew.) Short of writing to the vendor's solicitors, who are named in the particulars, and persuading them to help him in ascertaining further particulars, I cannot see that he was in a position to do anything whatever for himself. It would have been of little use even to have written to the Public Trustee, because the plaintiff could not have informed the Public Trustee anything about the will under which the reversion derived except its date and the date of its probate. It might be, such is the efficiency of the Public Trustee's Office, that that would be sufficient, after a great deal of research, to discover who the testator was and the terms of the will; but, short of that, as my Lord has pointed out, the plaintiff was helpless in this matter. On the other hand, the defendant vendor, who has to be identified for this purpose, I think, with the bankrupt herself, the owner of the reversion, was in a far stronger position, to put it at its lowest, than was the plaintiff to ascertain all relevant facts bearing on the reversion, and, more particularly, bearing on its value and what it was likely to bring in on the death of the annuitant.

That being so, I should have thought that it was fairly obvious in this case that the statement purporting to come, as it did come, from the defendant's solicitors, and expressing a belief vital in relation to this legal transaction, inevitably would suggest to the plaintiff that the opinion was being expressed on reasonable grounds; for it was a matter which everybody concerned, and especially a solicitor, must know would vitally affect the value of the reversion which the plaintiff was proposing to buy, in that a matter which obviously affects the value of a reversion more than anything else is whether the value will be reduced because of the principle of aggregation when the reversion falls in. For my part, accordingly, even in the absence of authority, I should have thought, on the facts of this particular case, that it was abundantly clear that the learned judge was right when he said that the plaintiff was entitled to expect that the opinion or belief was expressed on reasonable grounds, and I should have come to that conclusion if there had been no authority on the matter at all. There is, however, the authority to which LORD EVERSHED, M.R., referred and to which the learned judge referred, namely, *Smith v. Land & House Property Corpn.* (1) ((1884), 28 Ch.D. 7), and, in particular, the judgment of BOWEN, L.J., in that case, which, when applied to this particular case (and we are only dealing with the facts of this particular case), supports beyond doubt the conclusion at which the learned judge arrived and with which, as I have said, I entirely agree.

None of the other points which were addressed to us and were relied on in this appeal appear to have very much substance in them, and there is nothing that I can add to what LORD EVERSHED, M.R., has said with regard to them. I entirely agree with the conclusions at which he has arrived. I agree that the appeal should be dismissed.

ORMEROD, L.J.: I also agree that the appeal should be dismissed, and in the circumstances I do not think that there is anything that I can usefully add to the reasons given by my brothers.

Appeal dismissed.

Solicitors: *Oscar Mason & Co.* (for the defendant); *Charles H. Wright & Brown* (for the plaintiff). [Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

A

R. v. MATHESON.

[COURT OF CRIMINAL APPEAL (Lord Goddard, C.J., Streatfeild, Slade, Donovan and Havers, JJ.), March 10, 24, April 1, 1958.]

B

Criminal Law—Capital murder—Diminished responsibility—Evidence—Medical evidence of abnormality of mind not challenged—Verdict of capital murder—Verdict set aside as unsupported by the evidence—Homicide Act, 1957 (5 & 6 Eliz. 2 c. 11), s. 2.

Criminal Law—Practice—Capital murder—Diminished responsibility—Plea of guilty of manslaughter not to be accepted on indictment for capital murder—Homicide Act, 1957 (5 & 6 Eliz. 2 c. 11), s. 2.

C

Where a defence of diminished responsibility is raised, a plea of guilty of manslaughter is not, as a rule of practice, to be accepted, and the issue must be left to the jury just as the issue must be left if a defence of insanity is raised. If, on an indictment for murder, the defence seeks a verdict of manslaughter on the ground of diminished responsibility and also on some other ground, such as provocation, and the jury return a verdict of manslaughter, the judge should, generally, ask the jury whether their verdict is based on diminished responsibility or on the other ground or on both (see p. 90, letter G, post).

D

The appellant, who was fifty-two years old and was a confirmed sodomite, murdered a boy of fifteen by smashing his head. The appellant was tried on a charge of capital murder. The medical evidence, that of three doctors each of whose testimony was not challenged and was in accord with that of the others, was that the appellant was not insane within the M'Naghten Rules, but that his mind was so abnormal as substantially to impair his mental responsibility. Two of the doctors testified that the appellant's mental development was less than is expected of a child of ten. The appellant, having been convicted of capital murder, appealed on the ground that he was suffering from diminished responsibility within s. 2 of the Homicide Act, 1957, and was guilty only of manslaughter.

E

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Held: though the question of the appellant's abnormality of mind was a question for the jury and not for the medical witnesses to decide, yet the verdict was unsupported by the evidence, having regard to the fact that the testimony of the doctors was unchallenged and showed that the appellant was within s. 2 of the Homicide Act, 1957; therefore a verdict of manslaughter would be substituted.

G

Appeal allowed.

H

[**Editorial Note.** The Court of Criminal Appeal has jurisdiction under s. 5 (2) of the Criminal Appeal Act, 1907, to substitute a verdict of guilty of another offence if the appellant could have been convicted of that offence at his trial instead of the offence with which he was charged. The accused, though charged with capital murder, could have been convicted of manslaughter (s. 2 (3) of the Homicide Act, 1957).

As to appeals against conviction on the grounds that the verdict was unreasonable or cannot be supported by the evidence, see 10 HALSBURY'S LAWS (3rd Edn.) 535-537, paras. 985, 986.]

I

Case referred to:

(1) *Kirkwood v. H.M. Advocate*, 1939 S.C. (J.) 36.

Appeal.

This was an appeal by Albert Edward Matheson, the appellant, against his conviction of capital murder at a trial at Durham Assizes on Jan. 30, 1958, before FINNEMORE, J., and a jury, on indictment charging him with capital murder, viz., the murder of Gordon Lockhart on or about Nov. 18, 1957, in the

course or furtherance of theft*. At the trial, the appellant raised the defence of diminished responsibility under s. 2 of the Act of 1957. The grounds of the appeal were that the verdict of the jury on the issues of diminished responsibility, and whether the killing was done in the course or furtherance of theft was unreasonable and unsupported by the evidence, and that the judge misdirected the jury on the evidence regarding the issue of diminished responsibility and as to the meaning of the words "in the course or furtherance of theft". The appeal was allowed on the ground that the appellant was suffering from diminished responsibility, so that the question whether the killing was done in the course or furtherance of theft was not considered.

The facts appear in the judgment of the court which was delivered by LORD GODDARD, C.J.

G. S. Waller, Q.C., and P. M. Taylor for the appellant.

P. Stanley-Price, Q.C., and R. R. Rawden-Smith for the Crown.

Cur. adv. vult.

Apr. 1. LORD GODDARD, C.J., read the following judgment of the court: The appellant was convicted at the last Durham Assizes before FINNEMORE, J., of the capital murder of a boy aged fifteen named Gordon Lockhart. The defence was (1) that in killing the boy the appellant was suffering from diminished responsibility as defined by s. 2 of the Homicide Act, 1957, and was accordingly guilty not of murder but of manslaughter, (2) that the murder was not in the course or furtherance of theft so that if the defence of diminished responsibility was not accepted the murder was not capital. The court at the close of the argument allowed the appeal on the first ground, and substituted a verdict of manslaughter for that of murder. The second ground therefore need not be considered and the court gives no decision on it. We now proceed to give our reasons for allowing the appeal on the first ground.

The murder was of the most horrible description, so revolting as to be almost beyond belief. The appellant, who is fifty-two years of age, was a confirmed practising sodomite, and there was evidence of some association before the murder between him and the boy. The appellant worked as a handyman at St. James' Boxing Hall in Newcastle and on Nov. 18, 1957, the boy went to a new job at a cinema which he left about 4.30 p.m., having previously collected wages due to him from a previous employer. He did not arrive home and was not again seen alive. Two days later his mother received an anonymous postcard saying the boy had gone to London as a woman was after him for money. A second postcard was received by her the next day saying that Gordon was living in London with prostitutes making money like them and on Nov. 22 a third was received saying "Gordon is dead". All these three cards were written by the appellant. On the evening of Nov. 22 the police went to the Boxing Hall, and found the boy's body cut in half and stowed in a sump under the hall; it had been disembowelled and the intestines packed into a suitcase. The appellant wrote anonymously to the chief constable of Newcastle saying that the body was in the Tyne in sacks and accusing the boy of sodomy. The same day that this letter was received the appellant gave himself up to the police in Glasgow and described how he had killed the boy. All that need be said with regard to his confession is that he described how he had killed the boy by smashing his head, first with a glass bottle which he had filled with water to make it heavier, and then beating it with a claw hammer. This was confirmed by the post mortem. His other statements alleged that the boy was demanding £2 from him as the price of buggery and as he, the appellant, was only willing to pay £1 he had killed him. There is of course only the appellant's word for this accusation. He described how the bottle broke and that he threw the pieces to a place where the police found them. They found the broken bottle with newspaper

* Murder in such circumstances is capital murder by virtue of s. 5 (1) (a) of the Homicide Act, 1957.

- A packed round the neck so that if it broke it would not cut the hand that was holding it. He afterwards made further statements saying that he knew the boy would have his week's pay on him and that was why he killed him, but we need not consider this part of the confession as it would only be material if the court had to consider whether the murder was to be regarded as one in furtherance or in course of theft. The only issue dealt with on the appeal was that of
- B diminished responsibility; none of the facts were disputed by the appellant. Three medical men were called by the defence, Dr. Pickering, the senior medical officer of Durham Gaol, Dr. Orton, consultant psychiatrist at the Newcastle General Hospital, and Mr. Cuthbert, physician superintendent at St. Luke's Hospital, Newcastle; all three of experience in matters relating to mental health. Cross-examination was directed only to the elucidation of some points
- C in their evidence but the prosecution did not challenge the opinions they had formed and all three had personally examined the prisoner. They all agreed that he was not insane within the M'Naghten Rules. Both Dr. Pickering and Dr. Cuthbert said that his mental development was that of a boy of ten. Dr. Orton considered he was certifiable under the Mental Deficiency Act though not under the Lunacy Act. They were all satisfied that his mind was so abnormal as substantially to impair his mental responsibility. They did not merely
- D repeat the words of the section but gave the reasons which led them to form this opinion. Thus Dr. Pickering said the prisoner's intelligence measured by certain tests recognised for this purpose was not more than seventy-three while that of a normal or average man would be one hundred, and that his mental condition was due to arrested or retarded development. Dr. Orton called attention to the
- E records which showed the man had on many occasions swallowed razor blades and inserted nails in his urethra and as we have said was prepared to certify him under the Mental Deficiency Act. Dr. Cuthbert agreed that his mental development was rather less than what one expects in a child of ten and that he suffered from retarded development. It is unnecessary to set out their evidence in greater detail. It was clearly enough to shift the burden of proof
- F thrown on the defence by s. 2 of the Act of 1957* yet no medical evidence was given by the prosecution in rebuttal. What then were the facts or circumstances which would justify a jury in coming to a conclusion contrary to the unchallenged evidence of these gentlemen? While it has often been emphasised, and we would repeat, that the decision in these cases, as in those in which insanity is pleaded, is for the jury and not for doctors, the verdict must be founded on evidence.
- G If there are facts which would entitle a jury to reject or differ from the opinions of the medical men, this court would not and indeed could not disturb their verdict but if the doctors' evidence is unchallenged and there is no other on this issue, a verdict contrary to their opinion would not be "a true verdict in accordance with the evidence". Here it is said there was evidence of pre-meditation and undoubtedly there was, but an abnormal mind is as capable of
- H forming an intention and desire to kill as one that is normal; it is just what an abnormal mind might do. A desire to kill is quite common in cases of insanity. We cannot see that the anonymous letters displace the view that the man's mind was abnormal or that his responsibility was substantially impaired. They would appear indicative rather of a desire to torture the mother, again a sign of abnormality. The attempts at self mutilation in a most painful manner are
- I surely acts of a man on the border of insanity and not of a rational person. The revolting nature of the crime itself would cause most people to say that it was the work of a maniac, resembling as it did the murders of some seventy years ago which terrorised the east end of London and were known as the Ripper murders. We can well understand that a jury, faced with such an appalling crime committed by a sodomite whether from jealousy or because his victim would no

* Section 2 (2) of the Homicide Act, 1957, provides: "On a charge of murder, it shall be for the defence to prove that the person charged is by virtue of this section not liable to be convicted of murder."

longer pander to his vice, would think, as would many, that such a creature ought not to live and that consequently a verdict involving the capital sentence was the only one appropriate. But we have to bear in mind that Parliament has altered the law and decreed that if a killing is committed by a person whose abnormal mind has seriously diminished his responsibility the verdict is to be manslaughter and not murder*. If then there is unchallenged evidence that there is abnormality of mind and consequent substantial impairment of mental responsibility and no facts or circumstances appear that can displace or throw doubt on that evidence it seems to the court that we are bound to say that a verdict of murder is unsupported by the evidence. We prefer to rely on those words of the Criminal Appeal Act, 1907, rather than on the word "unreasonable". The Act directs the court to allow an appeal if they think that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence†. Having regard to what we think must have affected the jury or any body of ordinary minded citizens, we should not care to say their verdict was unreasonable though we feel bound to say it was not supported by the evidence. The fact is there was unchallenged evidence that this man was within the provisions of s. 2 of the Homicide Act, 1957, and no evidence that he was not. This decision therefore in no way departs from what has been said in other cases‡ that the decision is for the jury and not for the doctors; it only emphasises that a verdict must be supported by evidence. If there is evidence and a proper direction, this court will not usurp the function of the jury, unless indeed there is evidence so overwhelming that the court comes to the conclusion that though it might be said there was some evidence the other way, the verdict would amount to a miscarriage of justice. We base our decision on the ground that the evidence in this particular case did not support the conviction; but we recognise that there may be cases where, on the issue under s. 2 of the Homicide Act, 1957, evidence of the conduct of the accused before, at the time of and after the killing, may be relevant considerations for the jury in determining whether the accused has discharged the onus of proving such abnormality of mind as substantially to impair his mental responsibility for his acts.

Before parting with the case, this is a convenient opportunity for laying down a rule of practice in cases where a defence of diminished responsibility is raised. The judges of this court have resolved that a plea of guilty to manslaughter on this ground should not be accepted, though it seems it may be in Scotland—*Kirkwood v. H.M. Advocate* (1) (1939 S.C. (J.) 36). The issue must be left to the jury just as the issue must be if the defence is insanity. It may happen that on an indictment for murder the defence may ask for a verdict of manslaughter on the ground of diminished responsibility and also on some other ground such as provocation. If the jury return a verdict of manslaughter the judge may and generally should then ask them whether their verdict is based on diminished responsibility or on the other ground or on both.

Appeal allowed.

Solicitors: *Holmes & McGilvray*, Newcastle-upon-Tyne (for the appellant);
Director of Public Prosecutions.

[Reported by WENDY SHOCKETT, Barrister-at-Law.]

* See s. 2 (3) of the Homicide Act, 1957.

† See s. 4 of the Criminal Appeal Act, 1907 (5 HALSBURY'S STATUTES (2nd Edn.) 929).

‡ See *R. v. Spriggs*, [1958] 1 All E.R. 300 and *R. v. Dunbar*, [1957] 2 All E.R. 737 at p. 738.

A

INLAND REVENUE COMMISSIONERS v. WHITWORTH
PARK COAL CO., LTD. (In Liquidation).

INLAND REVENUE COMMISSIONERS v. RAMSHAW COAL
CO., LTD. (In Liquidation).

B

INLAND REVENUE COMMISSIONERS v. BRANCEPETH
COAL CO., LTD. (In Liquidation).

[COURT OF APPEAL (Jenkins, Romer and Ormerod, L.JJ.), January 13, 14, 15,
16, February 21, March 12, 1958.]

C

*Income Tax—Profits—Computation of profits—Year of assessment—Interim
income payments in respect of compensation on nationalisation of coal
industry—Payments in respect of specified periods—Whether income of those
periods or of years of receipt—Income Tax Act, 1918 (8 & 9 Geo. 5 c. 40),
Sch. D, Case VI, r. 2.*

D

*Income Tax—Exemption—Crown—Whether a “person” within income tax
legislation—Income Tax Act, 1918 (8 & 9 Geo. 5 c. 40), Sch. D, Case III,
r. 1 (a), All Schedules Rules, r. 19, r. 21.*

*Coal Mining—Nationalisation of industry—Colliery company—Interim income
—Income tax—Coal Industry Nationalisation Act, 1946 (9 & 10 Geo. 6 c. 59),
s. 22 (2), (3)—Coal Industry (No. 2) Act, 1949 (12, 13 & 14 Geo. 6 c. 79),
s. 1 (2).*

E

On Jan. 1, 1947, the colliery assets of the first appellant (which was a
company under the control of not more than five persons within s. 21 of
the Finance Act, 1922) were transferred to the National Coal Board under
the Coal Industry Nationalisation Act, 1946, and the company became
entitled to compensation from the Crown for those assets. The compensation
became due on Jan. 1, 1947, subject to determination of its amount and
would not, therefore, be paid for a substantial time. For the period between

F

Jan. 1, 1947, and the date on which compensation was fully satisfied the
company was entitled to “interim income”. Under s. 22 (2) (a) of the Act,
the right to interim income for the period between Jan. 1, 1947, and the
issue of stock or the making of a payment in satisfaction of any amount of
compensation was to be satisfied by making “in addition to the issue of the
stock then issued in satisfaction of that amount of compensation or to the
making of the money payment then made in satisfaction of that amount of
compensation . . . a money payment of an amount equal to interest for that
period on that amount of compensation at such rate or rates as may be
prescribed as respects that period or different parts thereof by order of the
Treasury.” These payments were to be made at the same time as the compen-

G

H

I

sation was paid or satisfied. Under s. 22 (3) “revenue payments” were
to be made in respect of each of the two years beginning with Jan. 1, 1947,
equal to one half of the comparable ascertained revenues of the com-
pany attributable to activities for which its transferred interests were used
or owned. No time was fixed for making these payments. Section 22 (5)
provided for adjustments for under-payments and over-payments arising
from payment before all relevant facts for giving effect to the provisions
were ascertainable and adjustments of payments were in fact made in
subsequent payments. By s. 1 (2) of the Coal Industry (No. 2) Act, 1949,
modified revenue payments were payable in 1949 and subsequent years.
The revenue payments were in substitution, so far as they went, for the
right to interim income.

From Jan. 1, 1947, the company was, as a consequence of the nationalisa-
tion, an investment company within the meaning of s. 20 (1) of the Finance
Act, 1936, and the whole of its actual income was deemed to be the income

of the members under s. 14 of the Finance Act, 1939. In 1948, 1949, 1950 and 1951, the company received payments in respect of interim income (viz., payments within s. 22 (2) of the Act of 1946) and revenue payments under s. 22 (3) of the Act of 1946 and under s. 1 (2) of the Act of 1949. All these payments were conceded to be income of the company for tax purposes. The Special Commissioners of Income Tax in their apportionment of the income of the company among the members under s. 21 of the Finance Act, 1922, assessed the payments (viz., both those made under s. 22 (2) of the Act of 1946 and the revenue payments made under s. 22 (3) and the Act of 1949) as income of the company in the year in which they were received and as being so assessable under Case III of Sch. D. The company contended that the payments should be assessed as income of the year or period in respect of which each was paid, and that they were so assessable under Case VI of Sch. D. On appeal,

Held: (i) the payments of interim income and revenue payments received by the company were assessable under Case VI of Sch. D for the reasons stated in paras. (ii) and (iii) below, but were assessable as income of the year of assessment in which they were received (*Leigh v. Inland Revenue Comrs.* (1928), 11 Tax Cas. 590, and *Grey v. Tiley* (1932), 16 Tax Cas. 414 applied on this latter point).

(ii) the interim income payments under s. 22 (2) of the Coal Act, 1946, were taxable under Case VI of Sch. D because, though calculated as a sum equal to interest at a prescribed rate on the compensation, they were not themselves such interest (*I.R. Comrs. v. Butterley Co., Ltd.*, [1956] 2 All E.R. 197, applied) and were not "annual" payments within r. 1 (a) of Case III of Sch. D as they lacked the necessary quality of recurrence (see p. 106, letters E to G, post).

(iii) the revenue payments received under s. 22 (3) of the Coal Industry Nationalisation Act, 1946, and s. 1 (2) of the Coal Industry (No. 2) Act, 1949, were not within r. 1 (a) of Case III of Sch. D as they were paid by the Crown (see p. 109, letter E, post), because r. 1 (a) of Case III was co-extensive with r. 19 and r. 21 of the All Schedules Rules and r. 19 of those rules could not apply to the Crown and r. 21 did not so apply as the Crown was not a "person" within that rule (*Madras Electric Supply Corpn., Ltd. v. Boardland*, [1955] 1 All E.R. 753 applied; see p. 107, letter H, and p. 109, letters A to C, post).

(iv) the revenue payments, though outside r. 1 (a) of Case III for the reasons stated at (iii) above, would otherwise have been "annual payments" within that rule for the following reasons—

(a) the revenue payments were made under a binding obligation and the fact that the obligation was a statutory obligation did not exclude their being annual payments (*Smith v. Smith*, [1923] P. 191, and *Inland Revenue Comrs. v. City of London Corpn.*, [1953] 1 All E.R. 1075 applied; see p. 103, letter E, post), and

(b) they had the necessary quality of recurrence implied by the description "annual" (see p. 104, letter D, and p. 105, letter H, post), and

(c) they were pure income profit in the hands of the recipient (see p. 105, letter D, post; dictum of LORD GREENE, M.R., in *Re Hanbury* (1939), 20 A.T.C. at p. 334 applied), it being immaterial that no time for paying the revenue payments was fixed by the Acts of 1946 or 1949 since the revenue payments were, under those Acts, to be made in respect of the years to which the Acts applied (*Cunard's Trustees v. Inland Revenue Comrs.*, [1946] 1 All E.R. 159, applied; see p. 105, letters G and H, post).

- A Per CURIAM: the word "arising" in r. 2 of the Rules Applicable to Case VI of Sch. D must be construed as meaning "received" (see p. 112, letter A, post).

Appeal dismissed on other grounds than those of the court below.

- B [As to annual payments chargeable to tax under Sch. D, see 20 HALSBURY'S LAWS (3rd Edn.) 247, 248, para. 453; and for cases on the subject, see 28 DIGEST 62-67, 316-350.

As to the basis of computation of income under Case VI of Sch. D, see 20 HALSBURY'S LAWS (3rd Edn.) 289, para. 528; and for cases on the subject, see DIGEST Supp.

- C As to chargeability of the Crown to tax and whether the Crown is a "person" within the Income Tax Acts, see 20 HALSBURY'S LAWS (3rd Edn.) 598, 599, para. 1171; and for cases on the subject, see 28 DIGEST 14, 69, and 3rd DIGEST Supp.

For the Income Tax Act, 1918, Sch. D, Case III, r. 1 (a) and Case VI, r. 2, and All Schedules Rules Applicable to Sch. A, B, C, D and E, r. 19 and r. 21, see 12 HALSBURY'S STATUTES (2nd Edn.) 167, 173, 188, 190, and for the corresponding provisions in the Income Tax Act, 1952, s. 123 (1), s. 135 (2), s. 169 and s. 170, see 31 HALSBURY'S STATUTES (2nd Edn.) 116, 132, 162, 165, 166.

- D For the Coal Industry Nationalisation Act, 1946, s. 22, see 16 HALSBURY'S STATUTES (2nd Edn.) 304-306; and for the Coal Industry (No. 2) Act, 1949, see 28 HALSBURY'S STATUTES (2nd Edn.) 1014.]

Cases referred to:

- E (1) *I.R. Comrs. v. Butterley Co., Ltd.*, [1955] 1 All E.R. 891; [1956] Ch. 453; *affd.* H.L., [1956] 2 All E.R. 197; [1957] A.C. 32; 3rd Digest Supp.
- (2) *Hill v. Gregory*, [1912] 2 K.B. 61; 81 L.J.K.B. 730; 106 L.T. 603; 6 Tax Cas. 39; 28 Digest 8, 28.
- (3) *Howe (Earl) v. Inland Revenue Comrs.*, [1919] 2 K.B. 336; 88 L.J.K.B. 821; 121 L.T. 161; 7 Tax Cas. 289; 28 Digest 111, 633.
- F (4) *Smith v. Smith*, [1923] P. 191; 92 L.J.P. 132; 130 L.T. 8; 28 Digest 68, 361.
- (5) *Inland Revenue Comrs. v. City of London Corpn. (as the Conservators of Epping Forest)*, [1953] 1 All E.R. 1075; 117 J.P. 280; 34 Tax Cas. 293, 315; 3rd Digest Supp.
- G (6) *Moss' Empires, Ltd. v. Inland Revenue Comrs.*, [1937] 3 All E.R. 381; [1937] A.C. 785; 1937 S.C. (H.L.) 35; 106 L.J.P.C. 138; 157 L.T. 396; 21 Tax Cas. 264; Digest Supp.
- (7) *Martin v. Lowry, Martin v. Inland Revenue Comrs.*, [1927] A.C. 312; 96 L.J.K.B. 379; 136 L.T. 580; 11 Tax Cas. 297; Digest Supp.
- (8) *Re Hanbury, Coniskey v. Hanbury*, (1939), 20 A.T.C. 333.
- H (9) *Cunard's Trustees v. Inland Revenue Comrs., McPheeters v. Inland Revenue Comrs.*, [1946] 1 All E.R. 159; 174 L.T. 133; 27 Tax Cas. 122; 2nd Digest Supp.
- (10) *Williamson v. Ough*, [1936] A.C. 384; 105 L.J.K.B. 193; 154 L.T. 524; 20 Tax Cas. 194; Digest Supp.
- (11) *Riches v. Westminster Bank, Ltd.*, [1947] 1 All E.R. 469; [1947] A.C. 390; [1948] L.J.R. 573; 176 L.T. 405; 28 Tax Cas. 159; 2nd Digest Supp.
- I (12) *Madras Electric Supply Corpn., Ltd. v. Boarland*, [1955] 1 All E.R. 753; [1955] A.C. 667; 35 Tax Cas. 612, 633; 3rd Digest Supp.
- (13) *Coomber v. Berks. JJ.*, (1883), 9 App. Cas. 61; 53 L.J.Q.B. 239; 50 L.T. 405; 48 J.P. 421; 2 Tax Cas. 1; 28 Digest 14, 69.
- (14) *Constantinesco v. R.*, (1927), 11 Tax Cas. 730; 28 Digest 19, 97.
- (15) *Grey v. Tiley*, (1932), 16 Tax Cas. 414; Digest Supp.
- (16) *Leigh v. Inland Revenue Comrs.*, [1928] 1 K.B. 73; 96 L.J.K.B. 853; 137 L.T. 303; 11 Tax Cas. 590; Digest Supp.

- (17) *Dewar v. Inland Revenue Comrs.*, [1935] All E.R. Rep. 568; [1935] 2 K.B. 351; 104 L.J.K.B. 645; 153 L.T. 357; 19 Tax Cas. 561; Digest Supp. A
- (18) *Try, Ltd. v. Johnson*, [1946] 1 All E.R. 532; sub nom. *Johnson v. Try, Ltd.*, 174 L.T. 399; 27 Tax Cas. 167; 2nd Digest Supp.
- (19) *Lambe v. Inland Revenue Comrs.*, [1934] 1 K.B. 178; 103 L.J.K.B. 69; 150 L.T. 190; 18 Tax Cas. 212; Digest Supp. B
- (20) *Forth Conservancy Board v. Inland Revenue Comrs.*, [1931] A.C. 540; 100 L.J.P.C. 193; 145 L.T. 121; 95 J.P. 160; sub nom. *Inland Revenue Comrs. v. Forth Conservancy Board*, 16 Tax Cas. 103; Digest Supp.
- (21) *Re Sebright, Public Trustee v. Sebright*, [1944] 2 All E.R. 547; [1944] Ch. 287; 113 L.J.Ch. 260; 171 L.T. 82; 2nd Digest Supp. C

Appeal.

The first appellant taxpayer company appealed to the Special Commissioners of Income Tax against directions made on it under s. 21 of the Finance Act, 1922, as extended by s. 14 of the Finance Act, 1939, for the years of assessment 1948-49, 1949-50 and 1950-51 and against the apportionments of the actual income of the company made for each of the three years in consequence of the directions. The sole question for determination was whether, in computing the actual income of the company for the purpose of the apportionments, interim income received by the company under the Coal Industry Nationalisation Act, 1946, and the Coal Industry (No. 2) Act, 1949, should be included in the actual income of the year in which it was received or, as the company contended, of the year or period in respect of which it was paid, it being conceded by the company for the purpose of the hearing before the commissioners that authorities binding on them would preclude them from holding that the sums received were of the nature of capital and should not be included in the company's actual income at all. D

The company carried on the trade of colliery proprietor until Jan. 1, 1947, when its colliery assets vested in the National Coal Board under the Coal Industry Nationalisation Act, 1946. At all material times it was a company to which s. 21 of the Finance Act, 1922, applied and was an investment company within s. 20 (1) of the Finance Act, 1936. From time to time it received payments from the Ministry of Fuel and Power in respect of interim income under the Act of 1946 and, in the case of some of the payments, under that Act and the Coal Industry (No. 2) Act, 1949. The payments were made under deduction of tax and were each accompanied by a letter from the Ministry and a certificate of deduction of tax. Each letter stated that the payment related to a claim by the company for interim income for a stated period. The dates of payment, amounts and periods were as follows: (1) Payment received Aug. 7, 1948, gross amount £9,068, net amount £4,987, for the eighteen months ended June 30, 1948; (2) Jan. 26, 1949, £2,733, £1,503, half year ended Dec. 31, 1948; (3) Sept. 12, 1949, £68, £37, Jan. 1, 1949, to Sept. 12, 1949; (4) Mar. 28, 1950, £1,837, £1,011, year ended Dec. 31, 1949; (5) July 14, 1950, £1,616, £889, half year ended June 30, 1950; (6) Aug. 11, 1950, £5, £3, July 1, 1950, to Aug. 11, 1950; (7) Nov. 13, 1950, £7, £4, July 1, 1950 to Nov. 13, 1950; (8) Feb. 21, 1951, £1,519, £835, half year ended Dec. 31, 1950; (9) May 25, 1951, £1,343, £705, two years ended Dec. 31, 1948; (10) Aug. 9, 1951, £810, £425, half year ended June 30, 1951. E F

Payments (3), (6) and (7) were payments of the interest addition under s. 22 (2) (a) of the Act of 1946 made on the occasions of the payments of partial compensation for transferred assets under s. 21 (1) (b). Payments (1) and (2) were made under s. 22 (3) of the Act of 1946, after deductions of £7 and £86 respectively in respect of adjustments for compensation already satisfied made under reg. 20 of S.R. & O. 1947 No. 1946. The accompanying letters stated: Payment (1): G H I

- A "It should be noted that the gross amount allowed is an instalment subject to audit. Any adjustment necessary will be made in a future payment."

Payment (2):

- B "It should be noted that the gross amount allowed is a provisional instalment subject to audit of the statutory revenue payment. Any adjustments in respect of over-payments or under-payments will be payable forthwith to or by the Minister."

C An adjustment to these payments was made by deducting £1,394 in calculating the gross amount of payment (4). This deduction was referred to as an "over-payment (provisional)", and was based on an estimate of the comparable ascertained revenue, and a further and final adjustment was made by payment (9), the accompanying letter to which stated that the comparable ascertained revenue had been approved by the Minister.

- D Payments (4), (5), (8) and (10) were made under the Coal Industry (No. 2) Act, 1949. In the case of payments (4), (5) and (8), the accompanying letters showed that the payments were calculated with reference to a provisional calculation of the comparable ascertained revenue, and each letter stated:

"It should be noted that where the amount now payable is based on provisional comparable ascertained revenue, any necessary adjustment will be made later, after the comparable ascertained revenue has been finally approved by the Ministry."

- E Payment (10) was based on the comparable ascertained revenue as approved by the Ministry.

- F Payments (4), (5), (8) and (10) were each expressed to be subject to the provision contained in s. 1 (5) of the Act of 1949 to the effect that, if they should exceed the interim income towards satisfaction of which they were paid, the excess would be repayable by the company. The letter accompanying payment (5) showed that, in arriving at the gross sum of £1,616, a deduction was made in respect of interest at three per cent. per annum for the half year in respect of compensation satisfied before June 30, 1950. A footnote to the letter stated that:

- G "Any necessary adjustments as a result of S.I. 1950 No. 967 dated June 12, 1950, which prescribes an interest rate of three per cent. per annum for the period Jan. 1, 1949, to June 30, 1949, and three and a half per cent. per annum for the period July 1, 1949 to June 30, 1950, will be made at a later date."

Adjustments were duly made in computing payment (8).

- H In the company's accounts for the year ended Mar. 31, 1948, there appeared on the credit side of the revenue account the item "Interim income provision (gross) £6,050". In the accounts for the years ended Mar. 31, 1949, 1950 and 1951, the revenue account was credited with "Interim income (net)" "£2,500 7s. 3d.", "£37 4s. 11d." and "£2,741 11s. 8d." respectively.

- I For the purpose of the apportionments under appeal, each of the payments (4), (5), (8) and (10) was treated as forming part of the actual income of the company of the year in which it was so received. These payments were not payable out of profits or gains brought into charge to income tax.

The Crown contended: (i) that these payments were annual payments chargeable to income tax under Case III of Sch. D to the Income Tax Act, 1918, and income tax had been properly deducted therefrom at the time the payments were made at the standard rate of the tax then in force; (ii) that accordingly, by virtue of s. 39 (2) of the Finance Act, 1927, the payments were income of the company for the years in which they were received by the company; (iii) alternatively, that the payments were chargeable to income tax under Sch. C to

the Act of 1918; (iv) alternatively, if the payments were chargeable to income tax under Case VI of Sch. D, that they were to be regarded as income of the company for the year of receipt; and (v) that by virtue of para. 6 of Sch. 1 to the Finance Act, 1922, each of the payments formed part of the actual income of the company for the year in which it was received by the company. The company contended: (i) that the payments were not chargeable to income tax under Sch. C and were not annual payments chargeable under Case III of Sch. D; (ii) that, if chargeable to income tax at all, they were chargeable under Case VI of Sch. D; and (iii) that each payment was income of the period in respect of which it was paid, and that the actual income of the company should be computed accordingly. A B

The commissioners held that the payments were chargeable to income tax under Case VI of Sch. D, and were not chargeable under Case III or under Sch. C. They held further that they formed part of the actual income of the company for the years or other periods for which they were stated to have been paid and accrued from day to day throughout such years or periods. They confirmed the directions under appeal and in due course adjusted the apportionments on the basis of an actual income of: 1948-49 £5,422 14s.; 1949-50 £3,453 15s.; 1950-51 £2,949 3s. On July 31, 1957, HARMAN, J., allowed the Crown's appeal against this determination and held that the payments were chargeable to income tax under Case III of Sch. D and were assessable to income tax for the year in which they were received. The company appealed to the Court of Appeal. C D

The second and third appellant companies each appealed against an order of HARMAN, J., dated July 31, 1957, allowing the Crown's appeal against a determination of the Special Commissioners. The second appellant company, Ramshaw Coal Co., Ltd., appealed against a sub-apportionment, made for 1948-49 under s. 32 of the Finance Act, 1927, among its members of an amount apportioned to it by an apportionment of the income of the first appellant company under s. 21 of the Finance Act, 1922. The third appellant company, Brancepeth Coal Co., Ltd., appealed against a sub-apportionment made for 1948-49 under s. 32 of the Act of 1927, among its members of an amount apportioned to it by the sub-apportionment made on the second appellant company. In each case the question for determination was whether the actual income of the first appellant company was correctly computed for the purpose of the apportionment made on the first appellant company and whether in consequence the amount which was the subject of the sub-apportionment was correctly computed. E F G

F. N. Bucher, Q.C., and P. M. B. Rowland for the companies.

John Pennycuik, Q.C., E. Blanshard Stamp and A. S. Orr for the Crown.

Cur. adv. vult.

Feb. 21. JENKINS, L.J., read the following judgment of the court: The first of these three appeals is brought by the Whitworth Park Coal Co., Ltd. from a judgment of HARMAN, J., dated July 31, 1957, whereby (reversing the determination of the Special Commissioners) he decided in favour of the Crown a question concerning the computation of the actual income of the company for the years 1948-49, 1949-50 and 1950-51 for the purposes of directions and consequential apportionments of the actual income of the company amongst its members given and made with respect to the company under the provisions of s. 21 of the Finance Act, 1922, as amended by s. 14 of the Finance Act, 1939. H I

Down to Dec. 31, 1946, the company, which was under the control of not more than five persons and consequently a company to which the provisions of s. 21 of the Finance Act, 1922, applied, carried on the business of a colliery proprietor. So long as the company continued to trade, the position, to put it very shortly, was that the giving of directions and making of consequential apportionments with respect to the company under s. 21 depended on the discretion of the assessing

A Special Commissioners, such discretion being exercised in the event of its appearing to them that the company had not distributed a reasonable part of its actual income so as to make the amount distributed income of its members for surtax purposes.

B By virtue of the provisions of the Coal Industry Nationalisation Act, 1946 (which we will for brevity term "the Coal Act of 1946"), the colliery assets of the company were on Jan. 1, 1947 (the "primary vesting date" fixed pursuant to s. 5 of the Act) compulsorily transferred to the National Coal Board, and the company became entitled in respect of the assets so transferred to compensation, which became due on the same date subject to the determination of the amount thereof, and also to "interim income" for the period between that date and the date on which such compensation should be fully satisfied.

C The company accordingly became as from the primary vesting date an investment company within the meaning of s. 20 (1) of the Finance Act, 1936, because it had ceased to trade and no longer had any income other than the interim income to which it was entitled under the Coal Act of 1946 (with certain modifications later introduced by the Coal Industry (No. 2) Act, 1949, hereinafter referred to as "the Coal Act of 1949") and which would not, if the company had been an individual, have been earned income as defined in s. 14 (3) of the Income Tax Act, 1918. Accordingly, by virtue of s. 14 of the Finance Act, 1939 (to put it very shortly), the whole of the actual income of the company was to be deemed to be the income of its members irrespective of the amounts of any distributions made, and the assessing Special Commissioners were enjoined to put into operation with respect to the company all the machinery of direction and apportionment contained in s. 21 of the Finance Act, 1922.

E There is no dispute as to the applicability of s. 21 of the Finance Act, 1922, and s. 14 of the Finance Act, 1939. It is moreover accepted by the company that the interim income to which it was entitled under the nationalisation legislation was for tax purposes income and not capital. But the assessing Special Commissioners, in making their apportionments for the three years under appeal, treated each sum received by the company in respect of interim income as income of the company for the year in which it was actually so received, and HARMAN, J., has held that they were right in so doing. The company contends that this method of computation was wrong and claims that (as held by the Special Commissioners who tried the case) each amount received in respect of interim income should be treated as accruing from day to day over the period in respect of which it was paid, and that the proportion of any such amount attributable to each of the three years under appeal should be ascertained on that footing.

G That is the sole question in the appeal. The competing contentions in regard to it are these:—

H A. For the Commissioners of Inland Revenue it is said: (i) that the payments made in respect of interim income were annual payments within the meaning of r. 1 (a) of Case III of Sch. D to the Income Tax Act, 1918, and consequently payable (as they were in fact paid) under deduction of tax at the standard rate in force at the time of payment, as provided by r. 21 of the All Schedules Rules in that Act, with the result that by virtue of s. 39 (2) of the Finance Act, 1927, each such payment was to be deemed to be income of the year in which it was paid; and (ii) that, even if (contrary to their first contention) Case III of Sch. D is inapplicable and recourse must be had to the sweeping up provisions of Case VI, the same result follows, i.e., each payment in respect of interim income must be treated as income of the year in which it was paid.

I B. For the company it is said: (i) that, while the result of applying Case III of Sch. D and r. 21 of the All Schedules Rules would be as claimed by the Commissioners of Inland Revenue, those provisions are not applicable to the payments here in question because (a) their character was not such as to make

them annual payments within the meaning of r. 1 (a) of Case III of Sch. D and r. 21 of the All Schedules Rules; and (b), even if they could in other respects properly be regarded as annual payments within the meaning of those provisions, the application to them of those provisions is excluded by the circumstance that the payer was the Crown as represented by the Minister of Fuel and Power; and (ii) that the appropriate head of charge was Case VI of Sch. D, and that proper assessments under that head would attribute to each year only such proportion of any payment in respect of interim income as would be appropriate on the footing that the amount of such payment was income of the period in respect of which it was paid, and accrued from day to day during that period.

In order to do justice to these contentions it is necessary to refer to the provisions of the Coal Act of 1946, and also to those of the Coal Act of 1949, relating to the right to interim income and the ways in which that right was to be satisfied. By s. 5 (1) of the Coal Act of 1946 the assets compulsorily acquired were to vest in the board on such date as the Minister (i.e., the Minister of Fuel and Power) should by order appoint. That date (as we have already mentioned) was fixed by the Minister as Jan. 1, 1947. By s. 19 of the said Act:

“(1) Compensation in respect of a transfer of transferred interests or of an overhead expenses increase shall be due on the primary vesting date, subject to determination of the amount thereof.

“(2) For the period between the primary vesting date and the date on which any such compensation is fully satisfied, there shall be a right to interim income, to be satisfied in accordance with the provisions of s. 22 of this Act.

“(3) Provision may be made by regulations for authorising the partial satisfaction of such compensation before the determination of the amount thereof has been completed.”

By s. 21 of the same Act compensation in respect of the assets transferred was to be satisfied by the issue of government stock, with certain exceptions (the only one applicable here being, we think, the value attributable to stocks of colliery products and consumable or spare stores) where it was to be satisfied by a money payment. By s. 22 of the same Act:

“(1) The right conferred by sub-s. (2) of s. 19 of this Act to interim income for the period between the primary vesting date and the date of the satisfaction in full of compensation in respect of a transfer of transferred interests, or of an overhead expenses increase, shall be satisfied in accordance with the provisions of this section.

“(2) Subject to the provisions of sub-s. (3) and sub-s. (4) of this section as to the revenue payments therein mentioned,—(a) the said right conferred by sub-s. (2) of s. 19 of this Act shall be satisfied, so far as regards interim income for the period between the primary vesting date and the time when any amount of compensation in respect of a transfer of transferred interests or of an overhead expenses increase is satisfied, by making, in addition to the issue of the stock then issued in satisfaction of that amount of compensation or to the making of the money payment then made in satisfaction of that amount of compensation, as the case may be, a money payment of an amount equal to interest for that period on that amount of compensation at such rate or rates as may be prescribed as respects that period or different parts thereof by order of the Treasury . . .

“(3) The following provisions of this sub-section shall have effect as to the making to colliery concerns, and to subsidiaries within the meaning of Sch. 1 to this Act of such concerns, of payments in respect of each of the two years beginning with the primary vesting date and the first anniversary thereof respectively, that is to say,—(a) a colliery concern or such a subsidiary shall be entitled in respect of each of the said two years to a payment

A of an amount equal to one half of the comparable ascertained revenue of the concern, or of the subsidiary, as the case may be, attributable to activities thereof for which the transferred interests thereof were used or owned; (b) the payments to be made under the last preceding paragraph are in this section referred to as 'revenue payments', and shall be money payments."

B Then sub-para. (c) provides a method of computing comparable ascertained revenue by reference to one of two alternative periods to be selected, to put it shortly, by the company concerned. Then, I think, we can go to sub-s. (4):

C " (4) The provision made by the last preceding sub-section shall be deemed, in the case of any colliery concern or of any such subsidiary, to be in substitution for the provisions of sub-s. (2) of this section, so far as regards additions thereunder for the said two years or any part thereof to compensation for a transfer of transferred interests being compensation attributable to transferred interests of that concern or subsidiary, except as to any excess of the aggregate amount of such additions over the aggregate amount of the revenue payments of that concern or subsidiary.

D " (5) The Minister may by regulations make such provision supplementary to or consequential on the provisions of this section as appears to him to be necessary or expedient, and in particular, but without prejudice to the generality of this sub-section, provision may be made by regulations made thereunder for making adjustments requisite for giving effect to the last preceding sub-section and for making good any underpayment or overpayment to a colliery concern or such a subsidiary which may occur in consequence of the making of additions or revenue payments under this section before all the facts relevant for giving effect to the last preceding sub-section have become ascertainable."

E I think that we can now pass to s. 1 of the Coal Act, 1949. That section provides:

F " (1) The following provisions of this section shall have effect with respect to the making to colliery concerns, and to subsidiaries of such concerns, of payments in respect of the year 1949 and subsequent years towards satisfaction of the right to interim income conferred by sub-s. (2) of s. 19 of the Coal Industry Nationalisation Act, 1946 (hereinafter referred to as 'the principal Act').

G " (2) A colliery concern or a subsidiary of a colliery concern shall, in respect of the year 1949 and in respect of any subsequent year before that in which compensation under the principal Act in respect of the transfer of the transferred interests of the concern or subsidiary is satisfied in full, be entitled to a payment of an amount equal to the amount by which one third of the comparable ascertained revenue of the concern, or of the subsidiary, as the case may be, attributable to activities thereof for which the transferred interests thereof were used or owned exceeds an amount equal to interest for the year in question on the aggregate amount of that compensation satisfied before the end of that year."

H Then there is a provision about the rate of interest, and there is reference to provisions about that in the Coal Act of 1946 to which I have already referred. Then sub-s. (3):

I " (3) A payment to which a colliery concern or a subsidiary of a colliery concern is entitled under the last foregoing sub-section in respect of any year shall be treated for the purposes of para. (a) of s. 22 (2) of the principal Act as being made towards satisfaction of the aggregate of the proportions attributable to that year of amounts which that paragraph requires to be paid as additions to stock issued or money payments made after the

expiration of that year in satisfaction of compensation in respect of transfers of transferred interests of the concern or subsidiary.”

Then sub-s. (5) gives the Minister power to make regulations

“making such provision supplementary to or consequential on the foregoing provisions of this section as appears to him to be requisite or expedient, and in particular, but without prejudice to the generality of this sub-section, provision may be made by regulations made thereunder for requiring the repayment to the Minister of any amount by which a payment made under this section in respect of any year to a colliery concern or subsidiary may exceed the aggregate towards satisfaction of which that payment is under sub-s. (3) of this section to be treated as being made, and as to the manner of recovery of that amount and the disposal of sums recovered in or towards satisfaction of repayment thereof:

“Provided that in a case where provision is made for recovering the excess or any part thereof by way of deduction from compensation in respect of transfers of transferred interests of the concern or subsidiary, provision shall be made for setting off against the deduction the aggregate of—(a) an amount which bears to the amount of the deduction the same proportion that the amount of income tax ultimately borne by the concern or subsidiary for the income tax year the beginning of which falls within the year in respect of which the excess arises bears to the amount which its total income for income tax purposes for that income tax year would be if it were computed without regard to any relief or deduction in respect of profits tax; and (b) an amount which bears to the amount of the deduction the same proportion that the amount of profits tax ultimately borne by the concern or subsidiary (as determined in accordance with rules laid down by the regulations) in respect of the aggregate (as so determined) of its profits which are attributable to the year in respect of which the excess arises bears to that aggregate ”.

Then sub-s. (6):

“(6) Nothing in the last foregoing sub-section or in regulations made thereunder shall be construed as implying that a payment made under this section to a colliery concern or subsidiary, or a part of any such payment, is for any purpose anything but a payment of income to the concern or subsidiary, or as precluding the distribution as income of a payment so made.”

It will be seen that these provisions prescribe three methods of satisfying the right to interim income, viz.:—(i) under s. 22 (2) (a) of the Coal Act of 1946, by making in respect of the period from the primary vesting date to the time of payment or satisfaction of any compensation, in addition to the compensation then paid or satisfied, a money payment of an amount equal to interest for that period on that amount of compensation at the rate or rates prescribed by the Treasury: (ii) under s. 22 (3) of the same Act, in respect of each of the calendar years 1947 and 1948, by a revenue payment equal to one half of the comparable ascertained revenue of the concern attributable to the activities thereof for which the transferred interests thereof were used or owned, this mode of providing for interim income being by sub-s. (4) in substitution for the provisions of sub-s. (2) so far as regards additions thereunder for those two years in respect of like subjects of compensation, except as to the excess of the aggregate amount of such additions over the aggregate amounts of the revenue payments made in the same case; and (iii) under s. 1 (2) of the Coal Act of 1949, in respect of the year 1949 and subsequent years, by making, in respect of each year down to the year in which the relevant compensation was satisfied in full, a modified form of revenue payment consisting of an amount equal to the excess of one-third of the comparable ascertained revenue over an amount equal to interest for the year in

- A question (at the rate or rates referred to in s. 22 (2) (a) of the Coal Act of 1946) on the aggregate amount of that compensation satisfied before the end of that year, payments under s. 1 (2) of the Coal Act of 1949 in respect of any year being treated (by sub-s. (3) of the same section) as made towards satisfaction of the proportions attributable to that year of the additions in respect of interim income falling to be made under s. 22 (2) (a) of the Coal Act of 1946 to compensation paid or satisfied after the end of that year, with power for the Minister under s. 1 (5) of the Coal Act of 1949 to provide by statutory instrument (*inter alia*) for the repayment to him of any amount whereby a payment under that section exceeded the aggregate towards satisfaction of which such payment was under sub-s. (3) to be treated as being made.

- The right to interim income and the three methods of satisfying it under the Coal Acts of 1946 and 1949 being as above described, the first matter for consideration is whether payments made towards satisfaction of such right in the three ways prescribed or any of them were of such a nature that (apart from the fact that the payer was a Minister of the Crown) they can properly be classed as annual payments within the meaning of r. 1 (a) of Case III of Sch. D.

- The income tax provisions directly relevant to this point appear to be:
- (i) paragraph 1 of Sch. D to the Income Tax Act, 1918, which provides that:

“Tax under this schedule shall be charged in respect of . . . (b) All interest of money, annuities, and other annual profits or gains not charged under Sch. A, B, C or E, and not specially exempted from tax.”

- (ii) paragraph 2 of the same schedule, which provides that:

- “Tax under this schedule shall be charged under the following cases respectively; that is to say . . . Case III.—Tax in respect of profits of an uncertain value and of other income described in the rules applicable to this Case . . . and subject to and in accordance with the rules applicable to the said Cases respectively.”

- (iii) rule 1 of the Rules Applicable to Case III of Sch. D which provides that:

- “The tax shall extend to—(a) any interest of money, whether yearly or otherwise, or any annuity, or other annual payment, whether such payment is payable within or out of the United Kingdom, either as a charge on any property of the person paying the same by virtue of any deed or will or otherwise, or as a reservation thereout, or as a personal debt or obligation by virtue of any contract, or whether the same is received and payable half-yearly or at any shorter or more distant periods.”

- (iv) the Miscellaneous Rules applicable to Sch. D, r. 1, which provides that:

- “Tax under this schedule shall be charged on and paid by the persons or bodies of persons receiving or entitled to the income in respect of which tax under this schedule is hereinbefore directed to be charged.”

- (v) rule 21 (1) of the All Schedules Rules Applicable to Sch. A, B, C, D and E, which provides that:

- “Upon payment of any interest of money, annuity, or other annual payment charged with tax under Sch. D, or of any royalty or other sum paid in respect of the user of a patent, not payable, or not wholly payable, out of profits or gains brought into charge, the person by or through whom any such payment is made shall deduct thereout a sum representing the amount of the tax thereon at the rate of tax in force at the time of the payment.”

Reference should also be made to para. 6 of Sch. 1 to the Finance Act, 1922, which provides that, in computing the actual income from all sources of a company for any year or period for the purposes of s. 21 of that Act:

"... the income from any source shall be estimated in accordance with the provisions of the Income Tax Acts relating to the computation of income from that source; except that the income shall be computed by reference to the income for such year or period as aforesaid and not according to an average of more than one year or by reference to any year or period other than such year or period as aforesaid."

So far as we are aware there has been no reported case concerning the assessment to income tax of interim income under the Coal Acts of 1946 and 1949, but the relevant provisions of those enactments have been the subject of close consideration in this court and the House of Lords in *I.R. Comrs. v. Butterley Co., Ltd.* (1) ([1955] 1 All E.R. 891; [1956] 2 All E.R. 197), in relation to profits tax. The effect of that decision will be sufficiently indicated by the following statement from the headnote of a report ([1957] A.C. 32). These sums were not to be included in the computation of the company's profits for the purposes of assessment to profits tax. To bring a payment within the scope of profits tax as "profits arising in each accounting period from any trade or business" it was not enough that it should be income derived from the property of the company without regard to the question whether it arose from a trade or business carried on by the company during the relevant period. The payments, though income, were not "income received from investments or other property" within the meaning of para. 7 of Sch. 4 to the Finance Act, 1937. Neither was the capital asset (viz., the right to receive compensation) an asset so related to any trade or business carried on by the company that it fell within para. 7, nor (if it were) were the payments in question "income" of that asset.

Counsel for the company cited a number of passages from the judgments and speeches in this court and the House of Lords in *I.R. Comrs. v. Butterley Co., Ltd.* (1). It will suffice to refer to the following observations from the speech of LORD RADCLIFFE. LORD RADCLIFFE said ([1956] 2 All E.R. at p. 205):

"In my opinion, the determining factor is the very special nature of the receipts involved. The Coal Industry Nationalisation Act, 1946, legislated for a revolution in the coal industry of this country, and in the system of ownership, management and working on which the industry was based. It was inevitable that the far-reaching disturbance of rights which this involved should require a period of several years for the adjustment of its consequences. These interim income payments which are now in question are the product of that disturbance and adjustment, and it does not seem to me at all surprising that they cannot well be related to any of those other kinds of receipt which normally come into the accounts of a company conducting a trade or business. They are *sui generis* and it would, I think, lead to confusion if they were described in any terms except those which are strictly applicable to their own special circumstances."

LORD RADCLIFFE said (*ibid.*, at p. 208):

"I said before that I regard these payments as *sui generis*. The main feature of them which impresses me is that they were not income which arose from any disposable source under the company's control."

There have been many judicial pronouncements as to the scope of r. 1 (a) of Case III and the following propositions can be regarded as established:—

(i) To come within the rule as an "other annual payment", the payment in question must be *eiusdem generis* with the specific instances given in the shape of interest of money and annuities. See *Hill v. Gregory* (2) ((1912), 6 Tax Cas. 39, per HAMILTON, J., at p. 47); *Earl Howe v. Inland Revenue Comrs.* (3) ((1919), 7 Tax Cas. 289, per SCRUTTON, L.J., at p. 303). Counsel for the company submitted that this requirement could not well be fulfilled by the interim income here in question consistently with LORD RADCLIFFE's description

A of it in *I.R. Comrs. v. Butterley Co., Ltd.* (1) as sui generis. He said in effect that, if interim income under the Coal Acts of 1946 and 1949 was in truth sui generis, it could not be ejusdem generis with any other form of payment, and that the natural home of sui generis income was Case VI of Sch. D. We can attach no great weight to this line of argument, for LORD RADCLIFFE was, as we think, directing himself to the peculiarity of interim income as income, not arising from
B any trade or business or from any contractual obligation as from any income-bearing asset, but payable simply because (as he put it [1956] 2 All E.R. at p. 205) "the nationalisation statute decreed that" it "should be paid". The fact that it is sui generis in these respects does not appear to us to preclude its inclusion in r. 1 (a) of Case III if it possesses the essential characteristics on which the application of the rule depends, which are in effect those appearing from the
C further propositions stated below.

(ii) The payment in question must fall to be made under some binding legal obligation as distinct from being a mere voluntary payment. See *Smith v. Smith* (4) ([1923] P. 191, per LORD STERNDALÉ, M.R., at p. 197 and per WARRINGTON, L.J., at p. 202). That requirement is clearly satisfied in the present case.

D (iii) The fact that the obligation to pay is imposed by an order of the court and does not arise by virtue of a contract does not exclude the payment from r. 1 (a) of Case III.

"The words in Case III, 1 (a) 'whether such payment' and so forth do not in my opinion limit the annual payments to those there mentioned, but merely provide that they at all events shall be included."

E See per WARRINGTON, L.J., in *Smith v. Smith* (4) (ibid., at p. 201) and LORD STERNDALÉ, M.R., to the same effect (at p. 197). We should add a reference to *Inland Revenue Comrs. v. City of London Corpn. (as the Conservators of Epping Forest)* (5) ([1953] 1 All E.R. 1075), where a payment made under an Act of Parliament in the shape of the Epping Forest Act, 1878, was held to be an annual payment within r. 1 (a) of Case III. It would seem to follow that the interim
F income in the present case is not excluded from the application of the rule by the circumstance that the obligation under which it is paid is a statutory obligation.

(iv) The payment in question must possess the essential quality of recurrence implied by the description "annual". But that description has been given a broad interpretation in the authorities. For example, in *Smith v. Smith* (4), WARRINGTON, L.J., said ([1923] P. at p. 201):

G "Again the fact that the payment is to be made weekly does not prevent it from being annual provided the weekly payments may continue beyond the year."

See also the case in the House of Lords of *Moss' Empires, Ltd. v. Inland Revenue Comrs.* (6) ([1937] 3 All E.R. 381), where the payments in question fell to be made
H under a guarantee by the appellants of the payment of a fixed preferential dividend at a specified rate on the ordinary shares of another company, and were therefore in their nature contingent. LORD MACMILLAN said (ibid., at p. 385):

I "At your Lordships' Bar it was argued for the appellant company that the payments were not annual payments, inasmuch as they were casual, independent, not necessarily recurrent, and throughout subject to a contingency. This argument commended itself to LORD MONCRIEFF, but I am unable to accept it. There was a continuing obligation, extending over each and all of the five years, to make a payment to the trustees for the shareholders in the event of the company earning no profits, or insufficient profits. The fact that the payments were contingent and variable in amount does not affect the character of the payments as annual payments. Rule 21 is not primarily a charging section, but is part of the machinery of collection. The charging enactment is to be found in Sch. D, Case III, r. 1, whereby

tax is imposed on: 'any interest of money, whether yearly or otherwise, or any annuity, or any other annual payment . . . payable . . . as a personal debt or obligation by virtue of any contract.' I am of opinion that the payments in question fall within these words."

LORD MAUGHAM said (*ibid.*, at p. 386):

"It is, I think, to be noted that we are not concerned here with the case of annual profits or gains arising from a trade, as to which the decision in *Martin v. Lowry* (7) ((1927), 11 Tax Cas. 297) would be decisive to show that, in that context, 'annual' means 'in any one year'. In r. 21, 'annual' must be taken to have, like interest on money, or an annuity, the quality of being recurrent, or being capable of recurrence. The payments we are concerned with were to continue for five years, subject to their being required to make up the guaranteed annual dividend, and were plainly payments intended to supplement, so far as necessary, the income of the recipient company during each of the years in question. In these circumstances, I am of opinion that they had the necessary quality of recurrence, and are within the terms of r. 21. In so deciding, I apprehend that your Lordships are not travelling in any way beyond the existing decisions with regard to 'annual payments' in that rule."

Having regard to these authorities, we cannot view the revenue payments in the present case as lacking in the necessary quality of recurrence. Those falling to be made under s. 22 (3) of the Coal Act of 1946 were expressly required to be made

" . . . in respect of each of the two years beginning with the primary vesting date and the first anniversary thereof respectively . . . ",

and it is plain that the amount of the revenue payment in respect of each of those two years was to be the same. Those falling to be made under s. 1 of the Coal Act of 1949 were expressly required to be made in respect of the year 1949 and subsequent years. It seems to us that the requirement of recurrence is amply satisfied here. We feel more difficulty as regards the interim income payable under s. 22 (2) (a) as an addition to the compensation satisfied on any occasion and comprising a sum equal to interest at the prescribed new rate or to the compensation then payable, and will return to that relatively small matter later in this judgment.

(v) The payment in question must be in the nature of a "pure income" profit in the hands of the recipient. By way of authority for this proposition we need only refer to *Earl Howe v. Inland Revenue Comrs.* (3) where SCRUTTON, L.J., said (7 Tax Cas. at p. 303):

"It is not all payments made every year from which income tax can be deducted. For instance, if a man agrees to pay a motor garage £500 a year for five years for the hire and upkeep of a car, no one suggests the person paying can deduct income tax from each yearly payment. So, if he contracted with a butcher for an annual sum to supply all his meat for a year, the annual instalment would not be subject to tax as a whole in the hands of the payee, but only that part of it which was profits",

and to *Re Hanbury, Coniskey v. Hanbury* (8) ((1939), 20 A.T.C. 333), where LORD GREENE, M.R., said (*ibid.*, at p. 334):

"There are two classes of annual payments which fall to be considered for income tax purposes."

Then I think there is a misprint. I think it should read:

"There is, first of all, that class of annual payment which the Acts regard and treat as being pure income profit of the recipient [and those words are

A repeated by mistake] undiminished by any deduction. Payments of interest, payments of annuities, to take the ordinary simple case, are payments which are regarded as part of the income of the recipient and the payer is entitled in estimating his total income to treat those payments as payments which go out of his income altogether. The class of annual payment which falls within that category is quite a limited one. In the other class there stand a number of payments, none the less annual, the very quality and nature of which make it impossible to treat them as part of the pure profit income of the recipient, the proper way of treating them being to treat them as an element to be taken into account in discovering what the profits of the recipient are."

C We should add that the payments held in *Earl Howe v. Inland Revenue Comrs.* (3) not to be within the provisions corresponding to r. 1 (a) of Case III of Sch. D and r. 21 of the All Schedules Rules consisted of premiums covenanted to be paid on certain policies of insurance effected in connexion with a mortgage and that the payments similarly excluded in *Re Hanbury* (8) were payments in respect of the use of certain chattels. It seems to us that the interim income payments in the present case were what LORD GREENE, M.R., termed "pure income profit" in *Re Hanbury* (8). Counsel for the company argued the contrary on the ground that the company was put to expense in the shape of the cost of the work necessary to be done by or on behalf of the company in connexion with the quantification of the compensation. But we do not see why this expense should prevent the interim income from being "pure income profit" in the sense intended by the Master of the Rolls in that case. So far as attributable to the interim income as distinct from the compensation itself, it was expense incurred in fixing the amount of the annual payment to be made, and not expense to be set against the annual payment as representing the cost of earning it, so as to convert it from an annual payment within r. 1 (a) into a mere element in the ascertainment of a balance of profit. If a continuing partner agreed to pay an outgoing partner an annuity based on the average profits of the partnership business for the last three years, the outgoing partner to pay the cost of ascertaining the amount, we apprehend that the outgoing partner could not claim that the annuity was prevented by his expenditure in ascertaining its amount from being in his hands pure income profit.

G Counsel for the company raised various other points, in addition to those already indicated, against the inclusion of interim income under the Coal Acts of 1946 and 1949 in the category of annual payments within r. 1 (a) of Case III of Sch. D. He said that no time was fixed for payment save in so far as payments under s. 22 (2) (a) of the Coal Act of 1946 fell to be made at the same time as the payment or satisfaction of the relative compensation. We do not regard this as material. The revenue payments under both Acts were to be made in respect of each of the years to which the relevant provisions of the Acts respectively applied. An obligation to pay a given sum in respect of each of a series of years implies in the absence of some provision to the contrary that the payment in question is to be made yearly, and an obligation in those terms would to our minds clearly possess the quality of recurrence required by the rule. In *Cunard's Trustees v. Inland Revenue Comrs.* (9) ([1946] 1 All E.R. 159), payments made from time to time under a discretionary power conferred on trustees were held to fall within r. 1 (a) of Case III of Sch. D.

Counsel for the company further took the point as to the payments to be made under s. 22 (2) (a) of the Coal Act of 1946 that their amount was variable at the will of the payer, inasmuch as the Treasury was to prescribe the rate or rates of interest by reference to which those payments were to be quantified. We think this point is met by *Cunard's Trustees v. Inland Revenue Comrs.* (9), where the amounts of the payments depended on the discretion of the trustees.

Counsel for the company also submitted that the revenue payments under the Coal Act of 1949 were not annual payments within the rule because under that Act the recipient might be called on to repay some part of the amounts received in the event of his turning out to have received more than the prescribed aggregate amount. We think *Williamson v. Ough* (10) ((1936), 20 Tax Cas. 194), is so far as it goes against him, but it dealt with provisions in a will for the recoupment to capital of payments made thereout to beneficiaries on account of income which, in the view of the House of Lords, did not impose on the beneficiaries a personal obligation to repay. Obviously a mere series of loans would not be annual payments within the meaning of the rule, but we hardly think a contingent obligation to repay such as we are concerned with here would suffice to exclude the payments in question from the operation of the rule. However that may be, we think this point is concluded against counsel for the company by s. 1 (6) of the Coal Act of 1949, which with reference inter alia to the provisions as to repayment contained in sub-s. (5) says this (I have already referred to it):

“ Nothing in the last foregoing sub-section or in regulations made thereunder shall be construed as implying that a payment made under this section to a colliery concern or subsidiary, or a part of any such payment, is for any purpose anything but a payment of income to the concern or subsidiary, or as precluding the distribution as income of a payment so made.”

We do not think the provisions of s. 22 (5) of the Coal Act of 1946 as to repayment, which are confined to overpayments made owing to mistakes of fact, affect the matter.

Returning to the interim income provided for by s. 22 (2) (a) of the Coal Act of 1946, we would observe that this interim income, though calculated as a sum equal to interest at the prescribed rate on the compensation to which it is added, is not described as interest of, or interest on, the compensation, and was held by the House of Lords in *I.R. Comrs. v. Butterley Co., Ltd.* (1) not to be such. It cannot therefore well be brought within r. 1 (a) of Case III of Sch. D as “ interest of money ”. Accordingly, we do not think that it is covered by *Riches v. Westminster Bank, Ltd.* (11) ([1947] 1 All E.R. 469), where interest on damages, although paid uno flatu with them, was within the rule as being “ interest of money ”. If it is not interest of money, is it at all events an “ annual payment ” for this purpose ? With some doubt we conclude that it was not. It is true that it is calculated at an annual rate, but the section requires it to be paid, as regards each item of compensation with reference to which it is payable, at the same time as and by way of addition to the compensation in question. We find difficulty in discerning here the relevant quality of recurrence and therefore conclude that this relatively small part of the interim income with which this case is concerned is a proper subject of tax under Case VI of Sch. D.

For the reasons we have endeavoured to state we conclude that, apart from the question whether r. 1 (a) of Case III of Sch. D and r. 21 of the All Schedules Rules have any application at all where, as here, the payer is a Minister of the Crown, the revenue payments received by the company under the Coal Acts of 1946 and 1949 would be taxable as annual payments under r. 1 (a) of Case III of Sch. D and subject accordingly to r. 21 of the All Schedules Rules, whereas the payments of interim income received by the company under s. 22 (2) (a) of the former Act are taxable under Case VI.

The next point for consideration is whether a payment made by a Minister of the Crown can fall within r. 1 (a) of Case III of Sch. D and r. 21 of the All Schedules Rules applicable to Sch. A, B, C, D and E. I have already referred to para. 1 of the rule. Paragraphs (2), (2A) and (2B) added to r. 21 of the All Schedules Rules in the Income Tax Act, 1918, by the Finance Act, 1927, s. 26, are in these terms:

A “(2) Where any such payment as aforesaid is made by or through any person, that person shall forthwith deliver to the Commissioners of Inland Revenue, for the use of the Special Commissioners, an account of the payment, or of so much thereof as is not made out of profits or gains brought into charge, and of the tax deducted out of the payment or out of that part thereof, and the Special Commissioners shall assess and charge
B the payment of which an account is so delivered on that person.

“ (2A) The Special Commissioners may, where any person has made default in delivering an account required by this rule, or where they are not satisfied with the account so delivered, make an assessment according to the best of their judgment, and if any person neglects or refuses to deliver an account so required, he shall forfeit the sum of £100 over and above the tax chargeable.
C

“ (2B) All the provisions of the Income Tax Acts relating—(a) to persons who are to be chargeable with income tax and to income tax assessments; (b) to appeals against such assessments; (c) to the collection and recovery of income tax; (d) to cases to be stated for the opinion of the High Court,
D

“ shall, so far as they are applicable, apply to the charge, assessment, collection and recovery of income tax under this rule, and the Special Commissioners shall, for the purpose of an assessment under this rule, have any powers of a surveyor, and, for the purpose of the representation of the Crown before the Special Commissioners on any appeal under this rule, any person nominated in that behalf by the Commissioners of Inland Revenue shall have all such powers as a surveyor has at and upon the determination of an appeal.”
E

It will be observed that under para. (2) the person by or through whom the relevant payment is made is enjoined to deliver an account of the payment and of the tax deducted thereout and the Special Commissioners are enjoined to assess and charge the payment of which an account is so delivered on that person. It will be observed further that under para. (2A) the Special Commissioners may make an estimated assessment on any person who has made default in delivering the prescribed account and any person who neglects or refuses to deliver the prescribed account is to forfeit £100 over and above the tax chargeable. Finally, it will be observed that the provisions of the Income Tax Acts as to the collection and recovery of tax applied by para. (2B) to tax under the rule include
F s. 169 (1) of the Income Tax Act, 1918, which provides that:

“ Any tax charged under the provisions of this Act may be sued for and recovered . . . from the person charged therewith in the High Court as a debt due to the Crown . . . ”
G

In view of these provisions we cannot construe the word “ person ” in r. 21 as including the Crown. The obligation to deduct tax imposed by para. (1) and the other obligations and penal provisions laid on the person by or through whom the payment is made by paras. (2), (2A) and (2B) seem to us to show quite clearly that the word “ person ” in the rule is not to be construed as including the Crown.
H

This conclusion, we think, accords in its result with the views expressed in the House of Lords in *Madras Electric Supply Corpn., Ltd. v. Boarland* (12) ([1955] 1 All E.R. 753). The actual decision in that case was that the words
I

“ If at any time . . . any person succeeds to any trade . . . which until that time was carried on by another person ”

in r. 11 (2) of Cases I and II of Sch. D included the case of succession by the Crown, because the rule did not operate to charge the person succeeding with any tax. But the principles underlying the immunity of the Crown from tax imposed by any statute were discussed, and there was some divergence of opinion amongst their Lordships on that subject. LORD REID and LORD MACDERMOTT preferred

the view that the word "person" in a provision imposing tax on the "person" referred to should as a matter of construction be held not to include the Crown, but that there was no reason for denying the word "person" its ordinary meaning (which would include the Crown) in a provision which did not operate to impose any tax on the person referred to. LORD KEITH of AVONHOLM on the other hand preferred the view that the word "person" must be construed as including the Crown even in a charging provision but that, where the effect of that construction would be to charge the Crown with tax, the royal prerogative operated to exempt the Crown from its application.

LORD TUCKER said this (*ibid.*, at p. 763):

"My Lords, I agree with my noble and learned friend, LORD TUCKER, that an historical investigation of the true nature of the royal prerogative or its precise impact on parliamentary legislation. It is beyond dispute that the Income Tax Acts do not operate to charge the Crown with payment of tax—in other words, the immunity derived from the prerogative has not been affected by express words or by necessary implication. This being the position, I can see no reason why the word 'person' in those parts of the Acts which do not impose a charge to tax should be construed otherwise than in its ordinary and natural meaning, which clearly includes the Crown."

LORD OAKSEY said (*ibid.*, at p. 757):

"My Lords, I agree with my noble and learned friend, LORD TUCKER, that it is unnecessary in this case to decide whether the Crown's admitted immunity from taxation depends on the construction of the statute or arises from the prerogative in some other way",

and he concluded his speech thus (*ibid.*):

"The words 'the tax payable for all years of assessment by the person succeeding' must, I think, be construed to mean the tax, if any, and not to deprive the taxpayer of balancing allowances to which he would have been entitled because his successor is not taxable."

Whether the immunity of the Crown is founded on construction, or on prerogative overriding construction, the result appears to us to be the same, viz., that the charging provisions of Taxing Acts do not extend to the Crown unless the Crown is included therein by express terms. The only possible difference might be that, if the exemption is assigned to prerogative, it is arguable that the Crown could submit to be bound by waiver. No such argument was, however, addressed to us, and we find it difficult to hold that categorical provisions such as those here in question, couched in language which is in terms appropriate to taxpayers and taxpayers only, are to be considered as binding on the Crown unless and until the Crown asserts the prerogative, so that the Crown can elect to be bound or not by asserting or refraining from the assertion of the prerogative, and having asserted the prerogative once more become bound by waiving it. We think that, whether construction or prerogative is the true basis of the immunity, the result must be that the Crown is excluded *ab initio* from the application of provisions such as those now under consideration.

We should add a reference to *Coomber v. Berks. JJ.* (13) ((1883), 2 Tax Cas. 1), where LORD WATSON said (*ibid.*, at p. 21):

"The exemption of the Crown from the incidence of rating statutes is a general privilege, and is nowise dependent upon the local or imperial character of the rate. It takes effect in all cases when the Crown is not named in the statute, or, I should prefer to say, in all cases where the enactments do not take away the privilege, either in express terms or by plain and necessary implication."

- A In *Constantinesco v. R.* (14) ((1927), 11 Tax Cas. 730), the House of Lords, in refusing to entertain the contention that r. 21 did not apply to the Crown because it had been raised too late, said nothing to suggest that, if it had been raised in time, it might not have succeeded. Rule 19 and r. 21 of the All Schedules Rules on the one hand and r. 1 (a) of Case III of Sch. D on the other are co-extensive, so that everything to which r. 1 (a) applies must also fall within r. 19 or r. 21, and
- B nothing can fall within r. 1 (a) unless it falls either within r. 19 or within r. 21. Rule 19, which deals with interest annuities, etc., payable wholly out of profits or gains brought into charge to tax, cannot apply to the Crown, because the Crown not being liable to tax has no profits or gains answering that description. This suggests that the complementary provisions of r. 21 are similarly limited in their application to persons other than the Crown. Moreover, r. 21 contemplates that
- C a person to whom it applies may have some profits or gains brought into charge and make payments partly out of such profits or gains and partly otherwise, a position which for the same reason could not arise in the case of the Crown.

It may further be noted that certain payments out of public funds are separately provided for in the Rules Applicable to Case III of Sch. D, which indicates that r. 1 (a) was not intended to include them. Reference may also be

D made, e.g., to the special machinery provided in Sch. C to deal with the deduction of tax from various kinds of payments made out of the public revenue. One may also contrast with the Coal Acts of 1946 and 1949 the special provisions as to tax which are to be found in s. 10 and s. 23 of the Transport Act, 1947, and s. 11 and s. 28 of the Electricity Act, 1947.

- E For these reasons we conclude that the revenue payments with which this case is concerned, while otherwise possessing the characteristics requisite for their inclusion in r. 1 (a) of Case III of Sch. D, are excluded from that rule by the circumstance that the payer is the Crown represented by one of Her Majesty's Ministers. It follows in the view we take that the whole of the interim income payments fall within Case VI of Sch. D, and it only remains to consider whether
- F such payments are nevertheless, as contended by counsel for the Crown, taxable as income of the years in which they were received, or on the other hand are, as contended by counsel for the company, to be treated as accruing from day to day over the period in respect of which they were paid, the amount attributable for tax purposes to each of the three years under appeal being ascertained on that footing.

Case VI of Sch. D comprises:

- G "Tax in respect of any annual profits or gains not falling under any of the foregoing Cases, and not charged by virtue of any other schedule."

Rule 2 of the Rules Applicable to Case VI provides that:

- H "The computation shall be made, either on the full amount of the profits or gains arising in the year of assessment, or according to an average of such a period, being greater or less than one year, as the case may require . . ."

- I Counsel for the Crown relied on the general principle that, for income tax purposes, a payment in the nature of income must be treated as income of the year in which it is received. He admitted that exceptions to the general rule were to be found in cases involving the assessment of the profits of a trade or profession under Case I or Case II, but claimed that no similar exception existed where, as here, the receipt in question is in the nature of a pure income profit as distinct from an element to be brought into computation for the purpose of arriving at a balance of profits and gains.

Counsel for the Crown referred to the judgment of ROWLATT, J., in *Grey v. Tiley* (15) ((1932), 16 Tax Cas. 414), where the taxpayer had become entitled to a commission in 1920-21 and received only part of it in that year and the balance in subsequent years and ROWLATT, J., held that, for the purposes of tax under

Case VI, the income arose when the payments on account of the commission were received. ROWLATT, J., said this (*ibid.*, at p. 422):

"Now the position that the Solicitor-General takes up, as I understand it, is this. He does not contend that at the end of the year, in this case, 1920-21, there was a right on the part of the Revenue to assess this gentleman to this tax because he earned the money. I take it he does not say that, and it would be very remarkable if that was the law because it would mean that a man was taxed before he had got anything to pay it out of. As I understand the position, and this is what I am addressing myself to all the time, the position taken is this, that if and when the money is paid, then arises the right to assess and that right, then, relates back to the year when the money was earned. I am bound to say, I think, that it strikes one as a somewhat curious proposition, looking at the Special Case which I have referred to, that when the end of the year comes it becomes ruled out and the question is whether the accounts ought to be rectified or anything of that kind. When the end of the year comes is it not the case that a man either has or has not incurred tax for that year? It seems to me that a very great confusion and very great difficulty arises if, as overdue payments of interest on foreign securities or profits of this kind fall due, a series of back assessments in respect of back years are to be made, not because there is a mistake about what ought to have been assessed in that year but because, by relation back, the facts of that year have become different facts afterwards, because that is what it must mean. I do not myself feel that that is right but I think in this case I really am bound, for what it is worth, by my own decision in *Leigh v. Inland Revenue Comrs.* (16) ((1928), 11 Tax Cas. 590). The whole thing may, of course, be opened elsewhere but I think I am really bound by my own decision in that case. That was a clean case. It was the case of a man who had bonds and had bought them, it does not matter whether he bought them or not but he had them, on which there were many years of arrears of interest. They were foreign bonds or colonial bonds but an agent paid them in this country and, therefore, they were not taxed as foreign securities but they were taxed under the special provisions of the Act, which I need not refer to, by a section dealing with the matter and were liable to suffer deduction of the tax in force at the date of payment. Those six years of arrears were paid at once and the tax was deducted at the rate of the year of payment. That has no significance because, even if they fall into the six income tax years by reason of the provisions which I have indicated, the rate of tax ought to be the rate of tax in the year of payment. That is artificially provided for by the legislature. That does not help the argument, but without the help of that decision I came to say this, that for super-tax purposes he must be held to have received all those instalments of interest in one year. The struggle in that case was—Mr. King was the struggler—to put them back to the previous years by virtue of the word 'receivable', just as here the struggle is to put them back by virtue of the word 'arising'. I said in that case that 'receivable' did not affect the matter at all, but the substance of the thing was that I thought and held that those receipts must be treated as all appertaining—I used that word—to the year in which they were actually received. I am bound to say that I think I ought to follow that in this case, though I still remain of the opinion independently that in dealing with these matters I want it to be understood that I say nothing more than this, that in dealing with these casual profits coming under Case VI, you must look at the time when the casual profits come in and not go back to the year *ex post facto* in which the contract was made and when the profits subsequently come in."

Counsel for the Crown also referred to *Dewar v. Inland Revenue Comrs.* (17) ([1935] All E.R. Rep. 568) where tax was claimed on unpaid interest on a legacy

A and it was held that, inasmuch as the interest in question had not been received, it was not chargeable to tax. LORD HANWORTH, M.R., said this (*ibid.*, at p. 575):

B “Then I come to *Leigh v. Inland Revenue Comrs.* (16), in which ROWLATT, J., whose experience and knowledge of the Income Tax Acts was quite unrivalled, says ([1928] 1 K.B. at p. 77): ‘It is to be remembered that for income tax purposes “receivability” without receipt is nothing. Before a good debt is paid there is no such thing as income tax upon it’. I agree with those words. It appears to me that the reason why you make up the return for the particular year is that you look to see in the course of that twelve months what has been received, and it may be that a good debt will be paid in a subsequent twelve months and not in the twelve months in respect of which you are making your declaration, and you cannot anticipate that the money will come in in its proper place in the following twelve months. I think ROWLATT, J., was right in saying that for income tax purposes receivability without receipt is nothing.”

C We need not make further reference to *Leigh v. Inland Revenue Comrs.* (16), the effect of which is sufficiently indicated in the citations made above.

D We were also referred to *Try, Ltd. v. Johnson* (18) ([1946] 1 All E.R. 532), where LORD GREENE, M.R., after referring to the practice of including in the accounts of a trade for the purpose of computing its profits debts due but unpaid, said this (*ibid.*, at p. 539):

E “But I venture to think in one sense that is an anomaly, because it is a departure from what I have always understood to be the fundamental conception of income tax legislation—that you ascertain your profits in reference to your receipts. The reason why that exception is brought in is that it is in accordance with ordinary commercial practice to treat debts in that way.”

F Counsel for the company placed some reliance on *Lambe v. Inland Revenue Comrs.* (19) ((1934), 18 Tax Cas. 212), where it was held that interest on certain debentures which was due and payable but unpaid should not be included in the taxpayer’s total income for surtax purposes because it had not been received. That accords with the cases to which we have already referred, and does not help counsel for the company. But at p. 220 of the report FINLAY, J., used language suggesting that, if and when the interest was in fact paid, it should not be treated as income of the year of payment but should be spread over the years in respect of which it was payable and charged to tax accordingly. But this expression of opinion was unnecessary for the purposes of FINLAY, J.’s decision and we cannot regard it as outweighing the views to the contrary expressed in the other cases to which we have referred.

H The argument of counsel for the company involves construing the word “arising” in r. 2 of the Rules Applicable to Case VI of Sch. D as meaning “arising in point of entitlement” and treating the interim income as accruing in point of entitlement from day to day. If that were right, then logically the amount arising in each year in the sense attributed to that expression by counsel I for the company, although not in fact paid, would have been taxable as income of that year. That conclusion seems contrary to the effect of the cases to which we have referred, and counsel for the company did not seek to support it. His contention was that the interim income, although arising (in his sense of the expression) year by year, did not become taxable until it was received and then was not taxable as income of the year of receipt but as income of the years over which it was accruing in point of entitlement. This would involve the reopening of assessments and the raising of additional assessments at any distance

of time from the year 1947-48 onwards according to the period taken to work out the compensation provisions under the Coal Acts of 1946 and 1949. We cannot think this is right, and in our view the expression "arising" in r. 2 of the Rules Applicable to Case VI must be construed as meaning "received".

Counsel for the company pointed out the reference to Case VI of Sch. D in s. 35 of the Finance Act, 1926, which by sub-s. (1) provides as follows:

"Where in the case of any profits or gains chargeable under Case I, Case II, r. 4 of Case III or Case VI of Sch. D it is necessary, in order to arrive at the profits or gains or losses of any year of assessment or other period, to divide and apportion to specific periods the profits or gains or losses for any period for which the accounts have been made up, or to aggregate any such profits or gains or losses or any apportioned parts thereof, it shall be lawful to make such a division and apportionment or aggregation."

But we take this provision to be directed to cases in which it is necessary to compute profits and losses for the purpose of arriving at a balance of gains, as in the ordinary case of a trade under Case I of Sch. D. That necessity might arise under Case VI when applied to activities analogous to but not actually constituting a trade. Compare *Inland Revenue Comrs. v. Forth Conservancy Board* (20) ((1931), 16 Tax Cas. 103). Accordingly, we do not think s. 35 (1) of the Act of 1926 advances the argument of counsel for the company in the present case, where the only income in question is in the nature of a pure income profit.

We should also refer to *Re Sebright, Public Trustee v. Sebright* (21) ([1944] 2 All E.R. 547), on which counsel for the company to some extent relied. The question with which VAISEY, J., was there concerned was at what rate tax should be deducted from arrears of a jointure in the adjustment of the rights of beneficiaries inter se, and we do not think it really touches the point at issue in the present case, which concerns the years to which the interim income received by the company should for tax purposes be held to belong.

We are conscious that we have not referred in detail to all the points raised in the exhaustive arguments presented to us, but we hope we have dealt adequately with the essential matters. For the reasons we have endeavoured to state we conclude that the apportionments under appeal in the first of the three cases should have been made on the footing that the interim income was taxable under Case VI of Sch. D and not under Case III of that schedule, but that this will not affect the actual result.

The other two appeals concern sub-apportionments to the two companies concerned under the provisions of s. 21 of the Finance Act, 1922, of their appropriate proportions of the total income of the first appellant company, and accordingly involve precisely the same question, which must be answered with respect to the second and third appellant companies in the same way.

F. N. Bucher, Q.C., for the companies (on the question of costs): As the court has held that the payments fall within Case VI and not Case III and tax has therefore been improperly deducted by the Crown in making the payments, the taxpayer should be assessed on the amounts actually received as contended by the Crown, i.e., the net amounts and not the grossed up amounts, and the apportionments made by the Special Commissioners were therefore excessive.

JENKINS, L.J.: This point was not raised in the argument. The best way of dealing with this will be to postpone the drawing up of the order for, say, a week for the parties to consider the matter and failing agreement for the case to be put in the list again for further argument.

Mar. 12. After further argument the court held that on the Case Stated

A and in the circumstances of the case this point was not open to the companies and it dismissed the appeals.

Appeal dismissed. Leave to appeal to the House of Lords granted.

Solicitors: *Tamplin, Joseph & Flux*, agents for *Darling, Heslop & Forster*, Darlington (for the companies); *Solicitor of Inland Revenue*.

B [Reported by F. A. AMIES, Esq., Barrister-at-Law.]

C

BAUME & CO., LTD. v. A. H. MOORE, LTD.

[COURT OF APPEAL (Jenkins, Romer and Ormerod, L.J.J.), February 26, 27, 28, March 28, 1958.]

D

Trade Mark—Infringement—Maker's name—"Bona fide" use of own name as trade mark—Confusion in the course of trade—Trade Marks Act, 1938 (1 & 2 Geo. 6 c. 22), s. 4 (1), s. 8.

Passing Off—Name of maker—"Bona fide" use by defendant of own name—Confusion of defendants' goods with plaintiffs'.

E

The plaintiffs, Baume & Co., Ltd., and their predecessors had traded in England as distributors and sellers of watches for some hundred years. Since 1878 the word "Baume" had been the registered trade mark for the watches, and the plaintiffs were the registered proprietors of the mark. The defendants, A. H. Moore, Ltd., began to import and sell watches made by a Swiss company, known as Baume & Mercier, S.A. The watches, and the boxes containing them, bore the mark "Baume & Mercier, Genève". The plaintiffs claimed that this use of the word "Baume" constituted an infringement of their trade mark (within s. 4 (1) of the Trade Marks Act, 1938)* and was calculated to pass off the goods sold by the defendants as the plaintiffs' goods. The defendants established that this use was an honest use by them of the makers' own name.

F

G

Held: this use constituted a passing off which should be restrained by injunction because (a) there was real probability that the watches marked "Baume & Mercier, Genève" would be regarded as being the same as, or in some way associated with, the plaintiffs' goods (see p. 121, letter G, post), and (b) no man was entitled, even by the honest use of his own name, so to describe or mark his goods as in fact to represent that they were the goods of another person (see p. 116, letter E, post).

H

Dicta of ROMER, J., in *Joseph Rodgers & Sons, Ltd. v. W. N. Rodgers & Co.* ((1924), 41 R.P.C. at p. 291) and of BUCKLEY, L.J., in *John Brinsmead & Sons, Ltd. v. Brinsmead & Waddington & Sons, Ltd.* ((1913), 30 R.P.C. at p. 507) applied on point (b).

I

Held further, but obiter: (i) no action lay for infringement of the plaintiffs' registered trade mark "Baume" because the use of the mark "Baume & Mercier, Genève" was within the exception created by s. 8 (a) of the Trade Marks Act, 1938, as that enactment protected the honest use by a person of his own name whether he traded under it or used it as a mark for his goods.

C. & T. Harris (Calne), Ltd. v. Harris ((1933), 51 R.P.C. 98) applied; dictum in *De Cordova v. Vick Chemical Co.* ((1951), 68 R.P.C. at p. 107) not adopted (see p. 123, letters C to E and I; cf., p. 121, letter H, post).

* The terms of s. 4 (1) are set out at pp. 121, 122, post.

(ii) but for the exception created by s. 8 of the Trade Marks Act, 1938, the use of the mark "Baume & Mercier, Genève" by the defendants would of itself be deemed by s. 4 (1) to be an infringement of the plaintiffs' registered mark, because the incorporation of the word "Baume" in the longer mark did not avoid the resemblance prohibited by s. 4 (1).

Dictum in *De Cordova v. Vick Chemical Co.* ((1951), 68 R.P.C. at pp. 105, 106) applied (see p. 122, letter H, post).

Per CURLIAM: the phrase "bona fide" in s. 8 (a) of the Trade Marks Act, 1938, meant the honest use by the person of his own name, without any intention to deceive anybody or without any intention to make use of the goodwill which had been acquired by another trader (see p. 123, letters F and G, post).

Decision of DANCKWERTS, J. ([1957] 3 All E.R. 416) reversed on the issue of passing off but not on the issue of infringement of trade mark.

[As to the bona fide use of a person's own name not constituting infringement of a trade mark, see 32 HALSBURY'S LAWS (2nd Edn.) 594, para. 900; and for cases on the subject, of the right to use one's own name, see 43 DIGEST 265, 1053 et seq.]

For the Trade Marks Act, 1938, s. 4 (1), s. 8, see 25 HALSBURY'S STATUTES (2nd Edn.) 1183, 1186.]

Cases referred to:

- (1) *Joseph Rodgers & Sons, Ltd. v. W. N. Rodgers & Co.*, (1924), 41 R.P.C. 277; 43 Digest 266, 1033.
- (2) *Reddaway v. Banham*, [1896] A.C. 199; 65 L.J.Q.B. 381; 74 L.T. 289; 13 R.P.C. 218; 43 Digest 277, 1098.
- (3) *Burgess v. Burgess*, (1853), 3 De G.M. & G. 896; 22 L.J.Ch. 675; 21 L.T.O.S. 53; 43 E.R. 351; 43 Digest 286, 1155.
- (4) *Valentine Meat Juice Co. v. Valentine Extract Co., Ltd.*, (1900), 83 L.T. 259; 17 R.P.C. 673; 43 Digest 267, 1038.
- (5) *Brinsmead (John) & Sons, Ltd. v. Brinsmead & Waddington & Sons, Ltd.*, (1913), 30 R.P.C. 493; 43 Digest 265, 1031.
- (6) *De Cordova v. Vick Chemical Co.*, (1951), 68 R.P.C. 103; 2nd Digest Supp.
- (7) *Saville Perfumery, Ltd. v. June Perfect, Ltd. & Woolworth & Co., Ltd.*, (1941), 58 R.P.C. 147; 2nd Digest Supp.
- (8) *Harris (C. & T.) (Calne), Ltd. v. Harris*, (1933), 51 R.P.C. 98; *affd.* C.A., (1934), 51 R.P.C. 264; Digest Supp.

Appeal.

The plaintiffs appealed from the decision of DANCKWERTS, J., dated Oct. 23, 1957, and reported [1957] 3 All E.R. 416, dismissing their action against the defendants for an injunction restraining them from infringing the registered trade mark of the plaintiffs and from passing off as the plaintiffs' watches, watches which were not the plaintiffs' goods. The facts appear in the judgment.

G. T. Aldous, Q.C., and *J. N. K. Whitford* for the plaintiffs.

Sir Lionel Heald, Q.C., and *F. E. Skone James* for the defendants.

Cur. adv. vult.

Mar. 28. JENKINS, L.J.: The judgment about to be delivered by ROMER, L.J., is the judgment of the court in this case.

ROMER, L.J., read the following judgment: The plaintiffs' trade mark consists of the word "Baume" and it was registered in 1878 in Cl. 10 of Sch. III for watches and all other descriptions of horological instruments. They and their predecessors in title have carried on business in the sale of watches since

A 1834. The watches are made for them by a firm in Switzerland called Mildia and are imported into this country and sold by the plaintiffs. It was admitted by the defendants that, since at least 1880, the plaintiffs' business of selling watches has been carried on by them or their predecessors under the trade mark "Baume"; that such business is a substantial one; and that for many years past substantial moneys have been expended in advertising.

B The defendants carry on business as watch importers and they sell directly to wholesalers. In about 1954 they entered into business relations with a Swiss company called Baume & Mercier, Société Anonyme, of Geneva, and began to import watches made by that company into this country for sale. These watches are supplied by the defendants to wholesalers in boxes, on the outside of which is printed the name "Baume & Mercier Geneva", and that name is also printed on the face of the watches themselves.

C The plaintiffs' case, as pleaded by para. 5 of their statement of claim, is that

D "the use of the word 'Baume' as part of the name of the watches advertised offered for sale and sold by the defendants is an infringement of the plaintiffs' said registered trade mark and is further calculated to deceive and cause confusion and to lead the trade and public to believe that the goods offered for sale or sold by the defendants are goods of the plaintiffs' manufacture or merchandise and is calculated to pass off or enable others to pass off goods not of the plaintiffs' manufacture or merchandise as and for the plaintiffs' goods."

E In his judgment, the learned judge, after considering the evidence which had been called before him, said ([1957] 3 All E.R. at p. 418):

F "In a matter of this sort it is always rather difficult to see how far confusion is likely or possible, and what exactly the public will do, in the absence of positive evidence of actual deception. On the whole I have come to the conclusion that the names are sufficiently similar so that members of the public would not necessarily be likely to perceive that 'Baume & Mercier' was not the same as 'Baume' and I think, therefore, that there is some probability that confusion might occur in England in respect of the sales of the watches."

G The learned judge, however, dismissed the action in so far as it was founded on infringement of the plaintiffs' trade mark, on the ground that the defendants were entitled to the protection afforded by s. 8 of the Trade Marks Act, 1938; and, in so far as the plaintiffs' claim was based on passing off, the judge dismissed it on the ground that there had been an honest user by the defendants of the makers' own name.

H We propose to consider first the issue of passing off. It is quite clear on the evidence, and indeed from the defendants' admission to which we have already referred, that the name "Baume" has, for many years past, been associated in this country with the watches distributed by the plaintiffs. The questions on this part of the case would accordingly appear to be: (1) Have the plaintiffs established that the sale by the defendants of Baume & Mercier watches is reasonably calculated to cause confusion in the trade and in the minds of the public; and (2) if so, is it a valid defence for the defendants to show (as they did show to the learned judge's satisfaction) that there had been an honest use by them of the makers' own name? Taking the second question first, it is to be observed that this is not a case of a defendant carrying on a business under a name, but of marking goods with a name. The distinction between these two classes of case was emphasised and explained by ROMER, J., in *Joseph*

Rodgers & Sons, Ltd. v. W. N. Rodgers & Co. (1) ((1924), 41 R.P.C. 277), where A
he said (*ibid.*, at p. 291):

"It is the law of this land that no man is entitled to carry on his business in such a way as to represent that it is the business of another, or is in any way connected with the business of another; that is the first proposition. The second proposition is, that no man is entitled so to describe or mark his goods as to represent that the goods are the goods of another. To the first proposition there is, I myself think, an exception: a man, in my opinion, is entitled to carry on his business in his own name so long as he does not do anything more than that to cause confusion with the business of another, and so long as he does it honestly. It is an exception to the rule which has of necessity been established . . . * To the second rule to which I have referred, I think there is no exception at all; that is, that a man is not entitled so to describe his goods as to lead to the belief that they are the goods of somebody else. It is not necessary that there should be an exception to that. It is perfectly legitimate for a man in the cutlery business to carry on business under his own name, whatever that name may be, but I can see no necessity for his marking his cutlery with a name (although it be his own name) which may have the effect of passing off those goods as the goods of the plaintiffs."

Whether or not the learned judge may have expressed the exception to the first of the two rules too widely it is not necessary, for present purposes, to consider; but he said (quite rightly in our opinion) that there is no exception to the second rule and it is that rule which is relevant to the present case. In *Reddaway v. Banham* (2) ((1896), 13 R.P.C. 218) LORD HERSCHELL, after referring to *Burgess v. Burgess* (3) ((1853), 3 De G.M. & G. 896) said (13 R.P.C. at p. 229):

"This, I think, clearly recognises that a man may so use even his own name in connexion with the sale of goods so as to make a false representation";

and see also *Valentine Meat Juice Co. v. Valentine Extract Co., Ltd.* (4) ((1900), 17 R.P.C. 673).

The next point which arises is whether it is a valid defence to an action for passing off that the defendant had no intention to deceive. In our judgment, it is clearly not, for fraud is not a necessary constituent of such an action. This clearly appears from the judgment of BUCKLEY, L.J., in *John Brinsmead & Sons, Ltd. v. Brinsmead & Waddington & Sons, Ltd.* (5) ((1913), 30 R.P.C. 493). The lord justice, in laying down certain propositions with regard to passing off, expressed himself as follows (*ibid.*, at p. 506):

"The law, as I understand it, is this:—if a man makes a statement which is true, but which carries with it a false representation and induces the belief that his goods are the plaintiffs' goods, he will be restrained by injunction. He cannot rely on the fact that his statement is literally and accurately true, if, notwithstanding its truth, it carries with it a false representation . . . † Secondly, if it is found that a man's object in doing that which he did was to deceive—that he had an intention to deceive—the court will be very much more ready to infer that his object has been achieved if the facts tend to show that that is the case, and to say that his intention to deceive ripening into deceit gives ground for an injunction; but it is not necessary to prove intention to deceive . . . If the fact is that the act which the defendant is doing does deceive, with the result that a

* The passage after the * is at p. 292.

† The passage after the † is at p. 507.

A man, who intends to be a customer of the plaintiffs, is induced by something which the defendant has done to become a customer of the defendant instead, even if the defendant has done that innocently, yet as soon as he learns that in point of fact that which he had no intention of using for the purpose of deceit does create deception, then he is doing that which is wrong, and he will be restrained from pursuing a course of action the result of which is, in point of fact, to take that which is the plaintiffs' property and give it to him, to defraud the plaintiffs' customers into becoming the defendant's customers. Thirdly, in the application of the principles which I have stated, there is, in my opinion, no difference whatever where the true statement consists in an accurate statement of the defendant's name as distinguished from any other true statement of fact, if of course you have evidence that from the use of his own name deception results. If a trader takes a name which is not his own name, but is that of a rival trader, and uses it in his trade, no doubt that is very strong evidence that he intends to deceive, and the court will fasten upon that in any case in which it occurs; but if that is not so, if he is simply using his own name and it is proved that its use results in deception, he will be restrained even from using his own name, without taking such steps as will preclude the deception which, by hypothesis, is engendered by his using his own name. There are many authorities for this proposition."

In our judgment, it follows from the second of the three principles enunciated by BUCKLEY, L.J., that the defence of innocent and honest user of the manufacturers' name on the watches which the defendants have sold will not avail them as a defence if the other ingredients of an action for passing off are established.

We turn, therefore, to the question whether the evidence which was called before the learned judge was such as to justify the view that the acts of which the plaintiffs complain were likely to cause deception. This is essentially a question of fact. In *Reddaway v. Banham* (2), which was an action to restrain passing off, LORD HALSBURY, L.C., said (13 R.P.C. at p. 224):

"My Lords, I believe that this case turns upon a question of fact. The question of law is so constantly mixed up with the various questions of fact which arise on an inquiry of the character in which your Lordships have been engaged, that it is sometimes difficult when examining former decisions to disentangle what is decided as fact, and what is laid down as a principle of law. For myself, I believe the principle of law may be very plainly stated, and that is that nobody has any right to represent his goods as the goods of somebody else. How far the use of particular words, signs or pictures does or does not come up to the proposition which I have enunciated in each particular case, must always be a question of evidence, and the more simple the phraseology, the more like it is to a mere description of the article sold, the greater becomes the difficulty of proof, but, if the proof establishes the fact, the legal consequence appears to follow."

The first witness for the plaintiffs was Mr. Louis Baume, who is a director and has been with the firm since 1938. He said that the firm was originally founded by two brothers in 1834 in Switzerland and subsequently one of the brothers came to London in 1840 and established Baume Frères in London. The firm in Switzerland continued as the manufacturing centre for Baume watches, whilst the London firm dealt with the distribution and sales. The name "Baume", to the best of his knowledge, had always been used on products made in Switzerland and sold through Baume & Company or Baume Frères.

The witness said that he was familiar with Baume & Mercier watches and first knew that they were being marketed in this country when he saw some in a shop in June, 1954. He said that the plaintiffs' "Baume" watches and the Baume & Mercier watches were about the same price and quality; they come within the same price range. The witness then gave evidence as to a practice, which apparently grew up in or after 1947, of English tourists, who had bought Baume & Mercier watches in Switzerland under guarantee, bringing the watches to the plaintiffs in London to be repaired under the guarantees. It was suggested before us that this practice indicated some confusion or identification in the minds of the tourists between Baume & Mercier and the plaintiffs. It was also suggested by the defendants that the practice indicated some degree of acquiescence by the plaintiffs in the activities of Baume & Mercier in this country. We do not, however, think there is much force in either of these points, because, as Mr. Louis Baume himself said in cross-examination, the plaintiffs name

"was invariably written inside the Baume & Mercier guarantees by the various retailers in Switzerland, quite erroneously";

it was natural enough, therefore, that, when the tourists required the guarantees to be implemented in England, they should take their watches to the plaintiffs in London for the purpose, and the plaintiffs repaired them as a matter of convenience. Mr. Louis Baume was asked as to the use of the word "Geneva" by Baume & Mercier on their watches and on the boxes in which they are supplied. He would not agree that the word "Geneva" on a watch has a value by reason of the name, because of the historical associations. He did agree, however, that the plaintiffs would not now be entitled to mark their watches "Geneva", because they are not made in Geneva. Finally, Mr. Louis Baume said that, prior to the incorporation of the plaintiff company (namely in 1948), the name "Baume" was registered as a trade mark in Switzerland by the partners who were then carrying on the plaintiffs' business and the mark was renewed in the name of the plaintiff company (which was formed in 1950) in 1952.

Next, Mr. Thomas W. Smitherman, managing director of Messrs. Butt & Company, Limited, of Chester, watchmakers and jewellers, gave evidence. He had been in the watchmaking trade for over thirty years. He knew of Baume watches and also had heard, some four or five years previously, of the name Baume & Mercier in relation to watches. He said that, when he first saw the name of Baume & Mercier, he thought it was a subsidiary company of the plaintiffs, but that he found out soon after that it was not. In cross-examination, Mr. Smitherman gave some evidence which was of considerable importance, and which I will read. He was asked:

"If, as a retailer, you had two watches, one of which you knew was a watch belonging to the plaintiff company, an English company, and another watch which you knew was manufactured by somebody called Baume & Mercier, Geneva, and somebody came and asked you for a watch, and you were showing them those two watches, would you not think it your duty to make it clear that they were two distinct watches? A.—Well, I might do. Q.—Would it not be your duty to the public as a seller of watches? A.—I feel I would not stock both the Baume and Baume & Mercier, because it would sort of—. Q.—You are making a supposition: Because of what? A.—Because I feel there would be a sort of feeling, a doubt, as to whether they were the same watch or not. Q.—I am asking you to assume for the moment that you are stocking both. Will

- A you make that assumption? A.—Yes. Q.—What I am saying is that, if you had both and you were selling watches to a customer, it would be your duty to the public to make clear that there was a difference between them? A.—I think I should. Q.—You suggested, I think, in answer to the last question that you thought there might be some confusion between those? A.—I would not stock them, because I think there would be a confusion.
- B Q.—Does that mean more than that people would suppose that there was some family connexion between the two firms? A.—No, I do not think so. Q.—You do not think it means more than that; you do not think that they would think it was the same company? Did you think that a company writing to you on that notepaper was the same company as one calling itself Baume & Mercier, Geneva? As a business man, you would realise it was not the same, would you not? A.—I would, but clients would not. Q.—You would? A.—Yes. Q.—If you are dealing with a client, you are the person to make it clear to him that they were not the same watch? A.—Yes, I might myself, but you cannot more or less be responsible—well, you are responsible for what your staff does, but I think it all comes back to the staff. Q.—Do you not think that your staff could be trained by you to realise that there are a number of different marks for watches, and that they ought, in dealing with the public, to make clear to the public what they are buying? A.—They do in nearly every case, but there is always the time when they would not or could not. Q.—There are a lot of other marks which are similar: Rotary and Rolex, for instance; a careless member of your staff could get those mixed up, could they? A.—
- E No; they would not, because the majority of the names mentioned are all well known names, are they not? Q.—We are not disputing, of course, that Baume is a well known name, and it must be clear, I suggest to you, that it is not the same company as a company calling itself Baume & Mercier, Geneva? A.—Unless the staff, or the person who is selling, point that out, I think the public would probably think it might be the same company. Q.—But the staff would point it out? A.—There is always an element of doubt that they would not.”

Mr. Robert Pipe, a watchmaker of some forty-six years' experience, said in evidence that he knew very well the trade mark “Baume” in connexion with the watch trade. He said also that he had had one or two Baume & Mercier watches in for repair and that, when he first saw the name “Baume & Mercier”,

- G he thought there might be some connexion between Baume & Mercier and Baume, because he knew the family was a Swiss one, but he found out there was no connexion. He was then asked [in cross-examination] if he knew that
- “there is a watch marked ‘Baume’ and also a watch marked ‘Baume & Mercier’; if you find a watch marked ‘Baume & Mercier, Genève’, you would have no difficulty in knowing that it was not a Baume watch? A.—That is so. Q.—It is only if you do not know that there is a Baume & Mercier watch you might wonder whether the Baume and the Baume & Mercier were the same? A.—The similarity of name might make you think of the connexion. Q.—You only thought it might be a Baume watch because you did not know at the time that there was a Baume & Mercier watch? A.—That is right.”

Mr. Sidney Rogers, a retailer of watches who had been in the trade for thirteen years, said that, when some Baume & Mercier watches were brought to him for repair, he

“assumed that there was a connexion, because the name ‘Baume’ was spelled the same way, and on talking about these various factories through the trade, I was told that Baume in this country was in fact Swiss. That was my first impression of the name ‘Baume’.”

Mr. R. A. Winter, who has been in the watch trade for about twenty-five years and is the managing director of the Rolex Watch Company, was asked whether, when he first came across the name "Baume & Mercier", it had any significance for him, and he answered: A

"No, except that my impression at that time, and until later, I must admit, till I was advised to the contrary, was it had to do with Baume." B

In cross-examination, he said that quite clearly he associated Baume & Mercier with the Baume company or Baume watch, which he had known several years before.

"Q.—That was simply because 'Baume' was part of the name of Baume & Mercier? A.—Yes, and I had the impression that there must be a connexion. Q.—But, if you had known that there was a certain company called Baume & Mercier, you would have had no difficulty in distinguishing it from the Baume watches? A.—Then I would have realised it." C

Mr. Alfred Moore, the managing director of the defendant company, produced some Baume & Mercier watches in the course of his evidence and said that the name "Baume & Mercier" was printed on the outside of the boxes in which they were supplied to the wholesalers, and also on the inside of the lids of the watches and on the dials. He also said that he attached great importance to the word "Geneva", because it is a centre of the watch trade of a certain class, and for further reasons which he gave. Mr. Mark Bouchat, a director of the defendant company who resides in Switzerland, produced in evidence a Swiss certificate of registration, dated July 17, 1940, of the trade mark "Baume & Mercier, Geneva" for watches, etc. Mr. Bouchat said that he had never heard of any confusion between Baume & Mercier watches and Baume watches sold by retailers in Switzerland. He further said his company sells about fifty thousand Baume & Mercier watches on an average every year in different countries, including Switzerland, of which about one thousand a year had been sold in England. The defendant company also called some trade witnesses with a view to showing that the plaintiffs' suggestion of probable confusion is unwarranted. Mr. Eric Hall, who is the senior partner in a firm of watch distributors to the retail trade, considered "Baume & Mercier" as being very different from "Baume", D E F

"chiefly because of the complete name Baume & Mercier, Geneva, which was complete, as a complete identity, on the dial. Q.—Have you ever known of any confusion arising between Baume & Mercier and Baume watches? A.—Not at all, no confusion. Q.—You were in fact not confused when you first heard of Baume & Mercier? A.—No, we were not confused at all. Personally, I never connected Baume & Mercier with the name 'Baume'. I looked upon them as two entirely different identities and I am sure that the name of Baume & Mercier was of great interest to us, certainly not because it was anything resembling the name of Baume." G H

Mr. William Gaseley, who is in the business of watch and clock repairing and selling, said that there was no possible chance of confusion between Baume and Baume & Mercier watches. He added that, when he first heard of the latter watches, he did not associate them with Baume watches, I

"because the name of one was on the dial, distinct: 'Baume & Mercier, Geneva'."

Finally, Mr. Raymond Laye, the manager of a firm of watchmakers and jewellers who sell entirely to the public, said that, when Baume & Mercier watches were first brought to his attention, he did not connect them with Baume watches; it was just a new company to him. He was asked whether, if he were marketing both watches, he would expect any confusion between them, and he answered:

A "No, I do not think so; not to the public today. I think they are very name-minded, and one could not get confused between the two names."

B That concluded the evidence on the question of likelihood of confusion. Counsel for the defendants contended before us that it was insufficient to afford a basis for an injunction against his clients. He relied on the fact that no case of actual confusion between the plaintiffs' watches and Baume & Mercier watches
C had been proved; that the only witnesses on the issue of likelihood of confusion called by the plaintiffs had been trade witnesses, and that notwithstanding that both the plaintiffs and Baume & Mercier had registered their names and trade marks in Switzerland, no evidence was before the court to show that any confusion had occurred in that country. He also contended that the fact that the plaintiffs' name was "Baume" simpliciter, whereas the offending name was the double name of "Baume & Mercier", was sufficient in itself to distinguish the one from the other, and that such distinction was emphasised by the word "Geneva" which follows on "Baume & Mercier".

D On the other hand, counsel for the plaintiffs, in addition to relying on the specific evidence of his witnesses (and in particular that of Mr. Smitherman) pointed out that the plaintiffs' goods and Baume & Mercier watches are of similar quality and in the same general price range and are sold through the same shops and over the same counters; that the name "Baume" is an unfamiliar one in this country except as a trade name for watches; that it has been used in connexion with the plaintiffs' watches for a hundred years and that every witness knew it well as a trade name for watches; and that there was some evidence before the learned judge that double names are usually referred to by their first names.
E

In our judgment, the considerations on which counsel for the plaintiffs relied, coupled with the witnesses whom the plaintiffs called, do establish a reasonable likelihood of confusion arising if the defendants continue to sell "Baume & Mercier" watches in this country. It appears to us that the evidence of the very experienced watchmaker and jeweller, Mr. Smitherman, was particularly cogent. He said in effect that he would not stock both Baume and Baume & Mercier watches in his shop because he thought that it would result in confusion both among his staff and through them, or independently of them, among the public. Evidence of a similar character was given by other of the plaintiffs' witnesses, though their evidence was admittedly not so strong as that of Mr. Smitherman. Notwithstanding the contrary views expressed by the witnesses
G called on behalf of the defendants, we are of opinion that there is a real probability of the Baume & Mercier watches being regarded in the shops as being the same as, or in some way associated with, the plaintiffs' goods, and that the plaintiffs have accordingly made good their case in so far as they found it on passing off; and that an injunction should be granted accordingly.

H Inasmuch as it is a matter of indifference to the plaintiffs whether they obtain an injunction against passing off or an injunction against infringement of trade mark, so long as they are granted either one or the other, it becomes in strictness irrelevant to consider, or adjudicate on, the arguments which were addressed to us on the trade mark aspect of the case. As, however, several points were raised and argued before us on the subject, we will briefly express our provisional views on them.

I The sections of the Trade Marks Act, 1938, which are relevant to the matter are s. 4 (1), and s. 8. Section 4 (1) is as follows:

"Subject to the provisions of this section, and of s. 7 and s. 8 of this Act, the registration (whether before or after the commencement of this Act) of a person in Part A of the register as proprietor of a trade mark (other than a certification trade mark) in respect of any goods shall, if valid, give or be deemed to have given to that person the exclusive right to the use of the trade mark in relation to those goods and, without prejudice to the generality

of the foregoing words, that right shall be deemed to be infringed by any person who, not being the proprietor of the trade mark or a registered user thereof using by way of the permitted use, uses a mark identical with it or so nearly resembling it as to be likely to deceive or cause confusion, in the course of trade, in relation to any goods in respect of which it is registered, and in such manner as to render the use of the mark likely to be taken either —(a) as being use as a trade mark; or (b) in a case in which the use is use upon the goods or in physical relation thereto or in an advertising circular or other advertisement issued to the public, as importing a reference to some person having the right either as proprietor or as registered user to use the trade mark or to goods with which such a person as aforesaid is connected in the course of trade.”

Section 8 provides:

“ No registration of a trade mark shall interfere with—(a) any bona fide use by a person of his own name or of the name of his place of business, or of the name, or of the name of the place of business, of any of his predecessors in business; or (b) the use by any person of any bona fide description of the character or quality of his goods, not being a description that would be likely to be taken as importing any such reference as is mentioned in para. (b) of s. 4 (1), or in para. (b) of s. 37 (3), of this Act.”

It is convenient also to refer to the definition of “ mark ” and “ trade mark ” in s. 68 (1) of the Act. It says:

“ ‘ mark ’ includes a device, brand, heading, label, ticket, name, signature, word, letter, numeral, or any combination thereof ”;

and

“ ‘ trade mark ’ means, except in relation to a certification trade mark, a mark used or proposed to be used in relation to goods for the purpose of indicating, or so as to indicate, a connexion in the course of trade between the goods and some person having the right either as proprietor or as registered user to use the mark, whether with or without any indication of the identity of that person, and means, in relation to a certification trade mark, a mark registered or deemed to have been registered under s. 37 of this Act.”

The first question to be considered is whether the defendants, in using the name “ Baume & Mercier, Geneva ” as a mark indicating the origin of the goods which are in question in this case, have infringed the plaintiffs’ right to the exclusive use of the trade mark “ Baume ”; and, inasmuch as “ Baume & Mercier, Genève ” is not identical with “ Baume ”, the answer to the question depends on whether “ Baume & Mercier, Genève ” nearly resembles “ Baume ” in the manner mentioned in s. 4 (1). In our view, this question must be answered in the affirmative, inasmuch as the defendants have incorporated the whole of the plaintiffs’ registered mark and the addition of the words “ & Mercier, Geneva ” does not avoid the prohibited resemblance. The defendants have undoubtedly used the “ essential feature ” of the plaintiffs’ mark. (Compare the observations of LORD RADCLIFFE in *De Cordova v. Vick Chemical Co.* (6) ((1951), 68 R.P.C. 103, at pp. 105, 106), and see also *Saville Perfumery, Ltd. v. June Perfect, Ltd., & Woolworth & Co., Ltd.* (7) ((1941), 58 R.P.C. 147).) Accordingly, and having regard to the views which we have expressed earlier in this judgment as to the likelihood of confusion, the defendants are in the position of infringers of the plaintiffs’ trade mark unless they are entitled to the protection of s. 8 of the Act of 1938.

Counsel for the plaintiffs contended before us that they are not. His argument, in summary, was that the section only protects a trader in the use of his own name if he uses it as the name of his business or on his stationery, invoices, etc., and that it does not protect him if he uses the name (assuming the likelihood of

A confusion) as a trade mark in respect of his goods; that the section was introduced into the Act *ex abundanti cautela* to show that the defence of bona fide user by a man of his own name as a business name which may be open to him in a passing off action is also available to him in an action for infringement of a registered trade mark. The contention of counsel for the plaintiffs on this point would appear to have the support of a dictum of the Privy Council in

B *De Cordova v. Vick Chemical Co.* (6). The Judicial Committee in that case was considering a section of the Jamaican Trade Marks Law which was the same, so far as relevant, as s. 44 of the Trade Marks Act, 1905 (which was the forerunner of s. 8 of the Act of 1938) and LORD RADCLIFFE said (68 R.P.C. at p. 107):

C “There is nothing in the section to suggest that it is directed specifically, if it is directed at all, towards protecting use by a person of a name or place of business or description by way of a trade mark.”

The expression of this view, was, however, in no way necessary to their Lordships' decision, and for ourselves we find some difficulty in accepting it. Section 8 (a) is expressed in perfectly general terms, and we can see no sufficient warrant

D for confining its operation to the bona fide use by a trader of his own name as a trade name as distinct from using it as a trade mark. We do not accept counsel for the plaintiffs' suggestion that s. 8 (the provisions of which were enacted in a somewhat narrower form by s. 44 of the Trade Marks Act, 1905) was introduced merely *ex abundanti cautela*. It seems to us that its object was to ensure that the use by a man of his own name should be protected,

E provided that the user was bona fide, whether he traded under that name or whether he used it as a trade mark in respect of his goods; and, if the narrower interpretation for which counsel for the plaintiffs contends is attributed to the section, it is difficult to apprehend the purpose of Parliament in enacting it at all. We would only add that the construction of the section which seems to us to be the right one is in conformity with the view which FARWELL, J., apparently took of the effect of s. 44 of the Act of 1905 in *C. & T. Harris (Calne), Ltd. v. Harris* (8) ((1933), 51 R.P.C. 98).

F The next point which was discussed before us was as to the meaning of “bona fide use” in s. 8. DANCKWERTS, J., said ([1957] 3 All E.R. at p. 420) that he understood that “bona fide” normally

G “. . . means the honest use by the person of his own name, without any intention to deceive anybody or without any intention to make use of the goodwill which has been acquired by another trader”:

and in that sense he acquitted the defendants of any want of bona fides in the present case. We agree with the learned judge's definition of the term “bona fide” and we see no reason to attribute a different or special meaning to the

H phrase in its context in s. 8. The mere fact in itself that a trader is using his own name which too closely resembles a registered trade name of which he is aware does not prevent the user from being “bona fide”, provided that the trader honestly thought that no confusion would arise and if he had no intention of wrongfully diverting business to himself by using the name. The truth is that a man is either honest or dishonest in his motives; there is no such thing,

I so far as we are aware, as constructive dishonesty. In our judgment, if a trader is honestly using his own name, then no action will lie for infringement of trade mark and any rival trader who thinks himself aggrieved must sue, if at all, for passing off.

We would accordingly hold, were it necessary to do so, that the defendants were entitled to rely on s. 8 of the Act as a defence to a claim for infringement having regard to the finding of the learned judge that they acted in good faith.

A final point which emerged at a somewhat late stage of the submissions of counsel for the plaintiffs was that the use of the name “Baume & Mercier”

by the defendants was an infringement of the "exclusive right" conferred on the plaintiffs by the first part of s. 4 (1) of the Act of 1938 to use their registered mark "Baume", whether or not such user was "likely to deceive or cause confusion". The point clearly does not arise in the present case, for the judge found (and we agree with him) that the plaintiffs had established likelihood of confusion. We prefer, therefore, to express no opinion on the point, but would merely say that, if counsel for the plaintiffs is right in his submission, it would seem to afford solid ground for adopting a wide construction of s. 8.

In the result, we are of opinion, for the reasons stated earlier in this judgment, that the plaintiffs are entitled to succeed on the issue of passing off in this action and that the appeal should accordingly be allowed.

Appeal allowed: injunction restraining the defendants from selling watches under any mark or name containing the word "Baume" and calculated to pass off: inquiry as to damages: leave to appeal to the House of Lords granted.

Solicitors: *Cummings, Marchant & Ashton* (for the plaintiffs); *Stollard & Limbrey* (for the defendants).

[Reported by HENRY SUMMERFIELD, Esq., Barrister-at-Law.]

PRACTICE NOTE.

CHANCERY DIVISION (COMPANIES COURT).

Company—Practice—Title of proceedings—Applications brought to or issued out of office of the Registrar, Companies Court—Group A to be added after Chancery Division in title—R.S.C., Ord. 5, r. 9—R.S.C., Ord. 53B—Name of judge to be omitted from general title of proceedings in winding-up or under Companies Act, 1948 (11 & 12 Geo. 6 c. 38), s. 210—Companies (Winding-up) (Amendment) Rules, 1957 (S.I. 1957 No. 973), r. 1 (f).

The attention of practitioners is called to the Companies (Winding-up) (Amendment) Rules, 1957 (S.I. 1957 No. 973), r. 1 (f), which provided for the omission of the name of the judge in the general title in all proceedings in the High Court in the winding-up of a company under the Companies Act, 1948, or under s. 210 of that Act.

It should also be noted that in accordance with R.S.C., Ord. 5, r. 9, all applications under the Companies Act, 1948, brought to or issued out of the office of the Registrar Companies Court pursuant to R.S.C., Ord. 53B, are assigned to Group A and the general title in all such matters where the company is not in liquidation should include after the words "Chancery Division" the word and letter "Group A".

By direction of the judge.

Mar. 31, 1958.

MAURICE BERKELEY,
Registrar.

A L. E. CATTAN, LTD. v. A. MICHAELIDES & CO. (a firm)
(TURKIE Third Party, GEORGE (TRADING AS YARNS & FIBRES CO.) Fourth Party).

[QUEEN'S BENCH DIVISION (Diplock, J.), March 26, 1958.]

B *Arbitration—Costs—Discretion of arbitrator—Judicial exercise—String of contracts—Counterclaim by ultimate buyer that goods not of contract quality—Suppliers added by seller as third party and by third party as fourth party—Counterclaim failed—Seller ordered to pay costs incurred by third and fourth parties but not awarded their amount against buyer.*

C *Costs—Third party—Sale of goods—Third and fourth parties added on issue whether goods are of contract quality—Ordinary rule as to costs of successful parties where goods are of contract quality.*

The sellers under one contract in a string of contracts brought an action against their buyers for the balance of the price of goods sold and delivered. By their counterclaim the buyers alleged that the goods were not in accordance with the description in the contract and claimed damages against the sellers. The sellers, while denying any breach of contract, served a **D** third-party notice on their supplier, claiming indemnity from him in the event of their being found liable in damages to the buyers. The third party served a fourth-party notice on his supplier, claiming a similar indemnity. The dispute having been referred by the court to arbitration, the arbitrator found that there was no substance in the buyers' counterclaim, and that, accordingly, the question of an indemnity by the third party to **E** the sellers and by the fourth party to the third party did not arise. The arbitrator's award as to costs was that the third party should pay the fourth party's costs of the reference and the action; that the sellers should pay the third party's costs including the amount paid by him to the fourth party; and that the buyers should pay the sellers' costs but not including the amount payable by the sellers to the third party. On an application by the sellers **F** to have the paragraph of the award dealing with their costs set aside or remitted to the arbitrator for further consideration,

G **Held:** the arbitrator having found on the face of his award that no question of indemnity arose as between the sellers and the third party, or as between the third party and the fourth party, and having dismissed the defendants' counterclaim, it was apparent that there had been an injudicial exercise by the arbitrator of his discretion over costs in that the sellers had not been awarded as against the defendants the amount that they would have to pay to the third party for costs; and so much of the award as related to this would be remitted to the arbitrator for re-consideration.

H The ordinary rule as to costs, where there is a string of contracts for the sale of goods and third and fourth parties are brought in on the issue of the goods being in accordance with description, stated (see p. 128, letters C to E, post).

[As to the award of costs by an arbitrator, see 2 HALSBURY'S LAWS (3rd Edn.) 47, para. 103.]

I Case referred to:

(1) *Heaven & Kesterton, Ltd. v. Sven Widæus A/B.*, [1958] 1 All E.R. 420.

Motion.

This was a motion to set aside, or remit to the arbitrator, Mr. Robert Hasty, for further consideration, a part of his award made on Nov. 29, 1957, in an arbitration held in accordance with the terms of three orders made by the district registrar at the Manchester District Registry on Feb. 15, 1957.

By a specially indorsed writ, issued on June 27, 1956, the plaintiffs, L. E. Cattan, Ltd., who were cotton brokers, claimed from the defendants, A. Michaelides &

Co. (sued as a firm), the sum of £800 as the balance of the price of a quantity of cotton yarn sold and delivered by the plaintiffs to the defendants under a contract dated Apr. 25, 1956. The plaintiffs having applied for leave to sign judgment under R.S.C., Ord. 14, the defendants made a payment of £300 in respect of the claim and filed an affidavit stating that they had a counterclaim in respect of the goods. By an order dated July 16, 1956, the plaintiffs were given leave to sign judgment for the balance of £500, but execution was stayed pending the hearing of the counterclaim, and the defendants were given leave to counterclaim. By their counterclaim, delivered on Oct. 22, 1956, the defendants claimed £600 damages against the plaintiffs on the ground that the yarn did not comply with the contract quality. The plaintiffs, by their defence to the counterclaim, denied any breach of contract, and they then served a third-party notice on their supplier, Maurice Turkie, claiming full indemnity from him in the event of their being found liable in damages to the defendants in respect of the counterclaim. The third party served a fourth-party notice on his supplier, G. A. George (trading as Yarns & Fibres Co.), claiming a similar indemnity. By three orders, dated Feb. 15, 1957, and made at the same time and with the consent of all the parties or their representatives, it was ordered, respectively, that the counterclaim, the third-party proceedings, and the fourth-party proceedings, and the costs of the further proceedings, be referred to the tribunal of arbitration of the Manchester Chamber of Commerce.

The matter came on for hearing before the arbitrator on Oct. 30, 1957. By his award, dated Nov. 29, 1957, the arbitrator found:

"(a) that the allegation in the counterclaim of the defendants has not been substantiated; (b) that no sum therefore falls to be set off against the . . . sum of £500 for which . . . the plaintiffs were given leave to enter judgment . . . (c) that consequent upon finding (a) the questions of an indemnity by the third party to the plaintiffs and by the fourth party to the third party do not arise."

The terms of the award were:

"(i) that the counterclaim of the defendants be wholly disallowed; (ii) that the defendants shall pay to the plaintiffs the said balance of £500; (iii) that the claim of the plaintiffs against the third party be disallowed; (iv) that the claim of the third party against the fourth party be disallowed; (v) that the third party shall pay the fourth party's costs of and incidental to this reference and to the . . . action; (vi) that the plaintiffs shall pay the third party's costs of and incidental to this reference and to the said action together with the amount paid by the third party to the fourth party under [para. (v)]; (vii) that the defendants shall pay the plaintiffs' costs of and incidental to this reference and to the said action but not including the amount payable by the plaintiffs to the third party under [para. (vi)]; (viii) that the fees and expenses of the tribunal amounting to £26 19s. shall be borne and paid by the defendants."

By their notice of motion, dated Jan. 2, 1958, the plaintiffs stated that they would move to have para. (vii) of the award set aside or remitted to the arbitrator for further consideration on the grounds: (a) that the plaintiffs, having wholly succeeded in their defence to the counterclaim, should not have been ordered to pay the third party's costs and the fourth party's costs without being reimbursed those costs by the defendants; (b) that the plaintiffs were entitled to bring in the third party and had acted reasonably in doing so, as there was no substantial difference between the terms and conditions of the contract whereby the plaintiffs sold the yarn to the defendants and the terms and conditions of the contract whereby the plaintiffs purchased the yarn from the third party; (c) that the plaintiffs had no responsibility for bringing in the fourth party, and, if the plaintiffs were deprived of the costs payable by them to the third party, the third party should have been deprived of the costs payable by him to the

A fourth party; and (d) that, in exercising his discretion as to costs by depriving the plaintiffs of the amount payable by them to the third party, the arbitrator did not exercise his discretion judicially and his order as to costs was in excess of his jurisdiction; and, alternatively, that the arbitrator was guilty of misconduct.

- B C. R. Beddington for the plaintiffs.
P. R. Pain for the defendants.
C. L. Hawser for the third party.
R. T. Monier-Williams for the fourth party.

DIPLOCK, J., stated the facts, the findings of the arbitrator and the terms of the award, and continued: Counsel for the plaintiffs submitted that the order in regard to the plaintiffs' costs (para. (vii) of the award) was a very odd order for costs. The oddity is that, whereas the third party has recovered his costs against the plaintiffs, and also the costs which he has been ordered to pay to the fourth party, the plaintiffs are not entitled to recover any of those costs against the defendants, who set the train of actions in motion. Counsel says that in a particular case an arbitrator or a judge may say that the plaintiffs should not pay the costs of the defendants' third-party proceedings on the ground that such proceedings were unjustified for a number of reasons; but, he says, it is wholly inconsistent with that principle that the plaintiffs in the present case should be compelled to pay the costs of the fourth party when they were not responsible for him being made a party to the proceedings.

E The order in regard to the plaintiffs' costs strikes me as very remarkable, but it was contended by counsel for the defendants that my jurisdiction to remit the award back to the arbitrator was limited to cases where I came to the conclusion that there could be no possible reason for an award in the form in which the arbitrator had made it. Counsel referred me to my recent judgment in *Heaven & Kesterton, Ltd. v. Sven Widaeus A/B*. (1) ([1958] 1 All E.R. 420) and particularly to the passage where I said (*ibid.*, at p. 424):

F "The basis and utility of arbitration as a method of determining disputes is that the parties select their own tribunal and agree to be bound by its decision on fact and, in so far as they do not take advantage of the special remedies by way of a Special Case, on questions of law. In general, an award of an arbitrator cannot be set aside for error whether of fact or of law . . ."

G However, I went on to say (*ibid.*):

"It seems to me that misconduct in that wide sense in which it is used in relation to arbitration is also a ground on which the court can interfere with the exercise by the arbitrator of his discretion as to costs."

H It is contended by the defendants, and, indeed, by the third and fourth parties (who are quite happy with the award as it stands) that there is no material here on which I can say that the arbitrator has been guilty of misconduct.

I This is a border-line case. This award is, I think, a speaking award. The arbitrator has not limited himself to awarding that the counterclaim be disallowed and that the consequences as to costs follow, but has put forward, I think, the findings on which his award is based, and, in particular, the finding that, consequent on the finding that the counterclaim fails, the questions of indemnity by the third party to the plaintiffs, and by the fourth party to the third party, do not arise. On those findings—and they represent the only findings in the case—it seems to me that the award as to costs clearly cannot stand. It would be an injudicial exercise of discretion to award against the plaintiffs the third party's costs, including the costs of the fourth party, and not to award to the plaintiffs against the defendants the plaintiffs' costs including the costs of the third and fourth party proceedings, which the plaintiffs have been

compelled to pay. On those findings, it is impossible, in my view, to draw the distinction which the arbitrator has drawn between the position of the third party and that of the plaintiffs as regards the costs of the further proceedings. I think, therefore, that that part of the award which deals with costs should be remitted to the arbitrator for his reconsideration. A

In remitting that part of the award, I think that I should make these observations about the way in which costs should be dealt with where third, fourth, fifth or sixth parties have been brought in in these string contract cases which are very common. In doing so, I want to make it clear that I am not seeking to substitute my discretion for that of the arbitrator, or to suggest that there may not be reasons in some circumstances for making a different award. In the ordinary way, however, where damages are claimed for breach of contract on one contract in a string of contracts, and the seller brings in his immediate seller as a third party, and the third party brings in his immediate seller as a fourth party, then, provided that the contracts are the same or substantially the same so that the issue whether the goods comply with a description is the same, the defendant (in this case it was the plaintiffs, because it was a counterclaim), if successful, should recover against the plaintiffs not only his costs but any costs of the third party which he has been ordered to pay: the third party in like manner should recover from the defendant his own costs and any costs of the fourth party which he has been compelled to pay, and so on down the string. That is the normal way in which costs should be dealt with in this kind of action where there is a string of contracts in substantially the same terms. In saying that, I am not excluding the possibility that there may be special reasons for departing from that normal practice. Whether it was reasonable for the defendant to bring in a third party at all is always a question to be considered, and that is a matter on which a lot of facts may be relevant. B C D E

Why I think that it is plain that the arbitrator cannot have applied the right principles in this case is the fact that the award as to costs is inconsistent in that it has adopted one method towards the plaintiffs—who were the defendants to the counterclaim—and another method towards the third party. I think, therefore, that this is a case where I should, in the exercise of my discretion under s. 22 (1) of the Arbitration Act, 1950, remit to the arbitrator for further consideration part of his award, namely, paras. (vi), (vii) and (viii), which deal with costs. I do not think that I should limit myself to remitting merely para. (vii), which relates to the defendants' costs, because there may be matters unknown to me which will affect the matter of costs, or which he may think, in his discretion, should affect the matter of costs. F G

Paragraphs (vi), (vii) and (viii) of award remitted for further consideration.

Solicitors: *Birkbeck, Julius, Coburn & Broad*, agents for *A. L. Hamwee & Co.*, Manchester (for the plaintiffs); *Simmons & Simmons*, agents for *March, Pearson & Green*, Manchester (for the defendants); *R. Barrow-Sicree*, Manchester (for the third party); *W. A. Sando, Parrott & Co.*, agents for *Kirk, Jackson & Co.*, Swinton (for the fourth party).

[Reported by E. COCKBURN MILLAR, Barrister-at-Law.]

A HOLMES AND ANOTHER v. KEYES (LORD) AND OTHERS.

[COURT OF APPEAL (Jenkins, Romer and Ormerod, L.JJ.), March 24, 25, 1958.]

Company—Director—Vacation of office—Failure to acquire qualification shares within two months after election—Election by poll—Result declared on following day—Date of election—Companies Act, 1948 (11 & 12 Geo. 6 c. 38), s. 182 (1), (3).

Company—Meeting—Completion—Business of meeting and voting on poll completed on one day—Counting votes completed on following day—When meeting completed.

Company—Articles of association—Construction—Principle to be adopted.

C By a company's articles of association, the qualification of a director was "the holding in his own right of five hundred ordinary shares of the company", and the office of a director was (under art. 98 (C)*) to be vacated if he did not acquire the number of shares required to qualify him for office within two months after appointment (which was also the maximum period permitted under s. 182* of the Companies Act, 1948). The articles further provided that, on a transfer of a share, "the transferor shall be deemed to remain the holder of the share until the name of the transferee is entered in the register of members in respect thereof". It was also provided (by art. 65) that "a resolution put to the vote of the meeting shall be decided on a show of hands unless before or upon the declaration of the result of the show of hands a poll be demanded", and that in the case of an equality of votes at a poll, the chairman of the meeting should be entitled to a further or casting vote, in addition to the votes to which he might be entitled as a member. At a general meeting of the company held on Dec. 23, 1957, resolutions were presented that K. and L. be appointed directors. A poll having been demanded in respect of each of the resolutions before any show of hands had taken place, there was no show of hands before either poll. The voting took place on Dec. 23, but the counting did not take place until the following day. On that day, Dec. 24, the company was informed by the scrutineers that K. and L. were duly elected. K. and L. did not then hold sufficient shares to qualify them to be directors; subsequently they purchased their qualification shares, but their names were not entered in the register of shareholders in respect of those shares until Feb. 24.

G **Held:** (i) there was no appointment of K. and L. for the purposes of s. 182 of the Companies Act, 1948, or art. 98 (C) of the articles of association, until the result of the poll was ascertained, viz., Dec. 24, 1957; the offices of K. and L. as directors were not, therefore, vacated for failure to acquire their qualification shares, as the shares were acquired by them on Feb. 24, 1958, viz., within the two months allowed by s. 182 and art. 98 (C).

H *Shaw v. Tati Concessions, Ltd.* ([1913] 1 Ch. 292) and *Spiller v. Mayo (Rhodesia) Development Co. (1908), Ltd.* ([1926] W.N. 78) considered.

(ii) on the true construction of art. 65 a poll could validly be demanded before a show of hands was taken.

Carruth v. Imperial Chemical Industries, Ltd. ([1937] 2 All E.R. 422) considered and distinguished.

I Per JENKINS, L.J.: the articles of association of the company should be regarded as a business document and should be construed so as to give them reasonable business efficacy where a construction tending to that result is admissible on the language of the articles, in preference to a result which would or might prove unworkable (see p. 138, letter F, post).

Decision of DANCKWERTS, J. ([1958] 1 All E.R. 721) reversed.

* The relevant terms of s. 182 of the Companies Act, 1948, are printed at p. 131, letter H, post. Article 98 (C) is printed at p. 132, letter H, post.

Costs—Appeal to Court of Appeal—Company—Directors—Shareholders' action against directors and company alleging vacation of directorship—Company not served with notice of appeal—Whether order would be made for company's costs of appearing on appeal.

A company, which was a defendant to an action by shareholders against two directors for a declaration that each had vacated office as director by failing to acquire qualification shares within due time, was not served with notice of appeal by the directors against the grant of an interlocutory injunction restraining them from acting as directors. The company nevertheless was represented by counsel at the hearing of the appeal. No objection was taken to the company being so represented.

Held: the Court of Appeal could not make an order in the company's favour for its costs of the appeal.

[As to the effect of the requirement that the holding of shares is a condition precedent to becoming a director, see 6 HALSBURY'S LAWS (3rd Edn.) 287, para. 587.

For the Companies Act, 1948, s. 182, see 3 HALSBURY'S STATUTES (2nd Edn.) 602.

As to costs of appeals to the Court of Appeal, see 26 HALSBURY'S LAWS (2nd Edn.) 128, para. 253.]

Cases referred to:

(1) *Shaw v. Tati Concessions, Ltd.*, [1913] 1 Ch. 292; 82 L.J.Ch. 159; 108 L.T. 487; 9 Digest (Repl.) 620, 4131.

(2) *Spiller v. Mayo (Rhodesia) Development Co. (1908), Ltd.*, [1926] W.N. 78; 9 Digest (Repl.) 620, 4132.

(3) *Carruth v. Imperial Chemical Industries, Ltd.*, [1937] 2 All E.R. 422; [1937] A.C. 707; 156 L.T. 499; sub nom. *Re Imperial Chemical Industries, Ltd.*, 106 L.J.Ch. 129; Digest Supp.

Interlocutory Appeal.

The two individual defendants appealed from the decision of DANCKWERTS, J., dated Feb. 28, 1958, and reported [1958] 1 All E.R. 721, granting to the plaintiff shareholders an interlocutory injunction restraining those defendants from acting as directors of the defendant company. Notice of this appeal was served on the plaintiffs, but not on the defendant company. The facts appear in the judgment.

J. E. S. Ricardo for the first defendant.

Gerald Gardiner, Q.C., and *T. D. D. Divine* for the second defendant.

Denys B. Buckley for the defendant company.

Gilbert Beyfus, Q.C., and *H. L. P. A. Sieghart* for the plaintiffs.

JENKINS, L.J.: The action in which this appeal arises is an action brought by Mr. William Arthur Holmes and Miss Zena Daniels, who are two of the directors of, and also shareholders in, a company called Gordon Hotels, Ltd., suing on behalf of themselves and all other shareholders of the company, except the individual defendants; and the defendants against whom the action is brought are Lord Keyes, Mr. Ashe Lincoln and the company, Gordon Hotels, Ltd. The action was brought for a declaration that Lord Keyes and Mr. Ashe Lincoln had vacated their offices as directors of the company. Having issued their writ, the plaintiffs moved for an injunction to restrain the two individual defendants from acting as directors until judgment in the action or further order. That motion came before DANCKWERTS, J., on Feb. 28, 1958, and he granted the injunction sought. From that order the two individual defendants now appeal to this court.

The question in the case is whether the defendants acquired their qualification shares, which directors are required to hold under the articles, within the period

A of two months from their appointment, as enjoined by s. 182 (1) of the Companies Act, 1948.

Their election came about in this way: the annual general meeting of the company was held on Dec. 23, 1957, and part of the business of that meeting was the appointment of directors. At the meeting I understand the position to have been this: The number of directors was seven, that being the maximum number provided for in the relevant article, as amended by special resolution. Four directors retired at the meeting, three by rotation and one who had been appointed since the last annual general meeting by the directors themselves and was accordingly, under the articles, due to retire at this annual general meeting. There were thus four vacancies, and I understand there were five candidates, including the two individual defendants. Resolutions for the election of the candidates standing for the office of director were put seriatim, and in each case a poll was demanded. In each case the votes on the poll were actually cast at the meeting on Dec. 23, 1957, but naturally it was not desired to keep the meeting waiting indefinitely while the votes were counted; so in fact the counting took place on the following day, the auditors of the company being appointed to act as scrutineers. The result of the counting showed that the two individual defendants, amongst others, were elected as directors.

The substantial question in the case is whether in those circumstances, for the purposes of s. 182 of the Act, the two individual defendants should be treated as having been appointed at the meeting itself so soon as all the votes on the relevant resolutions had been cast, or whether the true view is that the two individual defendants were not appointed until the result of the poll was ascertained on the following day. The importance of that question is this: If the individual defendants are to be treated as elected on Dec. 23, then for the purposes of the two months allowed for the acquisition of qualification shares, time began to run from midnight on Dec. 23, 1957, and expired, as I understand it, at midnight on Feb. 23.

The individual defendants in fact set about acquiring their qualification shares some time during January, and well within the two months they became beneficially entitled to shares, but there was no registration of the individual defendants as proprietors of the shares acquired until some time on Feb. 24, which would be too late*, if time is properly to be calculated from midnight on Dec. 23. If, on the other hand, they were not elected until Dec. 24, when the result of the poll was ascertained, then their acquisition of qualification shares and completion of their title by registration took place just within time. The question is a highly technical one and probably would not have been litigated at all but for certain unfortunate internal divisions in the councils of the company.

I should next refer to some of the provisions of the Act and of the articles of association of the company. I should first refer to s. 182, which is as follows:

H “(1) Without prejudice to the restrictions imposed by the last foregoing section, it shall be the duty of every director who is by the articles of the company required to hold a specified share qualification, and who is not already qualified, to obtain his qualification within two months after his appointment, or such shorter time as may be fixed by the articles.

I “(2) For the purpose of any provision in the articles requiring a director or manager to hold a specified share qualification, the bearer of a share warrant shall not be deemed to be the holder of the shares specified in the warrant.

“(3) The office of director of a company shall be vacated if the director does not within two months from the date of his appointment, or within

* Article 23 of the company's articles of association provided that: “The instrument of transfer of a share shall be signed both by the transferor and the transferee, and the transferor shall be deemed to remain the holder of the share until the name of the transferee is entered in the register of members in respect thereof.”

such shorter time as may be fixed by the articles, obtain his qualification, or if after the expiration of the said period or shorter time he ceases at any time to hold his qualification.

"(4) A person vacating office under this section shall be incapable of being reappointed director of the company until he has obtained his qualification."

Then there is a penal provision in sub-s. (5):

"If after the expiration of the said period or shorter time any unqualified person acts as a director of the company, he shall be liable to a fine not exceeding £5 for every day between the expiration of the said period or shorter time or the day on which he ceased to be qualified, as the case may be, and the last day on which it is proved that he acted as a director."

As to the articles, art. 1 excludes Table A in Sch. 1 to the Companies Act, 1929, which was the Companies Act in force when the articles were adopted,

"except so far as the same are repeated or contained in these articles."

Then art. 80, which deals with the number of directors, provides:

"Until otherwise determined by a general meeting, the number of directors shall not be less than three nor more than nine."

I understand that the maximum of nine was reduced to seven, exclusive of certain directors appointed on behalf of debenture holders, but nothing turns on that. Article 81 is the usual provision for the appointment of directors by the board.

"The directors may from time to time appoint any other person to be a director, either to fill a casual vacancy or by way of addition to the board, but so that the maximum number fixed as above shall not be thereby exceeded. Any director appointed under this article shall hold office only until the ordinary general meeting following next after his appointment, but shall then be eligible for re-election."

Then there is art. 83, the qualification of a director. That article as it originally stood was altered by special resolution, and in its new form reads as follows:

"The qualification of a director other than a nominated director shall be the holding in his own right of five hundred ordinary shares of the company of £1 each and s. 141 of the Act shall be duly complied with by every director requiring such qualification."

Section 141 of the Companies Act, 1929, corresponds to s. 182 of the Act of 1948. Article 98, which deals with the vacation of office by directors, provides: "The office of a director shall be vacated". Then there are events (A) and (B) which are not material. Then (C):

"If he ceases to hold the number of shares required to qualify him for office or does not acquire the same within two months after election or appointment."

Then there are three other disqualifying events, with which we are not concerned. The provisions as to the rotation of directors begin with art. 100:

"At the ordinary meeting in every year, two of the directors for the time being shall retire from office."

Then there is the usual provision deciding who is to retire, the rule being that the longest in office since their last election are the ones to retire; and there is a provision that as between directors of equal seniority, the directors to retire, in the absence of agreement, are to be selected from among them by lot. Then art. 101 provides:

"A retiring director shall be eligible for re-election and shall act as a director throughout the meeting at which he retires."

Article 102 reads:

A "Subject to any resolution for reducing the number of directors, the company shall, at the meeting at which any directors retire in manner aforesaid, fill up the vacated office of each director by electing a person thereto."

I do not think that anything turns on art. 103. Then art. 104 provides:

B "Subject to any resolution for reducing the number of directors, if at any meeting at which an election of directors ought to take place, the places of the retiring directors are not filled up, the retiring directors as aforesaid shall be deemed to have been re-elected."

We were referred in the course of the argument to art. 23 and art. 24, which deal with transfers of shares. I need not refer to those articles, for they were
C quoted only on the point that a director cannot be said to have qualified himself by the requisite shareholding unless and until his title is perfected by registration. That point was the subject of some argument, I understand, before the learned judge, but it is not now contended that a director can claim to have acquired his qualifying shares until he is actually on the register.

Finally, I should refer to some of the articles dealing with general meetings
D and proceedings at general meetings. Article 60 is the usual article stating the ordinary business at an ordinary meeting, and that includes the election of directors. Then art. 63 gives the usual power to the chairman, with the consent of any meeting at which a quorum is present, to adjourn the meeting from time to time and from place to place. Article 65, as amended by special resolution, reads thus:

E "At any general meeting of the company a resolution put to the vote of the meeting shall be decided on a show of hands unless before or upon the declaration of the result of the show of hands a poll be demanded in writing by the chairman or by at least five members present in person or by proxy and entitled to vote at the meeting, or by the holder or holders in person or
F by proxy of at least one-tenth of the total voting rights of all members having the right to vote at the meeting."

I do not think that it is necessary for me to read the whole of that article, which is in a very usual form. After the provisions for demanding a poll, it goes on:

"and unless a poll be so demanded a declaration by the chairman of the meeting that a resolution has been carried, or has been carried by a particular
G majority, or lost, or not carried by a particular majority, shall be conclusive and an entry to that effect in the minute book of the company shall be conclusive evidence thereof, without proof of the number or proportion of the votes recorded in favour of or against such resolution."

Article 66 is of some importance. That is in these terms:

H "If a poll be demanded in manner aforesaid, it shall be taken at such time and place and in such manner as the chairman shall direct, and the result of the poll shall be deemed to be the resolution of the meeting at which the poll was demanded. The demand for a poll may be withdrawn."

Next I would refer to art. 68:

I "In the case of an equality of votes, either on a show of hands or at a poll, the chairman of the meeting shall be entitled to a further or casting vote, in addition to the votes to which he may be entitled as a member."

Then art. 69 provides:

"The demand of a poll shall not prevent the continuance of a meeting for the transaction of any business other than the question on which a poll has been demanded."

Those, I think, are all the relevant articles, but I should perhaps refer again to the Companies Act, 1948, s. 144. That provides:

"Where a resolution is passed at an adjourned meeting of—(a) a company [that is the material case] the resolution shall for all purposes be treated as having been passed on the date on which it was in fact passed, and shall not be deemed to have been passed on any earlier date."

In the course of his submissions to us on behalf of the two individual defendants, counsel for the second defendant made two admissions. First, he said that he did not pursue the contention to the effect that the two individual defendants became duly qualified when they entered into contracts to purchase shares, but accepted the view that they could only become qualified when their title was completed by registration. That point, therefore, disappears from the case. Counsel for the second defendant further agreed that if the election took place on Dec. 23, time began to run from midnight on that day, and, on the other hand, if the election is treated as taking place on Dec. 24, time began to run from midnight on that day. So there is no dispute as to the method of computing time, and it is clear that if Dec. 23 was the proper date from which to compute the time, these two defendants were too late. On the other hand, if the proper date was Dec. 24, they were within time.

The learned judge, after stating the facts and citing the relevant articles of association, expressed his conclusion thus ([1958] 1 All E.R. at p. 724):

"It seems to me that, in the present case, the meeting was called on Dec. 23, and was on no other day. It is true that the result was not ascertained until the next day, but the meeting was complete and the poll was complete, except for the declaration of the result, on Dec. 23; and it seems to me that the elections of the defendants, if they were valid, took place on that day and on no other day. Consequently, it seems to me that time started to run from midnight at the end of that day, Dec. 23, and, therefore, had expired at midnight on Feb. 23, 1958, and the registration of the first and second defendants' shares in their names on Feb. 24 was too late."

That is the conclusion which counsel for the two individual defendants was concerned to attack. In the course of his argument he referred us to certain authorities, which were also referred to before the learned judge but which he regarded as distinguishable from the present case. It is perfectly true that these authorities did each of them deal with a different set of circumstances, but two of them, I think, do afford some assistance to the case of the two individual defendants, and I propose to confine my citation to those two cases. The first is *Shaw v. Tati Concessions, Ltd.* (1) ([1913] 1 Ch. 292) which is a decision of SWINFEN EADY, J., The headnote of the case was this:

"A poll demanded at a company meeting was directed to be taken at a future date, but the meeting itself was not adjourned: *Held*, that the mere postponement of the poll was not an adjournment ad hoc of the meeting within the meaning of an article allowing the lodgment of proxies forty-eight hours before a meeting 'or adjourned meeting', but the original meeting continued for the purpose of the poll, and no fresh proxies could be lodged."

The learned judge said this at the conclusion of his judgment (*ibid.*, at p. 297):

"If there is an adjourned meeting they [that is, the proxies] may be deposited later, namely, forty-eight hours before the adjourned meeting. But here there was no adjourned meeting, and the taking of a poll is not a meeting. The true legal position is this. There is no adjourned meeting, but the original meeting continues for the purpose of taking the poll until the poll is closed. Therefore proxies obtained and lodged later than forty-eight hours before the original meeting are not available."

Counsel for the plaintiffs, in regard to that authority, points to the words "until the poll is closed", and he says that the poll was closed in the present case when the votes on the poll were cast, and that this authority, therefore, should not be

A regarded as telling against him. I doubt whether, when he referred to the closing of the poll, SWINFEN EADY, J., meant to say that the meeting did not continue for the purpose of ascertaining the result of the poll.

The other authority appears to me clearly to regard a meeting in such a case as continuing until the declaration of the poll, which is in effect the ascertainment of the result of the poll. The case was *Spiller v. Mayo (Rhodesia) Development Co. (1908), Ltd.* (2) ([1926] W.N. 78), which was tried by RUSSELL, J. To put it very shortly, the question appears to have been whether, on the true construction of the articles of association of the company, a proxy could be revoked between the holding of a meeting at which a poll was demanded on a resolution and the time when the poll was held, this being a case where the entire poll—that is to say, the casting of the votes as well as the ascertainment of the result—was held on a day subsequent to the meeting. I think that sufficiently indicates the nature of the case, and I refer to it for these observations (*ibid.*, at p. 79):

D “The first point was there had been in fact no intimation of any revocation at all. In his Lordship’s opinion that could not be sustained. The second point was in his view a more formidable one. It was said that no intimation of the revocation was received before the meeting. In his Lordship’s opinion, if English language meant anything, the article required that in order to invalidate the vote, intimation in writing of the revocation must be received at the office before the meeting, and in his view that must mean before the commencement of the meeting. It was well settled that the taking of a poll was not a meeting of the company in the strict sense, but was in law a mere continuation of the meeting at which the poll was directed to be taken. For the particular purpose in question therefore the meeting must be held to have begun on Dec. 15 and to have come to an end at the declaration of the poll, a week later. The intimation of revocation, however, had been received between those two dates. In his opinion it was impossible to say on the true construction of the particular article that the proviso had been complied with, namely, that intimation in writing of the revocation had been received before the meeting.”

Those are the only two authorities to which I propose to refer on the effect of a poll being taken, or the result of a poll being declared, on a day subsequent to the date of the actual meeting at which the resolution was put, but I should also make some reference to *Carruth v. Imperial Chemical Industries, Ltd.* (3) ([1937] 2 All E.R. 422). I cite that for this reason: it appears that in fact on each of the resolutions appointing directors at the meeting of Dec. 23 a poll was demanded without first going through the formality of a show of hands, and it was suggested that, on the true construction of art. 65, that vitiated not only the appointments of the two individual defendants, but also the appointments of the directors who were appointed at the same meeting (in some ways one might say a rather appropriate conclusion to the dispute), but I am satisfied that the resolutions cannot be regarded as having been invalidated on that ground.

The case to which I refer dealt with a highly complicated scheme of arrangement between a company and its various classes of shareholders. The presentation of the scheme to the court for approval had to be preceded by the approval of the scheme at a meeting of the company, and also at the meetings of the various classes of shareholders. The proceedings at these meetings had to be regulated in accordance with the articles of association of the company. The particular article of association which was material for the present purpose was the article corresponding to art. 65 in the articles of the defendant company, but it had this important difference, that provision was made for a demand for a poll simply on the declaration of the result of the show of hands. The point arose in this way: apparently the arrangements for separating the different classes for the purposes of their several meetings were not as effective as they

might have been, so that in the case of at least one meeting there were present holders of shares of the class and strangers of various kinds, I imagine members of the company holding shares of other classes. The resolution was in fact put to the vote by show of hands, and on the declaration of the result, a poll was demanded, but LORD BLANESBURGH took the point that inasmuch as the meeting was diluted by the presence of strangers, the vote on a show of hands was (as one might say) a nullity because it was impossible to tell how far it included non-members. Of course, that difficulty would not enter into the voting by poll because each member would have to produce proper evidence of his being a holder of shares in the class. So, said LORD BLANESBURGH, as there had been no valid show of hands, the demand for a poll was irregular, because the proper time to demand it was on the declaration of the result of the show of hands, being a valid show of hands.

In my view, that case does not touch the present case. I should say that the point was taken and dealt with only by LORD BLANESBURGH, so that his observations may, I think, be regarded as obiter, though entitled to respect.

What to my mind concludes the matter is the circumstance that the article with which we are here concerned, art. 65, as adopted by special resolution, provides as follows:

"At any general meeting of the company a resolution put to the vote of the meeting shall be decided on a show of hands unless before or upon the declaration of the result of the show of hands a poll be demanded . . ."

It is to be observed that a poll can be demanded before the show of hands as well as on the declaration of the result of the show of hands. The language is capable of reading: unless before the declaration of the result of the show of hands or on the declaration of the result of the show of hands, and then it could conceivably be argued that the demand could not be made before the declaration of the result of the show of hands if there was no show of hands at all. That would be an inconvenient construction, which would compel going through the formality of a show of hands, not for the purpose of obtaining the result of that vote, but merely so that a demand for a poll could be made before the declaration of the result. I think that the article should read, as suggested by ROMER, L.J., in the course of the argument, in this way: At any general meeting of the company a resolution put to the vote of the meeting shall be decided on a show of hands unless before, or on the declaration of, the show of hands . . . That makes it clear that a poll can be demanded without going through the formality of a show of hands. The question, therefore, is, in my judgment, out of the way.

I should next state as best I can the arguments on either side in this highly technical controversy. The case for the two individual defendants may possibly be put in some such way as this: It cannot be said of any candidate for the office of director that he has been elected or appointed until he can say with truth I am a director, or until the company could truthfully tell him, if he asked, You are a director. These defendants agree that knowledge on the part of a candidate of his election is not the test, but they do submit that at all events he is not elected, in any effective sense of that expression, until the company can tell him, if he asks, Yes, you are a director. It is clear, say these defendants, that neither of them could, during the period between the casting of the votes on the poll and the ascertainment of the result of the poll, claim to be, or to exercise, any of the powers of a director. In these defendants' submission, the taking of the poll was not complete until the result was ascertained. Therefore, the individual defendants could not be said to have been elected until the result was ascertained. The possibility was suggested, I think, of the resolution for the election of a director being put to the vote by show of hands, and in such a case it was said that although the votes had been cast in the form of hands raised, so that in one sense the election may be said to have taken place, in another sense, and in the

A effective sense, it cannot be said to have taken place until the result of the show of hands, by counting hands raised on either side, has been ascertained.

On the side of the two individual defendants it is further argued that there is no sufficient reason for treating the election (which only becomes effective when the result is ascertained) as relating back to the date of the meeting; and it is pointed out that the period between the meeting and the ascertainment of the result need not (as in the present case) be a matter only of one day, it might be a substantial period; and, indeed, in certain circumstances, delay in ascertaining the result of the poll on the resolution for the appointment of a director might absorb the whole period allowed him under the articles in which to qualify himself. Suppose the articles said that he was to acquire his qualification within a fortnight of his appointment, and suppose a poll on the resolution for his election had been demanded and the result was not ascertained for a fortnight after the date of the meeting. The peculiar result would apparently ensue that at the very moment when for the first time it could be said of him -he is a director, he would vacate office for failure to acquire his qualification shares. This side of the argument may also be put thus:—by the express terms of s. 182 of the Act, every director is placed under a duty to obtain his qualification within two months after his appointment. How can a person who has stood for the office of director at a meeting and whose appointment has been the subject of a resolution, voted on by a poll vote, of which the result has not yet been ascertained, be said to be under a duty to acquire his qualification shares? He does not know whether he is a director or not; the company does not know whether he is a director or not. Nobody knows or can know until the result is ascertained. If he asks the secretary of the company: am I under a duty to acquire my qualification shares? at any time before the ascertainment of the result of the vote, the secretary could only answer—well, you may be under an obligation to do so, but it is impossible to say whether you are or not. It is obviously unreasonable to expect such a person to acquire the shares necessary to qualify him in case the poll turns out to have resulted in his election.

F In substance, therefore, in the submission of the two individual defendants, the effect of the view contended for by the plaintiffs and taken by the learned judge is that the period prescribed by the Act or the article for the acquisition of the qualification would be curtailed by the period of time elapsing between the date of the meeting and the date of the ascertainment of the result of the poll. The true view, as the two individual defendants would have it, is, as I understand it, in effect that the meeting should be treated as notionally continuing until the result of the poll is ascertained and that the appointment of the director concerned takes effect as from the date of such ascertainment. Some support for that view is, I think, to be found in *Shaw v. Tati Concessions, Ltd.* (1) and *Spiller v. Mayo* (2), to which I have already referred. It is not right, in the submission of the two individual defendants, to treat the ascertainment of the result as a mere formality, and by way of illustration of their submission to the contrary, they point out that in the event of an equality of votes, the chairman has a second or casting vote. They say that the ascertainment of the result is just as much a part of the taking of the poll as the casting of the votes.

Article 66 is relied on to some extent by both sides. It will be remembered that that article provides:

I “If a poll be demanded in manner aforesaid, it shall be taken at such time and place and in such manner as the chairman shall direct, and the result of the poll shall be deemed to be the resolution of the meeting at which the poll was demanded.”

The two individual defendants point out that what is referred to is the result of the poll and not the taking of the poll, and they say the effect of it is that when the result of the poll is ascertained, then that result is to be deemed to be the resolution of the meeting, but they say in effect that the resolution of the meeting

should be taken as being of the same date as the ascertainment of the result of the poll. The plaintiffs' view, on the other hand, is that the effect of art. 66 is to make the result of the poll the equivalent of the resolution of the meeting, that resolution being dated back to the date of the meeting, that is to say, Dec. 23, 1957, in the present case. A

On the plaintiffs' side, the argument is of this nature: the election is complete when the votes are cast on the poll; the ascertainment of the result of the poll is mere machinery; the people who ultimately turn out to have been elected were elected when those votes were cast although they did not know it and the company did not know it, and although they could not claim to be considered directors pending such ascertainment. Counsel for the plaintiffs admitted, as I understood him, that if the poll was taken—that is to say, if the votes on the poll were taken—on a later date, then that later date would be the date of the directors' appointment or election; but he says it is otherwise if the votes are cast on the actual day of the meeting and the counting takes place on a later day. That seems to me to involve an extremely fine distinction, because the effect would be that if in the present case the poll, in the sense of the casting of the votes, had been taken on Dec. 24, then that date would have been the date of appointment of the directors concerned, whereas the 23rd is taken for the day in the plaintiffs' submission simply because the convenient course was to let the votes be cast on Dec. 23 before the meeting broke up, and to arrange for the votes to be counted and the result to be ascertained on the following day. Moreover, this line of argument involves abandonment of the contention that the election must take place strictly at a meeting, for the holding of the poll on a date subsequent to the actual meeting is recognised as amounting to election on that day. B C D E

I hope that I have now done justice to the arguments on either side, and, finally, I should endeavour to express my own conclusions. I think that the articles of association of the company should be regarded as a business document and should be construed so as to give them reasonable business efficacy, where a construction tending to that result is admissible on the language of the article, in preference to a result which would or might prove unworkable. In my view, the doctrine of relation back for which the plaintiffs contend would produce a wholly unreasonable result, and I decline to adopt it unless constrained to do so by the terms of the Act and the articles. I can find nothing in the Act or the articles which constrains me to do so. I do not think that art. 66 is inconsistent with the individual defendants' view; on the contrary, I think that it tends to support that view. In my judgment, the ascertainment of the result should be considered as part of the poll, and, consequently, there can be no appointment of a director by a general meeting until the result of the poll is ascertained. It is only then that the appointment can become in any sense effective. In effect the meeting should be treated as continuing until the result of the voting on the poll is ascertained. Unless the appointment begins when the result of the poll is ascertained and on no earlier date, it would be impossible for the company to know who its directors were. That produces a result that is really quite impossible. It also seems contrary to principle to place a man under a duty to acquire qualification shares, on the footing that he has been elected as a director, at a period when it is not known whether the resolution appointing him a director has been carried or not. F G H I

It is with reluctance that I differ from the learned judge, a judge of great experience in matters of this kind, but, for the reasons I have endeavoured to express, I would allow this appeal and discharge this injunction.

I should perhaps add that in the course of the hearing before us reference was made to some further evidence which it was suggested might cast doubt on the qualification in shares of the individual defendants or one of them even now. We did not go into the details of that matter because it appeared to us that we

A should confine our attention to the matters which were raised before the learned judge. I only wish to say that I am for allowing the appeal simply on the footing that the only material facts were those before the learned judge and before us, and I say nothing as to any other ground it may be possible to advance for the contention that these directors are not duly qualified.

B ROMER, L.J.: I agree. It appears to me that the appeal raises a very short question of construction of s. 182 (3), of the Companies Act, 1948, and of art. 98 (C) of the company's articles of association. It is said by the plaintiffs that the effect of those provisions is that the two months which the two individual defendants had to acquire their qualification shares started at midnight on Dec. 23/24, on the ground that the poll which had been demanded at the meeting on Dec. 23 was taken on the same day and was then closed, and that there was nothing remaining to be done thereafter except to ascertain the result of the voting. That was the view which found favour with the learned judge. The two individual defendants, however, say that the period of two months did not start to run until midnight on Dec. 24/25, because the count did not take place until Dec. 24, and, therefore, it was not known until that day whether these defendants had been elected or not. It may well be that from one point of view the two individual defendants may be regarded as having been elected directors on Dec. 23, for it was by virtue of the votes given at the meeting on that day that they were appointed to the board. The question is, however, what is meant by "the date of his appointment" in the context in which those words appear in s. 182 (3) of the Act. The provisions of that sub-section impose a time limit within which a director has to perform a specified act, videlicet, attain his qualification shares. Failure to perform the act within the stipulated time is attended by serious consequences, namely, the compulsory vacation of his office by the director concerned.

In these circumstances, common sense would seem to suggest that the time should not start to run until it was known, at least by somebody, that a position had arisen which necessitated the acquisition of the qualification shares; and that position could not be said to have arisen until it had been ascertained that a particular candidate had in fact been elected, for until that was known, no question of obtaining qualification shares could arise. In a case such as the present a director cannot be said to have been appointed for relevant purposes until the result of the poll has been made known. Until that moment of time, it is a matter of speculation whether he has been elected to the board or not, and until that moment he is neither entitled to exercise the rights nor is he subject to the obligations of a director of the company.

In my judgment, it is not until those rights and obligations are shown to have arisen and a candidate has become clothed with his office accordingly that he can be said to have been appointed for the purpose of the section and art. 98 (C).

H It is unnecessary to refer to any of the authorities cited further than my Lord has already done. It is a mere short question of construction, primarily of s. 182, and in a parallel sense of art. 98, and in my opinion the effect of those provisions is as I have stated it to be. I would therefore allow the appeal. I would only add that I agree that it is irrelevant that the poll was not preceded by a show of hands. This is really quite clear when one analyses art. 65 as my Lord has done.

I ORMEROD, L.J.: I agree, and were it not for the fact that we are differing from the learned judge, I should find it unnecessary to add anything to the reasons which have already been given by my brethren.

The issue as it came before this court resolved itself into a short point, and that was whether the poll was complete when the votes were cast or was not complete until the result was ascertained by somebody, not necessarily communicated to the persons interested, but certainly ascertained by somebody.

It was agreed by counsel on behalf of the plaintiffs that in the case of a vote by a show of hands, the result was not complete until the votes had been counted

and the result of the count declared by the person in charge of the meeting. That seems a reasonable and common-sense view, particularly having regard, as was pointed out, to the fact that people may take their hands down in the course of the voting, and that many other things may happen before the votes are finally counted. However, it was contended on behalf of the plaintiffs that the same considerations would not apply to the taking of a poll, that when the votes were cast the matter was complete, the result could then be determined, and the contingencies such as a voter being able to change his mind and withdraw his hand could not arise, and therefore the poll was complete and nothing further needed to be done. I find it extremely difficult to accept this argument. Apart from anything else, it appears that even when the votes are cast, there may be much to be done and much to be decided before the result of the poll can be ascertained. It may well be that the proxies have to be examined, some of the votes may be disqualified, and so on; and, of course, there is always the possibility, as was pointed out by counsel for the second defendant, that there may be a tie which would require the casting vote of the chairman.

In these circumstances, it seems to me abundantly clear that the poll cannot be said to be taken until these matters have been examined, the votes finally determined and counted and the result ascertained. In this case the votes were cast on Dec. 23, the day of the meeting, but the result was not ascertained until Dec. 24, the day after the meeting.

Counsel for the plaintiffs, as I understand his argument, does not now contend that in any event, having regard to art. 66, the result of the poll, which is to be deemed to be a resolution of the meeting, must be dated back to the date of the meeting. His contention is that all that was necessary to be done had been done at the meeting on Dec. 23, and that, in those circumstances, the matter was complete and the directors were elected. I find it extremely difficult to accept that view, and it does not seem to be in accordance with art. 66, which provides that when a poll is taken it shall be taken at such place and in such manner as the chairman may direct, and the result of the poll shall be deemed to be the resolution of the meeting at which the poll was demanded. As I see it the words "the result of the poll" must imply the necessary ascertainment of that result, and until that result is ascertained, I find it difficult to understand how the poll could become what the article required, something which may be deemed to be the resolution of the meeting.

In any event, it does appear that any other construction would be so impracticable as to be unworkable. In this particular case, for instance, there were four vacancies on the board of directors. There were, I think, five candidates and four were elected. Until the result of the poll was ascertained, the officials of the company had no idea how many of the persons who had been candidates for election had been elected, who they were, and out of the seven directors to which the company was entitled, there were only three who could with any certainty be said to be directors of the company. It seems quite impossible that a company should carry on its business in such circumstances. Though the delay here was only a matter of some twenty-four hours, there seems to be no reason why in a similar case the delay should not be for a very much longer period. Taking all those matters into consideration, I am of the opinion that the poll here was not taken until the result was ascertained, and that as the result was not ascertained until Dec. 24, the election or the appointment of these two directors did not take place until then. If that be so, they have, of course, acquired their qualification shares in time, and the provisions of s. 182 (1) of the Companies Act do not apply.

I agree that this appeal should be allowed.

[Discussion as to costs followed which included discussion whether the defendant company, which had not been served with notice of appeal, should have costs.]

A *Denys B. Buckley* for the defendant company: The defendant company was a respondent to the motion in the court below, but was not served with the notice of appeal. The defendant company is, however, a party to the proceedings affected by the appeal, because the constitution of its governing body depends on the result of the appeal. No objection has been taken to the company being represented on the appeal.

B **JENKINS, L.J.**, after conferring with ROMER and ORMEROD, L.JJ.: In the circumstances we do not see how we can make any order for costs in favour of the defendant company.

Appeal allowed with costs in the Court of Appeal. Injunction discharged. No order as to the costs of the defendant company: liberty to the two individual defendants to apply in the Chancery Division for an inquiry as to damages. Leave to appeal to the House of Lords refused.

C Solicitors: *A. B. S. Thomson* (for the first defendant); *A. Kramer & Co.* (for the second defendant); *W. R. Bennett & Co.* (for the defendant company); *Basil Greenby & Co.* (for the plaintiffs).

[Reported by HENRY SUMMERFIELD, Esq., Barrister-at-Law.]

HANAK v. GREEN.

[COURT OF APPEAL (Hodson, Morris and Sellers, L.JJ.), November 18, 19, 20, 21, 1957, March 21, April 1, 1958.]

E *Costs—Counterclaim—Claim and counterclaim both successful—Lesser sum found to be due to plaintiff—Items in counterclaim in the nature of set-off—Defendant's right to costs on claim and counterclaim.*

Set-off—Cross-claim—Equitable right of set-off for cross-claim.

F The plaintiff bought a house from the defendant, a builder, and contracted with him that he would do specified alterations to it by the date fixed for completion of the purchase. She ordered certain items of extra work and subsequently complained that the work had not been completed to time and that some of it was not satisfactory. She did not accept the suggestion of the defendant's solicitor that the amount due for extra or unsatisfactory work "should be allowed . . . to offset any expense which [the plaintiff] may incur to complete any work which remains outstanding", but brought proceedings in the county court against the defendant, claiming £266 14s. in respect of thirty-seven items alleged not to have been completed or properly completed. In his defence the defendant said he would "if necessary seek to set up [his counterclaim] by way of set-off in extinction or . . . in diminution of the plaintiff's claim," and in his counterclaim claimed £95 15s. 10d. as a quantum meruit for extra work done, £18 2s. 2d. for loss caused by the plaintiff's refusal of access to his workmen and £3 0s. 9d. for trespass to tools of his workmen thrown away by the plaintiff. On a reference of the claims to arbitration, the referee allowed sixteen items claimed by the plaintiff to a value of £110 7s. 6d., which the county court judge reduced to £74 17s. 6d. by disallowing one item, and all three items claimed by the defendant (the item for £18 2s. 2d. being reduced to £12 7s. 6d.) at a total figure of £84 19s. 3d. The county court judge made an order that the plaintiff should pay the balance of £10 1s. 9d. to the registrar for the defendant and that the plaintiff should have the costs of the claim and the defendant the costs of the counterclaim, taking into account the fact that "the root cause of the trouble was the defendant's failure to do properly and on time the work he originally contracted to do," and he treated the costs of the reference as attributable as to one half to each of the parties. On appeal by the defendant on the question of costs,

Held: the proper order was judgment for the defendant on the claim with costs on scale 4 and judgment for the defendant for £10 ls. 9d. on the counterclaim with costs on scale 2, since the defendant had, in respect of what was due to him for the extra work and the expense arising from the plaintiff's refusal of access to his workmen, and (per *SELLERS*, L.J.) also in respect of the damages for trespass, an equitable set-off defeating the plaintiff's claim.

Young v. Kitchin ((1878), 3 Ex.D. 127) and *Newfoundland Government v. Newfoundland Ry. Co.* ((1888), 13 App. Cas. 199) followed.

Appeal allowed.

Per *MORRIS*, L.J. (*HODSON*, L.J., concurring): a cross-claim can be regarded as a set-off if in a court of law it would have been so regarded at the time of the Judicature Acts or if it would have been regarded by a court of equity as the basis for equitable set-off or for giving protection on equitable grounds to a defendant (see p. 151, letter G, post).

[Editorial Note. For the converse case, where a balance remained due to a plaintiff, and for the order for costs there upheld, see *Nicholson v. Little* ([1956] 2 All E.R. 699).

As to the effect of the Judicature Acts and Rules of the Supreme Court on the right of set-off, see 29 *HALSBURY'S LAWS* (2nd Edn.) 488, para. 690.

As to costs where there is a set-off equalling or exceeding the claim, see 29 *HALSBURY'S LAWS* (2nd Edn.) 520, para. 769; and for cases on the subject, see 40 *DIGEST* 433-439, 548-591.]

Cases referred to:

- (1) *Re A Judgment Debtor (No. 171 of 1934), Ex p. Judgment Creditor*, [1934] All E.R. Rep. 688; 151 L.T. 107; sub nom. *Re Bankruptcy Notice (No. 171 of 1934)*, [1934] Ch. 431; 103 L.J.Ch. 253; Digest Supp.
- (2) *Mondel v. Steel*, (1841), 8 M. & W. 858; 10 L.J.Ex. 426; 151 E.R. 1288; 21 Digest 175, 285.
- (3) *Basten v. Butter*, (1806), 7 East. 479; 3 Smith, K.B. 486; 103 E.R. 185; 44 Digest 1297, 29.
- (4) *King v. Boston*, (1789), 7 East. 481, n.; 103 E.R. 186; 39 Digest 472, 955.
- (5) *Kist v. Atkinson*, (1809), 2 Camp. 63; 21 Digest 176, 288.
- (6) *Thornton v. Place*, (1832), 1 Mood. & R. 218; 7 Digest 367, 142.
- (7) *Templer v. McLachlan*, (1806), 2 Bos. & P.N.R. 136; 127 E.R. 576; 42 Digest 313, 3480.
- (8) *Sheels v. Davies*, (1814), 4 Camp. 119; subsequent proceedings, *Shields v. Davis*, (1815), 6 Taunt. 65; 128 E.R. 957; 41 Digest 630, 4622.
- (9) *Rawson v. Samuel*, (1841), Cr. & Ph. 161; 10 L.J.Ch. 214; 41 E.R. 451; 40 Digest 379, 105.
- (10) *Young v. Kitchin*, (1878), 3 Ex.D. 127; 47 L.J.Q.B. 579; 40 Digest 380, 115.
- (11) *Morgan & Son, Ltd. v. Johnson (S. Martin) & Co., Ltd.*, [1948] 2 All E.R. 196; [1949] 1 K.B. 107; [1948] L.J.R. 1530; 2nd Digest Supp.
- (12) *Piggott v. Williams*, (1821), 6 Madd. 95; 56 E.R. 1027; 42 Digest 230, 2628.
- (13) *Stumore v. Campbell & Co.*, [1892] 1 Q.B. 314; 61 L.J.Q.B. 463; 66 L.T. 218; 40 Digest 408, 319.
- (14) *Stooke v. Taylor*, (1880), 5 Q.B.D. 569; 49 L.J.Q.B. 857; 43 L.T. 200; 44 J.P. 748; 40 Digest 369, 2.
- (15) *Bankes v. Jarvis*, [1903] 1 K.B. 549; 72 L.J.K.B. 267; 88 L.T. 20; 40 Digest 420, 416.
- (16) *Newfoundland Government v. Newfoundland Ry. Co.*, (1888), 13 App. Cas. 199; 57 L.J.P.C. 35; sub nom. *A.-G. for Newfoundland v. Newfoundland Ry. Co.*, 58 L.T. 285; 40 Digest 381, 117.
- (17) *Sharpe v. Haggith*, (1912), 106 L.T. 13; 40 Digest 431, 536.

- A (18) *Chell Engineering Co., Ltd. v. Unit Tool & Engineering Co., Ltd.*, [1950] 1 All E.R. 378; 2nd Digest Supp.
 (19) *Childs v. Blacker*, *Childs v. Gibson*, [1954] 2 All E.R. 243; 3rd Digest Supp.
 (20) *Smith v. Parkes*, (1852), 16 Beav. 115; 51 E.R. 720; 40 Digest 388, 183.

Appeal.

- B The defendant appealed against a judgment of His Honour JUDGE REID given in Kingston-upon-Thames County Court on July 4, 1957, whereby he ordered that judgment be entered for the plaintiff for the sum of £74 17s. 6d. with costs on county court scale 3, that judgment be entered for the defendant for the sum of £84 19s. 3d. with costs on county court scale 3, that the costs of an arbitration under s. 90 of the County Courts Act, 1934, should be halved and borne equally between the parties, and that one qualifying fee should be allowed for an expert witness on each side. The defendant asked that the judgment should be set aside so far as relating to costs, and that the plaintiff be ordered to pay the defendant the costs of the whole proceedings on county court scale 4 (or on scale 3 if adjudged appropriate) including the costs of arbitration with one qualifying fee for an expert witness, and the costs of the appeal; and that judgment should be for the balance of £10 1s. 9d. to be paid by the plaintiff to the defendant.

- D The grounds of appeal were that the judge misdirected himself and erred in law as to the principles on which he should exercise his discretion as to an award of costs, *inter alia*, in that: (a) the plaintiff by her particulars of claim sought to contend that the defendant was indebted to her in the sum of £266 14s. in respect of certain breaches of a building contract, having previously contended that a sum far in excess of £266 14s. was due to her; (b) the defendant by his set-off and counterclaim made good his contention that on balance he owed the plaintiff nothing, and further established that on balance the plaintiff was indebted to him in the sum of £10 1s. 9d; (c) the area of dispute by the choice of the plaintiff was set within the province of county court scale 4 (in excess of £100), and the defendant was called on to litigate within that sphere and to retain the services of counsel, and of an expert witness of standing and repute.

F A. R. Campbell for the defendant.

C. F. Dehn for the plaintiff.

Cur. adv. vult.

Apr. 1. The following judgments were read.

- G HODSON, L.J.: In this case I have had an opportunity of seeing the judgment which MORRIS, L.J., is about to read, with which I fully concur. In those circumstances, I do not propose to deliver a judgment of my own.

- H MORRIS, L.J.: The disputes between the plaintiff and the defendant were decided by the learned judge after considering the report made by a referee before whom the parties appeared for three days. So far as conclusions of fact and conclusions as to amounts are concerned, there is no appeal. The appeal originates in the discontent of the defendant as to the orders as to costs. But in order to meet the difficulties that face those who complain of orders concerning costs when there is a discretion in a judge as to the award of them, the defendant challenges the form in which the judgment was entered. If he does this successfully, then he submits that, on a different form of judgment, he can ask for a different order as to costs. It is only because of a very natural concern as to the costs of the struggle that submissions have been made to us as to the form in which the decisions in the struggle, not themselves now in issue, should be expressed.

I So it has come about that we have heard a learned debate, rich in academic interest, but, save so far as costs are affected, barren of practical consequence, on the subject whether certain claims could be proudly marshalled as set off or could only be modestly deployed as counterclaim.

Before recording the view on the points of law it is necessary to have in mind the nature of the various claims. The plaintiff bought a house from the defendant. The purchase was to be completed on July 31, 1954. The defendant, a builder, agreed to do certain works to the house which were detailed in a specification. For this he was to receive £800 in addition to the purchase price of the house. The works were to be finished by the date fixed for completion and the £800 was to be paid with the balance of the purchase money payable on completion. The works were not finished to time. The plaintiff ordered certain extra items of work. The plaintiff went into occupation of the house on Aug. 11, 1954. The plaintiff said that most of the interior work was then finished but that a good deal of it had not been done satisfactorily: as to the exterior work, the plaintiff said that it was not at that date completed and that some of the work that had been done was not satisfactory. The defendant in a letter of Aug. 31 agreed that some work remained to be completed. He complained of unreasonable behaviour on the part of the plaintiff in that she had refused to give the defendant's men entry to carry out repairs. Much correspondence took place in which mutual complaints were expressed. Both parties employed solicitors. In a letter of Jan. 5, 1956, which contained detailed comments or replies as to the complaints that had been made concerning various items of work required by the specification, the defendant's solicitors wrote:

"Your client still owes our clients certain moneys for extras and taking into account the additional expense to which they were put as a result of your client's lack of co-operation, it seems to us that to settle the matter your client should be allowed this money to offset any expense which she may incur to complete any work which remains outstanding under the contract."

No settlement was, however, effected. Eventually the plaintiff commenced proceedings in the county court. By her particulars of claim dated Dec. 7, 1956, she complained of failures to complete items of work or properly to complete them. The items of complaint were thirty-seven in number, and the referable items of damage added up to £266 14s. In his pleading the defendant admitted that certain of the works were not completed in proper manner and that

"subject to the counterclaim herein the plaintiff is entitled to recover in respect of such matters as follows":

there was then an enumeration of ten items with referable amounts totalling £19 2s.

On the reference, which was to a chartered architect, it was held that the plaintiff was right as to sixteen items and in reference to these the amount allowed was £110 7s. 6d. This was considerably less than the plaintiff had claimed and considerably more than the defendant had admitted. When the matter came before the learned judge, he disallowed one of the sixteen items. That left fifteen items totalling £74 17s. 6d.

In addition to dealing with the plaintiff's claim as referred to above and saying that his admissions of liability were "subject to the counterclaim herein", the defendant also pleaded (in para. 7) as follows:

"The defendant will refer to his counterclaim in this action and will if necessary seek to set up the same by way of set-off in extinction or in the alternative in diminution of the plaintiff's claim."

It is necessary to see, therefore, what the counterclaim was. It was threefold. First, a claim based on a quantum meruit for extra work ordered and done. There were four items and £95 15s. 10d. in total was claimed. The referee allowed the four items and fixed the figures to total £69 11s. Secondly, there was a claim that loss was caused because the plaintiff refused access to the defendant's workmen. Under this heading £18 2s. 2d. was claimed. The referee allowed £12 7s. 6d. Thirdly, there was a claim that the plaintiff had

A thrown away certain tools of the defendant's workmen. Damages in trespass were claimed in the sum of £3 0s. 9d. This was allowed by the referee.

To the counterclaim of the defendant the pleading of the plaintiff was as follows:

B "The plaintiff makes no admissions as to any of the facts and matters alleged in the counterclaim and puts the defendant to the proof thereof. If any sum is found due from the plaintiff to the defendant the plaintiff will give credit for the same against the sum due to her on her claim."

C In the result, therefore, the plaintiff became entitled to £74 17s. 6d. because the defendant had done bad work or omitted to do certain work. The defendant became entitled to £69 11s. for doing work not originally ordered: the defendant further became entitled to the £12 7s. 6d. and to £3 0s. 9d. as damages for trespass. The total entitlement of the defendant was £84 19s. 3d. The plaintiff was given judgment for £74 17s. 6d. and the defendant was given judgment for £84 19s. 3d. An order was made that the plaintiff should pay to the registrar of the court the sum of £10 1s. 9d., being the balance in favour of the defendant after deducting the amount adjudged to the plaintiff.

D When the question of costs came to be considered, there were submissions made to the learned judge, and counsel for the defendant urged that all the claims arose out of one transaction and should be set off. The learned judge gave the plaintiff her costs (on scale 3) on the claim and gave the defendant his costs (on scale 3) on the counterclaim. The referee had stated in his report that the defendant failed to complete the work by the agreed time and did some of the contract work some few months after the agreed time. In deciding what order to make as to costs, the learned judge was influenced by the fact that

E "the root cause of the trouble was the defendant's failure to do properly and on time the work he originally contracted to do."

F The learned judge thought "that justice would best be done" by the order he made and by setting off one total against the other. He thought that it would be fair to treat the costs of the reference as attributable as to one-half to each of the parties. The learned judge did not in his judgment deal with the question whether there was a set-off; this was probably because the submission as to set-off was only being made in furtherance of the endeavour to have an order as to costs which was favourable to the defendant.

G Counsel for the defendant submits that the items which total £84 19s. 3d. should have been treated as being in part set-off, with the result that the plaintiff should have been adjudged to recover nothing and the defendant to recover £10 1s. 9d. on his counterclaim. In *Re A Judgment Debtor (No. 171 of 1934)*, *Ex p. Judgment Creditor* (1) ([1934] All E.R. Rep. 688), LORD HANWORTH, M.R., said (*ibid.*, at p. 692):

H "With regard to the word 'set-off,' that is a word well known and established in its meaning; it is something which provides a defence because the nature and quality of the sum so relied upon is a sum which is proper to be dealt with as diminishing the claim which is made, and against which the sum so demanded can be set-off."

I In an action at law, a defendant could only set off after the passing of the Statutes of Set-off. The statute of 2 Geo. 2 c. 22 provided that, if there were mutual debts between a plaintiff and a defendant, then one debt might be set against the other; but under that statute, and under the statute 2 Geo. 2 c. 24, the claims on both sides had to be liquidated debts or money demands which could be ascertained with certainty at the time of pleading. Counterclaim is the creature of statute. The Supreme Court of Judicature Act, 1873, s. 24, enabled the courts to hear a counterclaim; until then a cross-claim had to be advanced by a separate action. But before the Act of 1873 there were circumstances in which a defendant who was sued could without bringing a separate action set up

certain contentions against the plaintiff. Thus, in answer to a claim for the price of goods sold, it became possible for a defendant to assert that the goods were of poor quality. He was allowed to do so by way of defending the claim made against him. That was not, however, by way of set-off. Though a set-off when permissible is a defence, it is, of course, not correct to say that every defence is a set-off. The way in which the matter developed was explained by PARKE, B., in his judgment in *Mondel v. Steel* (2) ((1841), 8 M. & W. 858). PARKE, B., said (*ibid.*, at p. 870):

"Formerly, it was the practice, where an action was brought for an agreed price of a specific chattel, sold with a warranty, or of work which was to be performed according to contract, to allow the plaintiff to recover the stipulated sum, leaving the defendant to a cross-action for breach of the warranty or contract; in which action, as well the difference between the price contracted for and the real value of the articles or of the work done, as any consequential damage, might have been recovered; and this course was simple and consistent. In the one case, the performance of the warranty not being a condition precedent to the payment of the price, the defendant, who received the chattel warranted, has thereby the property vested in him indefeasibly, and is incapable of returning it back; he has all that he stipulated for as the condition of paying the price, and therefore it was held that he ought to pay it, and seek his remedy on the plaintiff's contract of warranty. In the other case, the law appears to have construed the contract as not importing that the performance of every portion of the work should be a condition precedent to the payment of the stipulated price, otherwise the least deviation would have deprived the plaintiff of the whole price; and therefore the defendant was obliged to pay it, and recover for any breach of contract on the other side. But after the case of *Basten v. Butter* (3) ((1806), 7 East. 479), a different practice, which had been partially adopted before in the case of *King v. Boston* (4) ((1789), 7 East. 481, n.) began to prevail, and being attended with much practical convenience, has been since generally followed; and the defendant is now permitted to show that the chattel by reason of the non-compliance with the warranty in the one case, and the work in consequence of the non-performance of the contract in the other, were diminished in value (*Kist v. Atkinson* (5) (1809), 2 Camp. 63; *Thornton v. Place* (6) (1832), 1 Mood. & R. 218). The same practice has not, however, extended to all cases of work and labour, as for instance, that of an attorney, *Templer v. M'Lachlan* (7) ((1806), 2 Bos. & P.N.R. 136), unless no benefit whatever has been derived from it; nor in an action for freight; *Sheels v. Davies* (8) ((1814), 4 Camp. 119)."

PARKE, B., further said (8 M. & W. at p. 871):

"It must however be considered, that in all these cases of goods sold and delivered with a warranty, and work and labour, as well as the case of goods agreed to be supplied according to a contract, the rule which has been found so convenient is established; and that it is competent for the defendant, in all of those, not to set off, by a proceeding in the nature of a cross-action, the amount of damages which he has sustained by breach of the contract, but simply to defend himself by showing how much less the subject-matter of the action was worth, by reason of the breach of contract; and to the extent that he obtains, or is capable of obtaining, an abatement of price on that account, he must be considered as having received satisfaction for the breach of contract, and is precluded from recovering in another action to that extent; but no more."

Before the passing of the Judicature Acts, there were circumstances in which a court of equity would restrain one who was a plaintiff in an action at law from proceeding until the further order of the court with the trial of his action

A at law, or might restrain him until the further order of the court from levying execution on a judgment obtained in his favour. The court of equity would not act merely because there were cross-demands. The assistance of the court of equity would only be given to someone who could show some equitable ground for being protected against his adversary's demand. LORD COTTENHAM, L.C., made that clear in 1841 in his judgment in *Rawson v. Samuel* (9) ((1841), Cr. & Ph. 161 at p. 178). LORD COTTENHAM examined the reported cases dealing with what he said was "familiarily" spoken of as "equitable set-off" and came to the conclusion that what had to be established was that there was an equity which went to impeach "the title to the legal demand".

C After the Judicature Acts were passed it was no longer necessary for a defendant to bring a separate action if he had a cross-claim. He could present his cross-claim in the existing action brought against himself. So counterclaim, the creature of the Judicature Acts, became possible. Furthermore, it was provided that equitable defences could be relied on in actions at law (see s. 38 of the Supreme Court of Judicature (Consolidation) Act, 1925). Section 41 provides as follows:

D "No cause or proceeding at any time pending in the High Court or the Court of Appeal shall be restrained by prohibition or injunction, but every matter of equity on which an injunction against the prosecution of any such cause or proceeding might formerly have been obtained, whether unconditionally or on any terms or conditions, may be relied on by way of defence thereto."

E Then follow two provisos which I need not now read. If a plaintiff had a demand which was a matter of equitable jurisdiction and brought proceedings in a court of equity, then, not only could there be a set-off in regard to any liquidated demand, but the courts of equity allowed a defendant to defend by showing that he had what was called an equitable set-off, i.e., as LORD COTTENHAM pointed out, some equitable ground for being protected against the claim.

F In *Young v. Kitchen* (10) ((1878), 3 Ex.D. 127), a firm of builders, Downs & Co., erected certain buildings for the defendant, who then entered into possession of them. At that time a sum of money was due from the defendant to Downs & Co. in respect of the contract. Downs & Co. then assigned such sum to the plaintiff, who sued the defendant for it. But the defendant pleaded that Downs & Co. had been late in erecting the buildings, whereby he had suffered loss, and he also said that Downs & Co. had done defective work and that the contract had provided that defects were either to be remedied or allowed for. G The plaintiff demurred to the plea that Downs & Co. had not completed the buildings by the contract dates: he so demurred on the ground that the plaintiff, as assignee of Downs & Co., could not be held liable for breaches of contract by Downs & Co., and that such breaches constituted no answer to the plaintiff's claim. H CLEASBY, B., said (*ibid.*, at p. 130):

I "In substance I think the defendant is entitled to the benefit of this defence in reduction of the plaintiff's claim. The Judicature Act, 1873, s. 25 (6) says that the assignment of a debt or other legal chose in action shall be 'subject to all equities which would have been entitled to priority over the right of the assignee if this Act had not passed', that is, subject to all equities which would be enforced in a court of equity. I think this is a case where, in equity, the whole matter might be dealt with and the plaintiff's claim settled, after deducting all that ought to be deducted in respect of the failure to complete and deliver the buildings."

CLEASBY, B., pointed out (*ibid.*, at p. 131) that the defendant could not recover anything from the plaintiff but was entitled (*ibid.*, at p. 130)

"by way of set-off or deduction from the plaintiff's claim, to the damages

which he had sustained by the non-performance of the contract on the part of the plaintiff's assignor." A

CLEASBY, B., further put the position as follows (*ibid.*, at p. 131):

"... he only meets the plaintiff's claim by a counterclaim of damages arising out of the same contract..."

Morgan & Son, Ltd. v. S. Martin Johnson & Co., Ltd. (11) ([1948] 2 All E.R. 196), proceeded on the basis that a Court of Chancery would have recognised an equitable set-off. The plaintiffs claimed a sum of money for storing the defendants' vehicles. The defendants acknowledged that pursuant to contract the sum claimed would, but for what they asserted, have been due. They said, however, that as to one of the vehicles, which the plaintiffs were storing, itself worth more than what the plaintiffs claimed, the plaintiffs had either handed it over to someone else or had negligently allowed it to be stolen. So they said that their case was of such a nature that, quite apart from forming the basis for counterclaiming, it amounted to an equitable defence and that accordingly, following s. 38 of the Supreme Court of Judicature (Consolidation) Act, 1925, the court should give the same effect to it by way of defence as the Court of Chancery ought formerly to have given. If what a Court of Chancery would formerly have done would have been, on equitable grounds, to have granted an injunction against the prosecution of the plaintiffs' action, then, pursuant to s. 41 of the Act of 1925, the equitable grounds could be relied on by way of defence. The defendants were in effect saying: "We ought not to have to pay you for storing our vehicles since as to one of them you have allowed us to be deprived of it." The defendants said, therefore, that the plaintiffs ought not to have judgment for the amount claimed even though such judgment was stayed pending the hearing of the defendants' counterclaim, but that there should be leave to defend the plaintiffs' claim. Leave to defend was given. The question which arose was whether, in the circumstances of the case, a court of equity would have recognised that the defendants had an equitable set-off. The judgment of TUCKER, L.J., shows (see *ibid.*, at p. 199) that counsel for the plaintiffs conceded that a court of equity would have recognised that the defendants had an equitable set-off. Counsel for the plaintiff has submitted that this concession need not have been made. But TUCKER, L.J., thought that it was properly made, as is seen from his judgment (at p. 198). He cited the judgment of LORD COTTENHAM, L.C., in *Rawson v. Samuel* (9), and proceeded (*ibid.*, at p. 200): B
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"Those cases to which [the Lord Chancellor referred] do, however, indicate the kind of circumstances in which the Courts of Chancery give this equitable relief. The case most in point was that of *Piggott v. Williams* (12) ((1821), 6 Madd. 95), where there was a charge against a solicitor of negligence which went directly to impeach the demand for payment which he was making. In view of those authorities, I think that the present case is one where, on the facts set out in the affidavit, the Court of Chancery would have clearly allowed the defendants' claim as an equitable set-off against the plaintiffs' claim." H

COHEN, L.J., was of the same opinion, and he said ([1948] 2 All E.R. at p. 200):

"Once counsel for the plaintiffs conceded—as, in my view, he was constrained by the authorities to which we were referred, and, in particular, by the decision in *Piggott v. Williams* (12) to concede—that the facts alleged [in the affidavit sworn for the defendants,] if proved at the trial, would establish a good equitable set-off, it followed that the appeal must succeed. Before the Supreme Court of Judicature Act, 1875, such claims were often enforced by injunction, but it is plain from s. 41 of the Act of 1925 that an injunction would not now be the appropriate way of giving effect to a set-off and that under s. 38 effect should be given to it as an equitable defence if I

A so pleaded. That being so, it seems to me to follow that the matter must be dealt with as in *Young v. Kitchin* (10). CLEASBY, B., indicated that equity would deal with the matter by deducting from the claim of the plaintiff all that ought to be deducted in respect of the failure, if failure be proved, to deliver the lorry that the plaintiff received from the defendant."

B Though the Statutes of Set-Off were repealed by the Civil Procedure Acts Repeal Act, 1879, and the Statute Law Revision and Civil Procedure Act, 1883, there was in the former Act a saving for any jurisdiction or principle or rule of law or equity established, or confirmed (see s. 4 (1) of the Act of 1879), and the preamble of the latter Act referred to certain enactments

C "the subject-matter whereof is provided for by or under the Supreme Court of Judicature Act, 1873, and the Acts amending it, or rules made pursuant thereto."

D Section 39 (1) of the Supreme Court of Judicature (Consolidation) Act, 1925 (which is in terms comparable with s. 24, r. 3 of the Judicature Act, 1873), and R.S.C., Ord. 19, r. 3, are now operative. It has, however, been held in this court that the Judicature Acts conferred no new rights of set off. In *Stumore v. Campbell & Co.* (13) ([1892] 1 Q.B. 314) LORD ESHER, M.R., said (*ibid.*, at p. 316):

E "The Judicature Acts, as has often been said, did not alter the rights of parties, they only affected procedure, so that no set-off could now be maintained in such a case as this. Before these Acts a person having a cross-claim must have raised it by a cross-action; but these Acts have given a right to counterclaim. In some of the cases language has been used which would seem to imply that a counterclaim is sometimes in the nature of set-off and sometimes not. No doubt matter is occasionally pleaded as counterclaim which is really set-off: but counterclaim is really in the nature of a cross-action. This court has determined that, where there is a counterclaim, in settling the rights of parties, the claim and counter-claim are, for all purposes except execution, two independent actions. If the plaintiff sustains his claim, judgment goes for him on that; and if the defendant sustains his counterclaim, judgment goes for him on that. Either claim may be reduced by set-off. But if the plaintiff succeeds in the one case and the defendant in the other, there are two judgments which are independent for all purposes except execution."

G LOPES, L.J., said (*ibid.*, at p. 318) that the Judicature Acts did not alter or intend to alter the rights of parties.

H Since the passing of the Judicature Acts it is clear that reliance may be placed in any court on any equitable set-off that formerly could only have been asserted in a court of equity; furthermore, counterclaims may be presented and there is no need to advance cross-claims in a separate action. But it is not the case that every cross-claim may be presented as a set-off, even if in amount it equals or overtops the claim. Nor does the mere fact that the cross-claim is in some way related to the transaction which gave rise to the claim serve to invest the cross-claim with the quality of set-off.

I The position is, therefore, that since the Judicature Acts there may be (i) a set-off of mutual debts, (ii) in certain cases a setting up of matters of complaint which if established reduce or even extinguish the claim and (iii) reliance on equitable set-off and reliance as a matter of defence on matters of equity which formerly might have called for injunction or prohibition. The basis of (i) was explained in *Stooke v. Taylor* (14) ((1880), 5 Q.B.D. 569), in which case COCKBURN, C.J., pointed out (*ibid.*, at p. 576) that in the case of a set-off, the existence and the amount of a set-off must be taken to be known to a plaintiff who should give credit for it in his action against the defendant. He pointed out that that reasoning did not apply to a counterclaim, which to all intents and purposes

is an action by the defendant against the plaintiff and in which the claims are not confined to debts or liquidated damages. In the same case he said (*ibid.*, at p. 575):

“Set-off and counterclaim are both the creation of statute, the common law not admitting of the action of a plaintiff against a defendant being met by an independent claim of the defendant against the plaintiff, but leaving the defendant to his cross-action. The effect of these two modes of proceeding must, therefore, be sought in the statutes by which they were introduced, and in their results; and when these are looked at, it will be seen how essentially these two forms of procedure differ. By the Statutes of Set-Off this plea is available only where the claims on both sides are in respect of liquidated debts, or money demands which can be readily and without difficulty ascertained. The plea can only be used in the way of defence to the plaintiff's action, as a shield, not as a sword.”

The cases within group (ii) are those within the principle of *Mondel v. Steel* (2), to which I have referred. In these cases there is a defence to the claim which the law recognises (compare Sale of Goods Act, 1893, s. 53). The cases within group (iii) are those in which a court of equity would have regarded the cross-claims as entitling the defendant to be protected in one way or another against the plaintiff's claim.

Reliance may be placed in a court of law on any equitable defence or equitable ground for relief; so also any matter of equity on which an injunction against the prosecution of a claim might formerly have been obtained may be relied on as a defence. This may involve that there will have to be an ascertainment or assessment of the monetary value of the cross-claim which as a matter of equity can be relied on by way of defence. But this does not mean that all cross-claims may be relied on as defences to claims.

In *Bankes v. Jarvis* (15) ([1903] 1 K.B. 549), the position was that the plaintiff's son had bought a veterinary surgeon's practice from the defendant, and, in regard to a house of which the defendant was lessee and which was used in connexion with the practice, the plaintiff's son had covenanted to pay the rent and to perform the covenants and to keep the defendant indemnified. After carrying on the practice for a time, the plaintiff's son left the country after giving the plaintiff authority to sell the practice. The plaintiff sold it to the defendant. The sum of £50, being part of the agreed price, was owing by the defendant, but he had a claim against the plaintiff's son because he (the defendant) had had to pay £21 rent which the plaintiff's son had failed to pay and had also had to pay £30 because the plaintiff's son had failed to perform the covenants in the lease. The plaintiff, suing as agent or trustee for her son, claimed £50 from the defendant. The defendant had a perfectly good claim for £51 damages against the plaintiff's son. It was held that the defendant could set up as a defence to the claim against him that the plaintiff's son (the cestui que trust of the plaintiff) was indebted to the defendant in a sum for unliquidated damages exceeding the amount of the claim.

The conclusion seems to me to be clearly correct and obviously fair. It would have been manifestly unjust if the defendant had had to pay £50 to the plaintiff (who was an agent or trustee for her son) at a time when the defendant had an unquestioned claim for £51 against the plaintiff's son, who had left the country. There was a close relationship between the dealings and transactions which gave rise to the respective claims. If the case had been brought before the Judicature Acts, it would appear that the defendant would have had strong equitable grounds for asking a Court of Chancery to restrain the plaintiff from proceeding with her case. But since the Judicature Acts the position is that matters of equity on which such injunctions might formerly have been obtained may now be relied on by way of defence. LORD ALVERSTONE, C.J., in his judgment said (*ibid.*, at p. 552):

A "If grounds exist which formerly would have entitled a defendant to file a bill in Chancery to restrain the plaintiff from proceeding with his action, I think a defendant is now enabled to rely on those grounds as a defence to the action."

B CHANNELL, J., in his judgment pointed out (*ibid.*, at p. 553) that, if the defendant's claim had been for a liquidated amount then, as the plaintiff was suing as trustee for her son, there could even before the Judicature Acts have been a set-off. CHANNELL, J., added (*ibid.*):

C "Then the Judicature Act, and more especially the rules, distinctly put an unliquidated claim on the same footing as a liquidated claim for the purpose of set-off; and consequently the defendant's claim against the plaintiff's son, which, if liquidated, could have been pleaded before the Judicature Act as a set-off to the plaintiff's claim, can now, although unliquidated, be relied on as a defence to the extent of the claim."

D These words must, I think, be read in relation to the situation being dealt with in the case and in their context: they accord with the reasoning of LORD ALVERSTONE, C.J., and they explain the effect of the Judicature Acts in allowing reliance as a defence on matters of equity which formerly might have called for injunction or prohibition. But I do not understand that CHANNELL, J., was saying that the Judicature Acts abolished entirely the difference between set-off and counterclaim, and indeed in view of the authorities he could hardly have so intended.

E It was pointed out in *Bankes v. Jarvis* (15) that the plaintiff, suing as trustee ([1903] 1 K.B. at p. 552),

"cannot be in a better position than an assignee for value suing in his own name, against whom all equitable defences can be relied on."

F The case is in line with *Young v. Kitchin* (10) and with *Newfoundland Government v. Newfoundland Ry. Co.* (16) ((1888), 13 App. Cas. 199). In the latter case, as in *Young v. Kitchin* (10), there was an assignment and the principle of *Young v. Kitchin* (10) was followed. An assignee takes subject to equities. The result is that, by allowing certain matters of equity to be relied on by way of defence, there may in some cases be a setting up by way of defence of cross-claims which are for unliquidated damages.

G For the reasons that I have indicated, I consider that a cross-claim can be regarded as a set-off if in a court of law it would have been so regarded at the time of the Judicature Acts or if it would have been regarded by a court of equity as the basis for equitable set-off or for giving protection on equitable grounds to a defendant.

H What, then, is the result in the present case? The two sums of £69 11s. and £12 7s. 6d. were in substance and for all practical purposes sums which were extras to the defendant's contract. Although the latter of these was claimed to be recoverable as a sum due for breach of an implied term of the contract to allow reasonable access to the premises, it represented expense incurred by the defendant in the course of doing work for the plaintiff. Hence, leaving aside the small item of £3 0s. 9d., the sum recovered as damages for trespass, the defendant was entitled to £81 18s. 6d. That was an amount which in effect remained due to the defendant under the contract under which he agreed to do work for the plaintiff. But he had done some of the work badly and because of this the plaintiff was entitled to £74 17s. 6d. from him. On the authorities to which I have referred, it seems to me that a court of equity would say that neither of these claims ought to be insisted on without taking the other into account. It would not be equitable for the plaintiff to recover the £74 17s. 6d. while the £81 18s. 6d. was owing by her under the contract. If the defendant had assigned his claim to £81 18s. 6d. and if his assignee had sued the plaintiff, the plaintiff would have been entitled to set off her £74 17s. 6d. The position

would be comparable with that in *Young v. Kitchin* (10), to which I have referred above, and the passage from the judgment of *CLEASBY, B.*, becomes applicable. It would be a case where in equity the whole matter could be dealt with. The assignee would take subject to equities and the plaintiff, if sued for the £81 18s. 6d., would be entitled "by way of set-off or deduction" to the damages which she had sustained by the non-performance or faulty performance of the contract on the part of the defendant. On the authorities to which I have referred, it seems to me that the defendant had an equitable set-off which defeated the plaintiff's claim. This conclusion does not in any way depend on the terms used in the defence to the counterclaim. The question as to what is a set-off is to be determined as a matter of law and is not in any way governed by the language used by the parties in their pleadings (see *Sharpe v. Haggith* (17) (1912), 106 L.T. 13).

In my judgment, therefore, the defendant succeeded in defeating the claim of the plaintiff and in establishing his right to £10 ls. 9d. on the counterclaim. It becomes necessary to consider what is the fair order to make as to costs on this altered and different basis. I think that there should be judgment for the defendant on the claim with costs on scale 4: that there should be judgment for the defendant for £10 ls. 9d. on the counterclaim with costs on scale 2: that the costs of the reference (which should be taxed on scale 3) should be dealt with as was directed by the learned judge, i.e., that they be treated as referable as to one half to the plaintiff and one half to the defendant (a qualifying fee for one expert witness on each side being ordered). I would therefore allow the appeal.

SELLERS, L.J. (read by **HODSON, L.J.**): The defendant has, at the termination of this relatively expensive and protracted litigation, finished with a balance in his favour of £10 ls. 9d., which liability the plaintiff could have avoided if she had accepted the defendant's solicitors' suggestion in the letter of Jan. 5, 1956, and had refrained from commencing the proceedings. In these circumstances, it seems an undue burden to put on the defendant to order him to pay the costs of the action, even though they are to be reduced by the defendant's costs of the counterclaim. The learned judge's reasons for so ordering included some provocation of the plaintiff by the conduct of a loutish workman of the defendant. This matter seems to have arisen in the evidence but it had nothing to do with the defendant's conduct of the case. On the other hand, the plaintiff, who was of an excitable nature, so conducted herself in the course of the trial that she had to be committed to prison for contempt of court. She should not be further punished by depriving her of costs if she is in law entitled to them, but I cannot help feeling that this was a case where, on any view, the opinion of **DENNING, L.J.**, in *Chell Engineering Co., Ltd. v. Unit Tool & Engineering Co., Ltd.* (18) ([1950] 1 All E.R. 378), might have been invoked and applied (*ibid.*, at p. 383):

"... that in most of these cases it is desirable that a judge should consider whether a special order should be made as to costs because the issues are often very much interlocked, and the usual order of 'judgment for the plaintiff on claim with costs and for defendant on counterclaim with costs' does not always give a just result."

In *Childs v. Blacker* (19) ([1954] 2 All E.R. 243) the defendant, a tenant of a flat, had withheld rent to compensate for damages she claimed for breach of her tenancy agreement. She had tendered the balance of the rent, and at the trial the damages she recovered were greater than she had originally set off against the rent, so that the landlord recovered less rent than he had had tendered to him. The county court judge thought that the *Chell* decision (18) laid down the procedure which was to be followed except in exceptional circumstances. The Court of Appeal unhesitatingly reversed the order and directed that the tenant should have the costs of the action.

- A There had been in that case a tender, but it was a tender only of the balance of the rent. There was no tender in the present case, but there was, as it turned out, no balance in favour of the plaintiff. In order to avoid the liability for costs, if correctly awarded here, and to meet the plaintiff's claim which was pleaded at £266 4s. and had been originally advanced at nearly double, the defendant would have had to tender before action or have paid into court £75 or thereabouts. If
- B this had been accepted (as it might have been), the defendant would have been left with no security for his counterclaim of £85 or thereabouts. This leads me to think that the fair order would have been to have set off the two amounts and given the defendant judgment on the counterclaim for £10 1s. 9d. and for the costs of the claim, counterclaim and reference to have been dealt with on that basis as the judge thought right.
- C The question which has been argued is whether the judge would have been entitled to make such an order in law and, if so, whether he was obliged to do so in the circumstances of this case. Set-off was relied on by para. 7 of the defence, and it was reflected in the report of the referee, who assessed the plaintiff's damages at £25 8s. 3d., having set off the defendant's counterclaim against the total claim allowed at £110 7s. 6d. This was also in accordance with the plea of
- D the plaintiff in her defence to the counterclaim. Unfortunately for the plaintiff, the learned judge disallowed an item of £35 10s., reducing her claim to £74 17s. 6d., which was £10 1s. 9d. less than she owed the defendant.

- If the judge had followed the form of the referee's report and had entered judgment for the defendant for the balance in his favour after the claim had been set off against the counterclaim, I think it would have been open to him to
- E have done so and that it would have been in accordance with practice as it has developed. If he had no such power in law (which includes equity) it would, I think, be unfortunate, for costs would then seem to prevail over the substance of the matter. If in this case the result had been (and it would have meant but little adjustment of the cross-demands) that each was to recover £75 from the other, neither party would have received a penny out of the litigation but the
- F defendant, who did not want to litigate, would have been ordered to pay the costs of the action.

- Some counterclaims might be quite incompatible with a plaintiff's claim, in no way connected with it and wholly unsuitable to be used as a set-off, but the present class of action, involving building or repairs, extras and incidental work, so often leads to cross-claims for bad or unfinished work, delay or other breaches
- G of contract that a set-off would normally prove just and convenient, and, in practice, I should have thought, has often been applied, as indeed it was in the referee's report. It would serve to reduce litigation and its consequent costs. I would not be astute to restrict the right but rather to develop it and discourage litigation when no or little monetary benefit ensues on balance. It cannot, as I see it, make any difference which side commences proceedings in which cross-
- H claims arise. If there is a set-off at all, each claim goes against the other and either extinguishes it or reduces it.

- Set-off in its infancy was restricted, as my Lord has indicated by the cases cited. I refer, not to the statutory set-off, but to the practice of the courts of equity. But as far back as *Piggott v. Williams* (12) ((1821), 6 Madd. 95), it is interesting to observe that the Vice-Chancellor thought that the course which the
- I cause would probably take would be to retain the bill until an action for damages had been tried. The bill was for foreclosure of an estate pledged as security for the plaintiff's solicitor's costs. The client filed a cross-bill alleging that nothing was due and that the estate ought to be re-surrendered on the ground that the costs had been occasioned by the negligence and want of skill of the solicitor. The Vice-Chancellor held that the client, the plaintiff in the cross-bill, could restrain the defendant from enforcing his security "leaving the plaintiff's demand for damages unsatisfied." The purpose of this, it would appear, would

be to see whether the damages as assessed when set off from the claim for costs would extinguish it or to what extent they would reduce it. A

It seems to me that *Mondel v. Steel* (2) ((1841), 8 M. & W. 858), also reveals the germ of the law's development. As the shipowners (the building owners) could not counterclaim in the shipbuilders' action, they established a defence pro tanto for breach of contract and could sue nevertheless in a separate action for the balance of the damages suffered. The second action could only be maintained for the balance of the damages as part had been set off against the shipbuilders' claim in the first action. B

After the Judicature Acts, which permitted a counterclaim in an action for the first time, as CHANNELL, J., pointed out in *Bankes v. Jarvis* (15) ([1903] 1 K.B. 549), this difficulty was removed and a defence of set-off to the claim and a counterclaim could be set up to extinguish a claim and recover any balance in the one action. C

It is to be observed that *Morgan & Son, Ltd. v. S. Martin Johnson & Co., Ltd.* (11) ([1948] 2 All E.R. 196) was not cited to the court in the *Chell* case (18). Many cases were reviewed by TUCKER, L.J., in *Morgan's* case (11), and *Young v. Kitchen* (10) ((1878), 3 Ex.D. 127) and *Morgan's* case (11) itself would, as I read them, have supported the learned commissioner's form of judgment in *Chell's* case (18) but would not have affected the appellate court's decision on the costs. In all these three cases the cross-claim arose from the breaches of the same contract as the one sued on. In *Bankes v. Jarvis* (15), where a set-off was allowed, the damages set off did not arise out of the contract for sale on which the plaintiff sued but on an earlier contract between the defendant and the plaintiff's son on whose behalf the plaintiff, his mother, was suing. As I read the case, the court would have held that a set-off existed against the son if he himself had been the plaintiff. He was in fact out of the country, but if he had been in the country and had been penniless and he had sued, the defendant would have been no less anxious to establish a set-off. D

In *Newfoundland Government v. Newfoundland Ry. Co.* (16) ((1888), 13 App. Cas. 199) the Judicial Committee of the Privy Council allowed a set-off by the government against the railway company, who sued as contractors, and against the other plaintiffs, the trustees of the bondholders. It was held that it was clearly conceivable that the government might show damage arising from the non-construction of the railway, whether by the delay or otherwise. LORD HOBHOUSE stated the law as follows (*ibid.*, at p. 212): E

"There is no universal rule that claims arising out of the same contract may be set against one another in all circumstances. But their Lordships have no hesitation in saying that in this contract the claims for subsidy and for non-construction ought to be set against one another. It is hardly necessary to cite authorities for a conclusion resting on such well-known principles. Their Lordships will only refer to *Smith v. Parkes* (20) ((1852), 16 Beav. 115), not so much on account of the decision as for the sake of quoting a concise statement by LORD ROMILLY of the principle which governed it. He says, 'All the debts sought to be set off against the defendant Parkes are debts either actually due from him at the time of the execution of the deed' (this was the deed by which the third party who resisted the set-off was brought in) 'or flowing out of and inseparably connected with his previous dealings and transactions with the firm.' That was a case of equitable set-off, and was decided in 1852, when unliquidated damages could not by law be the subject of set-off. That law was not found conducive to justice, and has been altered. Unliquidated damages may now be set off as between the original parties, and also against an assignee if flowing out of and inseparably connected with the dealings and transactions which also give rise to the subject of the assignment. It appears to their Lordships that in the F

A cited case of *Young v. Kitchin* (10) the decision to allow the counterclaim was rested entirely on this principle."

In the present case the referee allowed the defendant £12 7s. 6d. for loss suffered by him because the plaintiff refused access to the defendant's workmen. I would regard that as clearly a matter of equitable set-off, as it arises directly under the contract on which the plaintiff herself relies. But that sum deducted from the plaintiff's claim of £74 17s. 6d. would not in itself be sufficient so to reduce the claim as to alter the scale of costs. The items for extras totalling £69 11s. include two charges in connexion with the moving in of the plaintiff's household goods, and the other item of £3 0s. 9d. is a claim for damages in trespass as the plaintiff had apparently thrown away some tools of the defendant's workmen. These two items are closely associated with and incidental to the contract of June 14, 1954, on which the plaintiff sues for breach, and in my opinion they also should have been allowed as a set-off. I agree, therefore, that the appeal should be allowed and an order for costs made in the terms proposed.

Appeal allowed with costs. Defendant to have in the county court costs on the claim on scale 4 and costs on the counterclaim on scale 2, and costs of the reference (on scale 3) to be treated as referable one half to the plaintiff and one half to the defendant. Leave to appeal to the House of Lords refused.

Solicitors: *H. B. Wedlake, Saint & Co.* (for the defendant); *Ashurst, Morris, Crisp & Co.* (for the plaintiff).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

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CHAPPELL & CO., LTD. v. NESTLÉ CO., LTD. AND ANOTHER.

[COURT OF APPEAL (Jenkins, Romer and Ormerod, L.J.J.), February 3, 4, 5, March 19, 1958.]

F *Copyright—Infringement—Music—Record—Manufacture of records for chocolate suppliers' advertising campaign—Records to be sold by suppliers each for sum of money to a purchaser tendering three wrappers from suppliers' chocolate bars—Sales at that price showed profit—Whether sale by "retail"*
G *—Whether price ordinary retail selling price as defined—Copyright Act, 1956 (4 & 5 Eliz. 2 c. 74), s. 8 (1)—Copyright Royalty System (Records) Regulations, 1957 (S.I. 1957 No. 866), reg. 1 (1) (f), reg. 3.*

In accordance with s. 8 (1) (b) of the Copyright Act, 1956, manufacturers of records gave to the owners of copyright in a musical work notice of the manufacturers' intention to make records of the work. By reg. 1 (1) (f)* of the Copyright Royalty System (Records) Regulations, 1957, the notice was required to state the ordinary retail selling price (defined in reg. 3*) at which the records were to be sold to the public; this was stated by the notice to be 1s. 6d. The manufacturers made the records and sold them to chocolate suppliers for 4d. each, knowing the use to which the suppliers intended to put the records. The suppliers advertised them for sale at 1s. 6d. each, with a stipulation that an intending purchaser must send also three wrappers from the suppliers' milk chocolate bars. The suppliers' object was to advertise their milk chocolate, but the price enabled them to make a reasonable profit on the sale of a record. The wrappers when received had no value and were thrown away. Unless the sales of the records to the chocolate suppliers were for the purpose of the records being sold "by retail" within s. 8 (1) (c) of the Act of 1956† the manufacture of the records by the manufacturers and their distribution by the suppliers were infringements of

* The terms of reg. 1 (1) (f) and of reg. 3 are at p. 160, letters C to E, post.

† The relevant terms of s. 8 (1) are at p. 157, letters F and G, post.

copyright under s. 2 (5) (a) and s. 5 (3) of the Act of 1956. The exclusive licensees and the owners of the copyright brought an action against the chocolate suppliers and the manufacturers of the records for an injunction to restrain them from infringing copyright in the work on the ground that the transaction was not within s. 8 of the Act of 1956.

Held (ROMER, L.J., dissenting): there was no infringement of copyright as the sales of the records by the chocolate suppliers were sales "by retail" within s. 8 (1) (c) of the Copyright Act, 1956, for the following reasons—

(i) the words "by retail" in s. 8 bore their ordinary meaning and denoted sales to persons buying for their own use as distinct from sales to persons buying for re-sale in the course of trade, and

(ii) the stipulation that three wrappers should also be sent by an intending purchaser was a condition that each purchaser should thus qualify himself to purchase a record, was not a stipulation for a further consideration additional to the price of 1s. 6d. and did not prevent either the sales of the records by the chocolate suppliers being retail sales within s. 8 or the price of 1s. 6d. being the ordinary retail selling price of a record within reg. 1 (1) (f) and reg. 3 of the Copyright Royalty System (Records) Regulations, 1957.

Per JENKINS, L.J.: to bring a given case within s. 8 of the Copyright Act, 1956, first, the sales of the record which it is intended to effect must no doubt be sales by retail (viz., sales to members of the public for their own use as distinct from persons buying for re-sale in the way of trade); secondly, such sales, to make them sales at all as distinct from gifts, must be sales at a price; and, thirdly, the price must consist of a sum of money or at all events of valuable consideration to which a precise equivalent in terms of money can be assigned (see p. 161, letter I, post).

Appeal allowed.

[As to copyright in musical works and records thereof, see 8 HALSBURY'S LAWS (3rd Edn.) 378, 381, paras. 694, 697; and for cases on the subject, see 13 DIGEST 175, 176, 113-119.

For the Copyright Act, 1956, s. 8, see 36 HALSBURY'S STATUTES (2nd Edn.) 86.]

Cases referred to:

- (1) *Boosey v. Whight*, [1900] 1 Ch. 122; 69 L.J.Ch. 66; 81 L.T. 571; 13 Digest 176, 120.
- (2) *Walsh v. Secretary of State for India*, (1863), 10 H.L. Cas. 367; 32 L.J.Ch. 585; 8 L.T. 839; 11 E.R. 1068; 42 Digest 706, 1232.
- (3) *David v. De Silva*, [1934] A.C. 106; 103 L.J.P.C. 44; 150 L.T. 223; Digest Supp.
- (4) *London County Council v. Aylesbury Dairy Co., Ltd.*, [1898] 1 Q.B. 106; 67 L.J.Q.B. 24; 77 L.T. 440; 61 J.P. 759; 42 Digest 728, 1507.
- (5) *R. v. Chapman*, [1931] 2 K.B. 606; 100 L.J.K.B. 562; 146 L.T. 120; 95 J.P. 205; 23 Cr. App. Rep. 63; Digest Supp.
- (6) *Dawson (Clapham), Ltd. v. Dutfeld*, [1936] 2 All E.R. 232; Digest Supp.
- (7) *Turpin v. Middlesbrough Assessment Committee & Bailey*, [1931] A.C. 451; 100 L.J.K.B. 271; 145 L.T. 73; 95 J.P. 115; Digest Supp.

Appeal.

The plaintiffs brought an action for an injunction to restrain the first defendants, Nestlé Co., Ltd., and the second defendants, Hardy Record Manufacturing Co., Ltd., manufacturers of records, from infringing by their servants or agents or otherwise the copyright in the musical work entitled "Rockin' Shoes", under which the plaintiffs had been granted an exclusive licence, and any other musical work of which they were the owners of the copyright or under which they had been granted an exclusive licence. On Nov. 14, 1957, UPJOHN, J., gave judgment for the plaintiffs in the action and ordered that the defendants should be restrained from infringing the copyright of the plaintiffs as claimed

A and that there should be an inquiry as to damages. The defendants appealed to the Court of Appeal on the ground that the judge was wrong in finding that the first defendants were not selling records of "Rockin' Shoes" by way of retail sale and in holding that the transactions of the defendants were not within s. 8 of the Copyright Act, 1956.

B *G. T. Aldous, Q.C.*, and *J. N. K. Whitford* for the first defendants.
J. M. Cope for the second defendants, the record manufacturers.
K. E. Shelley, Q.C., and *P. J. S. Bevan* for the plaintiffs.

Cur. adv. vult.

Mar. 19. The following judgments were read.

C **JENKINS, L.J.:** I will ask ORMEROD, L.J., to deliver the first judgment in this case.

D **ORMEROD, L.J.:** This is an appeal from an order of UPJOHN, J., made on Nov. 14, 1957, that the defendants be restrained from infringing the copyright in a musical work entitled "Rockin' Shoes" or any other musical work of which the plaintiffs are the owners of the copyright or under which they have been granted an exclusive licence. The matter came before the learned judge on a consent order that the motion originally launched by the plaintiffs, the exclusive licensees, should be treated as the trial of the action, and the owners of the copyright, the Winneton Music Corporation, were allowed to be joined as plaintiffs. By consent of the parties the action was tried on the evidence filed on the motion. There were no pleadings and no issues arose on the facts. The sole question was, and is, the construction to be put on the words "retail sale" in s. 8 of the Copyright Act, 1956.

E It will be useful before setting out the facts to read the relevant parts of the section in question. Section 8 of the Copyright Act, 1956, reads as follows:

F " (1) The copyright in a musical work is not infringed by a person (in this section referred to as 'the manufacturer') who makes a record of the work or of an adaptation thereof in the United Kingdom, if—(a) records of the work, or, as the case may be, of a similar adaptation of the work, have previously been made in, or imported into, the United Kingdom for the purposes of retail sale, and were so made or imported by, or with the licence of, the owner of the copyright in the work; (b) before making the record, the manufacturer gave to the owner of the copyright the prescribed notice of his intention to make it; (c) the manufacturer intends to sell the record by retail, or to supply it for the purpose of its being sold by retail by another person, or intends to use it for making other records which are to be so sold or supplied; and (d) in the case of a record which is sold by retail, the manufacturer pays to the owner of the copyright, in the prescribed manner and at the prescribed time, a royalty of an amount ascertained in accordance with the following provisions of this section.

G " (2) Subject to the following provisions of this section, the royalty mentioned in para. (d) of the preceding sub-section shall be of an amount equal to $6\frac{1}{4}$ per cent. of the ordinary retail selling price of the record, calculated in the prescribed manner: Provided that, if the amount so calculated includes a fraction of a farthing, that fraction shall be reckoned as one farthing, and if, apart from this proviso, the amount of the royalty would be less than three-farthings, the amount thereof shall be three-farthings."

I From this it will be seen that the copyright in a musical work is not infringed by a person making a record thereof, provided the conditions set out in the section are fulfilled. In this case, apart from a question on the notice, with which I will deal later, the only condition which it is claimed has not been fulfilled is the one set out in sub-s. (1) (c), viz., that the manufacturers, the second defendants, intended to sell the record by retail or to supply it for the purpose of being so sold. It is not disputed that the manufacturers knew how Nestlé Co., Ltd.,

the first defendants, intended to deal with the records, and supplied them for that purpose. A

The facts are that the Hardy Record Manufacturing Co., Ltd., whom I shall refer to as the manufacturers, make records by a new process which is so inexpensive as to enable them to be sold wholesale for 4d. each. They are one-sided records made on a thin film of cellulose acetate, and are designed to be played at seventy-eight revolutions per minute. The first defendants, the well-known suppliers of milk chocolate and other similar products, entered into an agreement with the manufacturers to purchase a quantity of recordings of a piece of dance music called "Rockin' Shoes", the copyright of which was vested in the plaintiffs. They caused to be supplied to the manufacturers the necessary cards on which the records could be mounted. On the cards was printed, amongst other matters, a notice that this and other records could be obtained by sending to the first defendants for each record a postal order for 1s. 6d., together with three wrappers for the first defendants' 6d. milk chocolate bars. It was agreed by the first defendants that the object of selling records in this way was to advertise their milk chocolate. None the less, they stated, and it was not disputed, that the price of 1s. 6d. enabled them to make a reasonable profit on the sale of a record. The learned judge held that sales of records such as this were not retail sales within the meaning of the section, and granted an injunction to the plaintiffs. B C D

Counsel for the first defendants contended that the words in question in the statute should be given their normal meaning, and that "sale by retail" meant a sale to the consuming customer in contrast to a wholesale sale which is a sale to the trade. He further contended, as a matter of construction, that under the general law a work once published is free to the public. The Copyright Acts restrict that freedom and impose penalties for infringement, and should therefore be construed so as not to restrict the public more than necessary. He cited *Boosey v. Whight* (1) ([1900] 1 Ch. 122) which established that there was no copyright in recorded music (in that case the perforated sheets for an "Aeolian" organ) and submitted that the section of the Copyright Act, 1911, which restricted the freedom of performance of recorded music, and s. 8 of the Act of 1956 which replaced it, should not in consequence be given an interpretation more restrictive than was strictly necessary. He cited a number of authorities in support of this submission, including *Walsh v. Secretary of State for India* (2) ((1863), 10 H.L. Cas. 367 at p. 386), *David v. De Silva* (3) ([1934] A.C. 106 at p. 114), and, to show that the principle was applied more rigidly if penal consequences were involved, *London County Council v. Aylesbury Dairy Co., Ltd.* (4) ([1898] 1 Q.B. 106 at p. 109), and *R. v. Chapman* (5) ([1931] 2 K.B. 606 at p. 609). It was further contended that, even if, as the learned judge appears to have held, a sale by retail meant a cash sale, i.e., a sale where the consideration was wholly in money, the sale of a record under the conditions set out above was in fact a cash sale. E F G

Counsel for the plaintiffs contended in the first place that, as the effect of s. 8 of the Act of 1956 was to make an exception to the grant of the broad right of copyright, it should in consequence be construed narrowly. He further contended that a sale by retail meant a sale in the ordinary way of a trader's business, and that the section did not contemplate a transaction such as this, which was for the purpose of advertising the first defendants' goods, and in respect of which other conditions had to be fulfilled by the purchaser in addition to the payment of the price. It was submitted that the use in s. 8 (2) of the term "ordinary retail selling price" as a basis for calculating the royalty to be paid necessarily implied that the sale "by retail" in sub-s. (1) (c) should be an "ordinary" retail sale. The contrast contemplated in the section, submitted counsel, was not the contrast between wholesale and retail, but between selling by retail on the one hand and methods of distribution which might have some of the indicia of a sale on the other, and the transaction in question came within the latter H I

A classification. Whichever way the transaction is regarded, it is not disputed that it was a sale. *Dawson (Clapham), Ltd. v. Dufield* (6) ([1936] 2 All E.R. 232), and indeed a number of earlier authorities, establish beyond doubt the proposition that a transaction is none the less a sale because part of the consideration consists of the exchange of other goods. There seems to be little authority as to the definition of "retail". In *Turpin v. Middlesbrough Assessment Committee & Bailey* (7) ([1931] A.C. 451 at p. 473) VISCOUNT DUNEDIN said:

"It may be that in strictness the words 'retail trade or business' are only applied with complete accuracy to cases of selling goods; or it may be that they may properly be applied to all trades and business which deal directly with the 'consuming' customer."

C The question under consideration there was whether a garage and motor repair depot was an industrial hereditament within s. 3 (1) of the Rating and Valuation (Apportionment) Act, 1928, but it would certainly appear that LORD DUNEDIN regarded dealing with the consuming customer as a necessary ingredient of "retail trade".

D For my part, after a careful consideration of the words of the section and of the submissions of counsel for the plaintiffs, I can find no sufficient ground for the meaning which he seeks to attribute to the word "retail". The distinction appears to me to be between a sale to the trade on the one hand, and to the public, or, as LORD DUNEDIN puts it, to the consuming customer on the other. A retail sale may take place in a number of ways. The commonest way no doubt is by a sale in a shop over the counter; but it may, and frequently does, take place by means of the post and other similar means. Again, a retail sale may be for cash or for credit, or may be in part exchange of other goods, as is frequently so in the case of motor cars. It was suggested at one stage of the argument that a sale could not be by retail if there were conditions or restrictions attached to it. This would exclude from the definition sales by a co-operative society or by any dealer who sought to limit in any way the number or class of his customers.

F How then does the transaction in question fall short of being a sale by retail? It was admitted on behalf of the plaintiffs that, if the first defendants had offered the record for sale as it was except for the condition attached of sending three chocolate wrappers, the transaction would have been within the terms of the section. It is necessary to consider, therefore, the effect of the condition. It is agreed that the wrappers were of no value, but the plaintiffs submitted that they were part of the purchase price of the record. The defendants took the view, on the other hand, that the object of the condition was to limit the class of purchasers so that the only people who could purchase the records were those who had qualified to be members of the class by sending the necessary wrappers. This latter view appears to me to be the correct one, and in these circumstances I find it difficult to see why this should not be a sale by retail just as much as it would be if no condition were attached.

H It was argued that the first defendants might alter the terms of the sale by increasing the number of wrappers required and reducing the price to one that would bear no relation to the cost of the record. That, of course, is not this case, and it might be that in such circumstances the transaction might be held not to be a genuine sale; but in any event the proviso to s. 8 (2) sets out the minimum royalty to be paid, so that it may well be that in such circumstances the owner of the copyright would suffer no undue hardship.

I It was further argued that, although the first defendants were selling the records at a reasonable profit, the real advantage to them was the profit they made, or expected to make, on the sale of their usual products as a result of what was admittedly an advertising campaign. This argument appears to have found favour with the learned judge, who says on p. 11, after dealing with the value to the first defendants of the chocolate wrappers:

"This bears no resemblance at all to the transaction to which, in my

judgment, the section is pointing, that is, an ordinary retail sale with an ordinary selling price."

I cannot agree with this view. The motive for making the sale does not appear to be relevant, nor does the fact that the seller hopes to obtain some benefit from the transaction other than the actual profit on the sale.

A further argument put forward by the plaintiffs was that this transaction could not be a retail sale within the meaning of s. 8 as it was impossible to comply with the provision of s. 8 (1) (b) that the manufacturer should before making the record give to the owners of the copyright a prescribed notice of his intention to make it. The particulars required in the notice are set out in reg. 1 (1) of the Copyright Royalty System (Records) Regulations, 1957 (S.I. 1957 No. 866) made in pursuance of powers contained in the Copyright Act, 1956. Regulation 1 (1) of the regulations reads:

"The notice required by sub-s. (1) and sub-s. (5) of s. 8 of the Act shall contain the following particulars:— . . . (f) the ordinary retail selling price (as hereinafter defined) of the records, or, where it is intended to reproduce the work on more than one type of record, the ordinary retail selling price of each type of record, the manufacturer intends to make and the amount of the royalty payable on each record."

Then in reg. 3 it is provided that:

"The ordinary retail selling price of any record shall be calculated at the marked or catalogued selling price of single records to the public, or if there is no such marked or catalogued selling price, at the highest price at which single records are ordinarily to be sold to the public, exclusive of purchase tax in either case."

It is agreed that notice was given by the manufacturers, but the ordinary retail selling price was set out in the notice as the amount at which the records were to be sold without reference to the wrappers. The plaintiffs' submission was that, as the ordinary retail selling price could not be set out in the notice, the transaction could not be one within the section. If the view which I have expressed previously is the correct one, viz., that the transaction was intended to be a sale of records for 1s. 6d. each limited to persons who sent three wrappers in respect of each record, there does not appear to be any substance in this argument.

It follows from what I have said that in my view, taking the ordinary meaning of the words used in the section, the transactions contemplated by the first defendants were sales by retail, and the defendants were entitled to make and sell the records in accordance with the provisions of s. 8 (1) of the Copyright Act, 1956. In the circumstances, it is unnecessary to consider whether the words of the section should be given a broad or a narrow construction in accordance with the respective contentions of the parties. I would allow the appeal.

JENKINS, L.J.: The substantial question in this appeal is whether the second defendants, Hardy Record Manufacturing Co., Ltd., the manufacturers, in making gramophone records of the musical work "Rockin' Shoes" and supplying them to the first defendants, Nestlé Co., Ltd., for the purpose of their being disposed of by the first defendants in the manner which I am about to describe, were, as regards any given record so made and disposed of, making and supplying the record "for the purpose of its being sold by retail by another person" within the meaning of s. 8 (1) (c) of the Copyright Act, 1956. If, as the learned judge held, that question should be answered in the negative, the manufacturers are not entitled to the benefit of the exception provided by s. 8 and must accordingly be held, in accordance with the learned judge's decision, to have infringed (under s. 1 (2) and s. 2 (5) (a) of the Act) the copyright in the work, of which the second plaintiffs are the owners and the first plaintiffs the exclusive licensees, by making the records in question; and the first defendants must likewise be

A held to have infringed (under s. 5 (3)) such copyright by distributing the infringing records.

I need not repeat the facts at length. Briefly, the manufacturers made records of "Rockin' Shoes" and other musical works by a novel and remarkably cheap process in which the recording was made on a thin film of cellulose acetate adapted for mounting on a cardboard disc. The manufacturers sold these
B records to the first defendants at 4d. each (the first defendants providing the cardboard mounts) and the first defendants advertised them for sale at 1s. 6d. each, but with a stipulation to the effect that intending purchasers must in respect of each record send to the first defendants, in addition to the 1s. 6d., three wrappers from 2 oz. (6d.) packets of Nestlé's milk chocolate. The price
C of 1s. 6d., after providing for the cost of the records and 4½d. purchase tax, left the first defendants with 9½d. per record, which sufficed to cover the cost of the cardboard mountings, postage and the like, and leave some profit. The wrappers are in themselves completely worthless and are thrown away when received. In these circumstances, is the transaction between the first defendants and any person to whom they supply a record on the terms above stated a sale by retail within the meaning of s. 8? The Act contains no definition of "sale by retail"
D and one is thus thrown back on the ordinary meaning of the words, which I take to be sale to persons buying for their own use or consumption as distinct from persons buying for re-sale in the course of trade. Some support is to be found for this meaning in the passage from the speech of VISCOUNT DUNEDIN in *Turpin v. Middlesbrough Assessment Committee & Bailey* (7) ([1931] A.C. 451 at p. 473), to which ORMEROD, L.J., has already referred.

E Counsel for the plaintiffs relied on the reference in s. 8 (2) to "the ordinary retail selling price of the record" as the figure on which the royalty is to be calculated as showing that the sale by retail contemplated in s. 8 (1) (c) is to be an ordinary sale by retail, or, in other words, a sale by retail in the ordinary course of the business of selling records by retail. The so-called sales by retail
F of records in the present case did not, in his submission, answer this description, inasmuch as they were not sales in the ordinary course of the business of selling records by retail to customers paying a stipulated money price without any superadded condition or consideration to be performed or provided by such customers. Here each sale was subject to the condition that the purchaser should not only pay the money price of 1s. 6d. per record but should produce his three Nestlé chocolate wrappers. Counsel said, in effect, that this was not a
G retail sale in the ordinary course of the business of selling records by retail but was a sale of records for a cash consideration plus the performance by the purchaser of a special condition designed to promote the sale of the first defendants' chocolate.

H I cannot myself regard the reference in s. 8 (2) to the ordinary retail selling price as limiting the meaning of s. 8 (1) (c) in the way suggested by counsel, and in this connexion I would observe that, by the joint effect of s. 8 (2) and reg. 3 of the Copyright Royalty System (Records) Regulations, 1957 (S.I. 1957 No. 866) made under the section, the meaning relevant to the present case of the words "ordinary retail selling price" is simply

I "the highest price at which single records are ordinarily to be sold to the public, exclusive of purchase tax . . ."

To bring a given case within s. 8 of the Act, first, the sales of the record which it is intended to effect must no doubt be sales by retail (viz., sales to members of the public for their own use as distinct from persons buying for re-sale in the way of trade); secondly, such sales, to make them sales at all as distinct from gifts, must be sales at a price; thirdly, the price must, as I think (although counsel for the defendants was disposed to argue the contrary) consist of a sum of money or at all events of valuable consideration to which a precise equivalent in terms of money can be assigned. This last requirement appears to me to be

impliedly demanded by the provisions in regard to the calculation of the ordinary retail price of the record and the computation of royalties thereon contained in s. 8 (2) of the Act and reg. 3 of S.I. 1957 No. 866. A

Given fulfilment of these three requirements, it seems to me that s. 8 applies, and that there is no justification for assigning to sub-s. (1) (c) the limited meaning suggested by counsel for the plaintiffs, which would confine its application to retail sales in the ordinary course of the business of selling records by retail, and might have the effect of excluding transactions which apart from that limitation would undoubtedly rank as sales by retail in the commonly accepted sense of that expression. B

The questions to be answered in the present case are accordingly these, and I append to each of them the answer which in my view should be given to it: First, if sales at all, were the sales of records effected by the first defendants in the way above described sales by retail within the meaning of s. 8 (1) (c)? In my view this question must undoubtedly be answered in the affirmative. The offer was clearly directed to such members of the public as might wish to acquire the records for their own use, and could not be of the slightest interest to persons requiring records for re-sale in the way of trade. C

Secondly, were these transactions sales as distinct from gifts? Here again the answer must, I think, clearly be in the affirmative. The cash price of 1s. 6d. per record, according to the evidence, left the first defendants with some profit, and each purchaser of a record did at all events undoubtedly pay that amount, whether the condition as to the delivery of the three chocolate wrappers should or should not be regarded as importing some addition to the price over and above the cash payment of 1s. 6d. D

Thirdly, did the price paid for each record consist of a sum of money or at all events of valuable consideration to which a precise equivalent in terms of money could be assigned? This seems to me to be the difficult point in the case. The transaction has been described and analysed in various ways in the course of the argument. Counsel for the first defendants was prepared, if necessary, to contend that it was a sale for 1s. 6d. in cash plus three wholly valueless chocolate wrappers which, being wholly valueless, could be ignored. This attractively simple proposition appears to me to be far removed from the realities of the case. E

On the other side, it was argued that the transaction was a sale for a price consisting of 1s. 6d. in cash, plus the benefit resulting to the first defendants from the purchase by somebody of three 6d. packets of their chocolate evidenced by the three empty wrappers. Apart from the difficulty that the wrappers produced by any given purchaser need not necessarily represent chocolate bought by him, I do not think this view of the effect of the condition requiring the production of three wrappers is maintainable, nor, as I understand the argument, was it sought to be maintained to the extent of allocating some part of the price of the chocolate to the price of the record. Whoever bought the chocolate represented by the three wrappers must be taken to have bought it at the ordinary retail price of 6d. per packet. That price no doubt includes some element of net profit to the first defendants, but it is a price wholly attributable to and exhausted by the purchase of the chocolate. Moreover, whoever bought the chocolate would presumably have bought it from a retailer and not from the first defendants themselves. Accordingly, I do not think that the cash price of 1s. 6d. per record can be treated as increased by the amount of the net profit accruing to the first defendants in respect of the sale of the chocolate represented by the three empty wrappers or any part of that amount. F G H I

A simplified form of the bargain (more favourable to the plaintiffs' contention than the actual bargain involved) might be thus expressed: In consideration of your buying three packets of our chocolate at the ordinary retail price of 6d. each and evidencing such purchase by sending us the three empty wrappers, we, the first defendants, will sell you a record from our list at the price of 1s. 6d. If the bargain was in that form, I think it would be difficult to maintain that the

A price of the record was not simply 1s. 6d. (which admittedly showed a profit to the Nestlé Company) but 1s. 6d. plus some part of the price of the chocolate. A fortiori I think it is still more difficult to do so where, as in the present case, the bargain does not require the intending purchaser of a record to buy chocolate but merely to produce empty chocolate wrappers.

But, say the plaintiffs, the stipulation as to the production of three empty wrappers was undoubtedly of the first importance to the first defendants and indeed the whole essence of their scheme, which was to encourage the purchase of their chocolate by persons wishful of obtaining the necessary qualification in wrappers to enable them to buy a record or records. I agree; but does it follow that the imponderable value to the first defendants of the stipulation, admittedly capable of estimation, if at all, only after the advertising campaign based on the "record offer" had run its course, should be apportioned amongst the individual transactions so as to make the price of the record in each case not merely 1s. 6d. but 1s. 6d. plus x? I think not.

In my judgment the delivery of three Nestlé chocolate wrappers required by the terms of this offer should be looked on as a condition qualifying the person delivering them to buy a record at the price of 1s. 6d., and not as an addition to the price of an unascertained and unascertainable amount representing some minute fraction of the advantage which the first defendants hoped to derive, in the form of increased sales of their chocolate, from the advertising campaign as a whole. In other words, I think the effect of the offer was that anyone acquiring three empty wrappers as evidence of the purchase of three packets of Nestlé's chocolate became entitled to buy a record at the price of 1s. 6d. on payment of that price and production of the three empty wrappers to show that they had been duly acquired.

The learned judge in substance accepted the submissions made on behalf of the plaintiffs. I can best state his conclusion and the reasoning on which it was based by making the following quotation from his judgment:

"That is the matter I have to consider: can this be regarded as a retail sale for the purposes of the section? It seems to me that the section is directed to retail sales in the ordinary course of business, i.e., a sale for cash, a money price. That is what a sale is ordinarily defined to be, and the section is contemplating a sale for a money price. Can this transaction be so regarded? Now what does the purchaser have to do. He cannot get the record on tendering 1s. 6d. He has either to purchase three bars of Nestlé's chocolate, or, as was suggested, spend a rather profitless or unpleasant time scavenging in his neighbour's dustbins to see if he can find any wrappers that have been abandoned by them; but that is what he has to do. It does not seem to me that it is proper to describe that as a cash purchase. What is the value to the vendor, the first defendants? It is very great indeed, because it is all part of an advertising campaign, and I confess I listened with some amazement to the argument which said that really the existence of the wrappers in the letter containing the postal order for 1s. 6d. could really be ignored because they were worthless. That is not the transaction at all. In fact, the first defendants are making a nice profit on charging 1s. 6d. for the record, but that is not the subject of this scheme at all; admittedly not. Mr. Rainer was perfectly frank and fair about it. The whole object, of course, is to promote sales of Nestlé's milk chocolate. The price of 1s. 6d. is quite a minor consideration. It may be 1s. one day or may be 2s. another; so that it is not the point. The vital part of this transaction is to get in three wrappers, and that represents a great deal of value to the first defendants, because it is evidence of an advertising campaign pushing up their sales. That is the value to them. This bears no resemblance at all to the transaction to which, in my judgment, the section is pointing, that is, an ordinary retail sale with an ordinary retail selling price. I think it is quite

wrong to suppose that the retail selling price here is 1s. 6d. The purchaser has to purchase three bars of chocolate and that is the real value of this transaction to the first defendants.

"In my judgment, therefore, this transaction cannot properly be described as a transaction of retail sale and falls outside the section."

For the reasons which I have endeavoured to state, I am unable to accept the view that the cash price of 1s. 6d. per record should be treated as increased by some unascertainable amount on account of the stipulation requiring the delivery of three empty wrappers. If that view were right it would, as I think, follow that the resulting price of 1s. 6d. plus x would be a price incapable of statement as a sum of money and accordingly that the transaction would fail to satisfy the third of the three conditions I have postulated as necessary to qualify it for inclusion in s. 8. If, however, as I think, the price should be looked on as 1s. 6d. per record with a limitation of the offer of records at that price to such members of the public as should deliver three empty chocolate wrappers in respect of each record bought, then I cannot see that the transaction, undoubtedly a sale, is prevented from being a sale by retail within the meaning of s. 8 by the circumstance that the class of potential purchasers is limited to those who comply with the condition as to the delivery of wrappers.

Section 8 (1) (c) refers to the selling of the record "by retail" simpliciter, with no superadded requirement to the effect that the sales referred to must be retail sales in the ordinary course of business. If a shopkeeper acquires a limited stock of some cheap and novel line of goods and offers them for sale at a price showing a profit, but nevertheless an apparently advantageous price from the customer's point of view, with an intimation that they will be sold only to customers who produce evidence of the purchase at his shop since a specified date of other goods to some prescribed minimum value, I cannot see that his sales to consuming, or in other words retail, customers of the special line of goods are prevented from being sales by retail by the circumstance that they are limited to those customers who comply with the condition regarding the purchase of other goods. Nor do I see any justification for the view that in such a case the price charged for the special line of goods should be treated as increased by some part of the price paid for other goods purchased in order to comply with the condition. In this imaginary case the shopkeeper no doubt gets a collateral advantage in the shape of the enhanced sales of other goods he effects or hopes to effect to customers seeking to comply with the condition and thus qualify themselves as purchasers of goods of the special line, just as in the actual case before the court the first defendants get a collateral advantage in the shape of the enhanced sales of chocolate resulting or hoped to result through the purchase of Nestlé's chocolate by persons wishing to acquire the wrappers necessary to qualify them as purchasers of records. But this collateral advantage does not in the actual case form part of the price of the record any more than it would in the imaginary case form part of the price of goods of the special line.

The plaintiffs' real complaint in the present case appears to me to be that 1s. 6d. per record is too cheap a price, yielding too small a royalty, and is not in fact the true price, because the first defendants can afford to let the records go cheap for the sake of the collateral advantage they get in the shape of increased sales of their chocolate. But any retailer of goods may get some collateral advantage from their sale without any such special arrangements as I have assumed in the case of my imaginary shopkeeper. For example, a novel and attractive line of goods may bring in customers who will buy other things as well, and may be stocked by a retailer with that very object in view rather than the actual profit he hopes to make from the sale of the goods themselves. As to the cheapness of the price of 1s. 6d. per record, this according to the evidence is made possible by the new and exceedingly cheap method of manufacture used by the manufacturers. Moreover, according to the evidence, this price shows the

- A first defendants a profit, and I see no sufficient reason for regarding it otherwise than as the true price. It is moreover to be observed that the plaintiffs have no right to insist on the records being sold at any particular price or at a price showing a profit. If the first defendants had sold the records at 1s. 6d. or even less than that without any condition as to the production of wrappers, the plaintiffs admittedly would have had no ground for complaint, even though
- B the records might be accompanied by matter advertising Nestlé's chocolate.

- The view that I have formed to the effect that 1s. 6d. is to be regarded as the price of a record, without any addition in respect of the condition as to wrappers, disposes of the plaintiffs' subsidiary argument to the effect that the prescribed notice given by the manufacturers pursuant to s. 8 (1) (b) of the Act and reg. 1 (1) of S.I. 1957 No. 866 was defective, in that it did not and could not specify the
- C ordinary retail selling price as required by reg. 1 (1) (f) of the statutory instrument.

I should add that I likewise reject an argument raised on reg. 3 of the statutory instrument, which defines "the ordinary retail selling price of a record" in these terms:

- "The ordinary retail selling price of any record shall be calculated at the
- D marked or catalogued selling price of single records to the public, or if there is no such marked or catalogued selling price, at the highest price at which single records are ordinarily to be sold to the public, exclusive of purchase tax in either case."

- The point taken here (in addition to the objection that 1s. 6d. was not the true price) was to the effect that the first defendants' sales of records were not sales
- E to the public, because of the condition as to wrappers. I see no sufficient reason for holding that this condition prevented such sales from being sales to "the public". I think "the public" in this context is used as meaning members of the public purchasing records for their own use as distinct from traders purchasing for re-sale. Nor can I regard it as right to treat that paragraph as qualifying the simple reference to sales by retail contained in s. 8 (1) (c) of the Act itself.
- F For these reasons I would allow this appeal.

- ROMER, L.J.:** It is with regret and diffidence that I feel constrained to differ from the judgments of my brethren on this appeal, but for my part I have reached the conclusion that the decision of UPJOHN, J., was correct and should be upheld. I can state my reasons for this view very shortly, because they are
- G substantially the same as those expressed by the learned judge in his judgment.

- The question is whether the sales by the first defendants of the records in question in this case can properly be regarded as sales "by retail" within the meaning of that phrase as used in s. 8 (1) of the Copyright Act, 1956. The subsection has been read and I will not read it again, but I respectfully agree with, and adopt, the following passage in the judgment of the learned judge:

- H "Referring back to s. 8, it is at once apparent that the emphasis in the section (and in this it differs from s. 19 of the earlier Act) is on 'retail sale'. In para. (a) it is a necessary condition precedent, in fact satisfied in this case, that records must have been imported or made for the purpose of retail sale. Passing over para. (b), which, as I have said, is satisfied subject to a point
- I I shall mention in a moment, para. (c) again stresses the retail sale aspect of the matter because he has to state, if he is to satisfy the section, that 'the manufacturer intends to sell the record by retail, or to supply it for the purpose of its being sold by retail by another person'. Then in (d) again there is the reference that, in the case of a record which is sold by retail, the manufacturer has to pay a royalty and, finally, in sub-s. (2), there is a reference to the ordinary retail selling price. It seems quite clear, therefore, that the question that I have to determine is whether this transaction can properly be described as a retail sale, or whether it is the manufacturer's intention to sell the record by retail."

In some sense it is quite true to say that the sale of the records by the first defendants is a sale by retail; for it is not a sale by wholesale but it is a sale direct to the consumer, namely, the public. It appears to me, however, that the retail sales envisaged by the section are ordinary retail sales for cash, across the counter or in response to written orders, such as characterise, I suppose, the vast majority of purchases of gramophone records by members of the public. The reason why, in my opinion, it is ordinary retail sales, and those alone, which are within the contemplation of the section, is that under s. 8 (2) the royalty payable to the owner of the copyright is a percentage of "the ordinary retail selling price of the record"; and I am unable to see how there can be an ordinary retail selling price in the absence of an ordinary retail sale. The issue, therefore, as it seems to me, is narrowed down to the question whether the sales by the first defendants are ordinary retail sales.

The learned judge came to the conclusion that they are not, and I agree with him. It is quite true that the three chocolate wrappers which have to accompany each application for a record are intrinsically valueless and that the only money price which the customer has to send with his application is the sum of 1s. 6d. That sum, however, is not the only price which the customer has in fact to pay for the record; for he or one of his family or friends has to pay for three bars of the first defendants' chocolate as well. This represents a profit to the first defendants on each sale of a record in addition to the 1s. 6d. which they receive in cash. The learned judge said:

"The vital part of this transaction is to get in three wrappers and that represents a great deal of value to the first defendants, because it is evidence of an advertising campaign pushing up their sales. That is the value to them. This bears no resemblance at all to the transaction to which in my judgment the section is pointing, i.e., an ordinary retail sale with an ordinary retail selling price. I think it is quite wrong to suppose that the retail selling price here is 1s. 6d. The purchaser has to purchase three bars of chocolate and that is the real value of this transaction to the first defendants."

I am in agreement with those views of the learned judge. I cannot help thinking that the owner of the copyright was entitled, under s. 8, to a royalty assessed on the full purchase price of each record sold by retail. Under the first defendants' method of selling them, the copyright owner gets a royalty assessed on the cash part only of each sale and he gets nothing in respect of the consideration which, although indirect, passes from the customers and is received by the first defendants; and the minimum royalty provision would, in many cases of transactions of this character, be no satisfactory substitute for the loss. The position would become still more unfavourable to the owner of the copyright if the first defendants (which they might well do at any time) reduced the amount of cash payable by the customers and increased the number of the requisite wrappers.

In my judgment, the sales of the records in the manner in which they are carried out do not constitute sales "by retail" of the character envisaged and required by s. 8 of the Act; and I would only add that it seems to me difficult, if not impossible, for the manufacturer to give, in relation to such sales, the particulars required by reg. 1 (1) (f) of the Copyright Royalty System (Records) Regulations, 1957. I would accordingly dismiss the appeal.

Appeal allowed. Leave to appeal to the House of Lords granted.

Solicitors: McKenna & Co. (for the first defendants); Howe & Rake (for the second defendants); Syrett & Sons (for the plaintiffs).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

A

BOSLEY v. BOSLEY.

[COURT OF APPEAL (Hodson, Morris and Pearce, L.J.J.), March 18, 1958.]

Divorce—Desertion—Consensual separation—Deed providing for maintenance signed—Wife's request to return rejected—Maintenance agreement subsequently dated and copies exchanged—Whether husband in desertion.

B

The wife left the husband in the middle of December, 1951, their parting being by consent. In the same month both of them signed copies of an agreement by the husband to pay a sum to the wife for maintenance, but the copies were not exchanged pending a settlement of a loan that the husband had made. The agreement did not provide for the husband and wife to live apart. At the end of December, 1951, the wife asked the husband to take her back. The husband refused. In February, 1952, the signed copies of the agreement were exchanged. In 1956 proceedings for divorce were instituted by the husband on the ground of the wife's desertion. By her answer the wife denied desertion and sought a divorce on the ground of the husband's desertion.

C

D

Held (MORRIS, L.J., dubitante): the husband was in desertion after he rejected in December, 1951, the wife's request to take her back, and the exchange of the copies of the signed maintenance agreement in February, 1952, did not establish a consensual separation at that time because the maintenance agreement, which contained no contract to live apart, was consistent with a state of desertion just as it would be consistent with a consensual separation (*Pardy v. Pardy*, [1939] 3 All E.R. 779, distinguished); on the facts there was no new agreement in 1952 to live apart by consent, the husband remained in desertion of the wife and she was, therefore, entitled to a decree.

E

Per PEARCE, L.J.: the court should be slow to decide that a term is imported into a husband and wife's separation agreement that the separation shall be for ever and that there shall be no right ever to ask the other party to return to cohabitation (see p. 173, letter C, post).

F

Appeal allowed.

[**Editorial Note.** The decision in the present case should be considered with that in *Crabtree v. Crabtree*, [1953] 2 All E.R. 56.

As to an agreement for maintenance, not being a separation agreement, see 12 HALSBURY'S LAWS (3rd Edn.) 252, para. 468; and for cases on the subject, see 27 DIGEST (Repl.) 355, 2941 and SUPPLEMENT.]

G

Case referred to:

(1) *Pardy v. Pardy*, [1939] 3 All E.R. 779; [1939] P. 288; 108 L.J.P. 145; 161 L.T. 210; 27 Digest (Repl.) 354, 2932.

Appeal.

H

By his petition dated July 16, 1956, the respondent husband prayed for the dissolution of his marriage to the appellant wife on the ground of her desertion. By her answer dated Oct. 16, 1956, the wife denied desertion and prayed for the dissolution of the marriage on the ground of the husband's desertion. The parties were married at the Parish Church, Steyning, Sussex, on Apr. 4, 1951. The wife left the husband on Dec. 15, 1951, but on Dec. 30, 1951, she wrote a letter requesting her husband to take her back, a request which was refused by a letter dated Jan. 2, 1952. On Jan. 4, 1952, the wife saw the husband and asked him to take her back and the request was again refused. In December, 1951, the husband had caused to be drawn up a deed providing for maintenance of the wife, which was signed by both parties in that month. The deed was in the following form:

I

"This agreement is made the 25th day of February, 1952, between William Gordon Bosley of Middle Farm Harwell in the county of Berks farmer (hereinafter called the husband) of the one part and Sheila Ray

Bosley his wife of Little Mutton, 17, Coombe Road, Steyning in the county of Sussex (hereinafter called the wife) of the other part. Whereas (1) unhappy differences have arisen between the husband and the wife by reason whereof they have agreed to enter into the arrangements hereinafter contained. (2) There is no issue of the marriage between the husband and the wife but the husband is liable for the maintenance of Nigel Graham Jeffcoat (hereinafter called the child) the child of the wife by a former marriage. Now it is hereby agreed between the parties hereto as follows:—

“(1) The husband will pay to the wife for her support and maintenance the weekly sum of £4 13s. during the joint lives of the husband and the wife and for so long after the death of the husband as the wife shall remain his widow and so long as she shall lead a chaste life the first payment to be made hereunder on Dec. 22 next.

“(2) The wife will out of the said weekly sum or otherwise support and maintain herself and the child and will indemnify the husband against all debts to be incurred by her and against all liability whatsoever in respect of the child and will not in any way at any time hereafter pledge the husband's credit.

“(3) The wife shall not so long as the husband shall punctually make the weekly payments hereby agreed to be made commence or prosecute any proceedings against the husband for maintenance but upon the failure of the husband to make the said payments as and when the same become due the wife shall be at full liberty at her election to pursue all and every remedy in this regard either by enforcement of the provisions hereof or as if this agreement had not been made.

“(4) If at any future time the husband and wife shall come together and cohabit with each other or if their marriage shall be dissolved or they shall be judicially separated then and in such case all agreements and provisions herein contained shall become void but without prejudice to any act previously done hereunder or any proceedings on the part of either party in respect of any breach theretofore committed of all or any of the same.

“(5) In this agreement unless the context otherwise requires the expression ‘the husband’ shall include his executors and administrators.”

Pending settlement of a claim by the husband for repayment of a loan he had made to the wife's parents in respect of the purchase of a house, copies of the deed were not exchanged until Feb. 26, 1952.

On Oct. 11, 1957, Mr. Commissioner BUSH JAMES gave judgment in favour of the husband pronouncing that the wife had not sufficiently proved the contents of her answer and rejecting the prayer thereof and further pronouncing that the husband had sufficiently proved the contents of the petition. He decreed that the marriage between the parties be dissolved by reason of the wife's desertion. The wife appealed to the Court of Appeal on the ground that the judgment was against the weight of the evidence, that the judge had misdirected himself in law and that he had failed to draw proper inferences from the evidence of the parties.

J. G. Leach for the wife.

P. R. Hollins for the husband.

HODSON, L.J.: This is an appeal by a wife from an order of Mr. Commissioner BUSH JAMES dated Oct. 11, 1957. The suit was a suit for divorce presented by Mr. Bosley against his wife on the ground of desertion. They were married in 1951. The husband was a widower of fifty-one, and the wife was a widow of thirty-one. He had a daughter and she had a small child two years of age. At the time of the marriage she was getting an Indian Army pension and a widow's pension amounting to £4 13s. a week, which she lost on her marriage.

A The marriage lasted a very short time, for, although the parties had known one another for quite a long time, it was not a success and they parted in 1951, the year in which they were married. The wife left the husband. Before she left she wrote a letter to her husband humbling herself and trying to express by words her desire to behave properly towards her husband again, which she said she had not been doing in the past. I need not read the letter because

B it appears from the husband's evidence that she was making plans to leave, and eventually on Dec. 15 she left. The commissioner has found that she had told her husband that she was going, and a day or a few days before she left she went to see her sister-in-law (the husband's sister) and said good-bye to her and told her that she was leaving and that the marriage was at an end. The commissioner said:

C "I have no doubt that she had made up her mind to leave, and to leave permanently. An arrangement was made by the husband with his solicitor to give her an allowance and I think that in no sense was that agreement entered into by way of separation."

The husband recognised that his wife had lost her widow's pension, and he

D regarded it as a matter of honour that, if the parties separated, he should put that right. He went to his solicitors with that idea in view, and a document was drawn up which was signed by him before the parting but which was not signed by the wife until on or about Dec. 19. He kept the document. He did not hand it over to his wife, because he had generously provided £1,750 for his wife or for her family in connexion with a house and he wanted to get at

E any rate part of that sum back—he was prepared to accept £1,500—before he entered into the agreement to maintain his wife at the same rate as she had been getting under her pension. The agreement was actually dated Feb. 26, 1952, when it was handed over at the same time as the matter of the repayment of the money which the husband had put up was dealt with. The agreement was an agreement for maintenance. On the face of it, it was not an agreement

F between these two people to live apart for joint lives or for any other period: it was a provision for the payment of maintenance during the joint lives of the husband and wife and for so long after the death of the husband as the wife should remain a widow and lead a chaste life. The agreement was dated back to Dec. 22, which was a few days after the actual parting. The agreement is so drawn as to suggest, without saying, that it was an agreement for separation,

G because it refers in cl. 4 to the parties coming together again, which obviously implies that they are at the time of the execution of the agreement apart. Nevertheless, it was an agreement merely to maintain the wife and not an agreement that the parties should live apart for any particular period or at all. As the husband put it in his evidence, the door was left open.

According to the husband's evidence, the actual parting in December was

H really a consensual parting: it was not a parting against his will at all. He was dissatisfied with the way things had turned out; he thought things never could be right between his wife and himself, and when she suggested that she should go he agreed. Even if he could be said to have had the agreement rather forced on him by his wife's behaviour, showing her determination to go, nevertheless his evidence was clear enough that he did agree to her going. He was

I asked this question by counsel:

"You had, before she left on Dec. 16, agreed with her that that was the only answer, to break up the marriage?"

His answer was "Absolutely". So far as I can see that was the general drift of the evidence.

The commissioner does not find in his judgment that the marriage was brought to an end without agreement. All he says is: "I have no doubt that she had made up her mind to leave, and to leave permanently"; and when he refers

to the agreement he is referring to the financial agreement which I have mentioned. I should have thought it was tolerably clear on the husband's evidence that the parting in the middle of December was a parting by consent. After the parting the wife wrote her husband a letter on Dec. 30 asking him to see her, and he refused to do so. In that letter (which again was in terms of humility) she made it quite clear that she wanted her husband to have her back.

"Will you have me back, Gordon? It's not easy to have to say this but I guess life is not easy and anything that is really worth while has to be fought for."

The husband thought this matter over very carefully and he sat down and wrote a long letter to his wife on Jan. 2, in which he said that he could not have her back.

"I can still see only one answer to the problem and that is that I go ahead and find a housekeeper as soon as possible and in the meantime I have many friends whose firesides are available to me any evening I like to walk in."

The commissioner did not in any sense find, and I do not see how he could have found, that the wife's letter to the husband was not a genuine one and that she was not really trying to get back. Indeed, the husband was not really saying that she was not genuine in that sense. All he was saying was that he was quite sure, having regard to the past history of the case, that it would not work. He was saying in effect that the leopard could not change his spots, and that if she was a bad wife before she would be a bad wife in the future, and he was not prepared to change his mind.

On that state of the evidence, the only answer must be (subject to a matter to which I shall have to refer) that from Jan. 2, when the husband wrote to the wife refusing to have her back, he was in desertion, and that desertion subsisted for three years immediately preceding the presentation of the answer, because the answer was not presented until 1956. Counsel has suggested, however, that there may be a difficulty in the way of finding the husband to be a deserter because the original parting appears to have been consensual. In *Pardy v. Pardy* (1) ([1939] 3 All E.R. 779), a deed of separation was in existence which presumably contained the common term that the parties were covenanting to live apart during joint lives, so that the husband who was sued for divorce or the court could always say: "There is no desertion because there is an agreement to live apart". To my mind, that case and the authorities dealing with separations for joint lives (of which there are many) have no application to the present position, where there was not such a contract but merely at most an agreement to part for an indefinite period. No doubt the husband thought that he would never have his wife back at all. That the wife did not think so is quite clear from her subsequent action, because she very soon went to him to ask if she might come back. On any view of the matter, however, the agreement was not to live apart for any definite period, and I think that such an oral agreement cannot be understood as carrying with it a promise to live apart for joint lives, or (to use the words which I suppose come more naturally to two people talking together) "for ever"; and, if it cannot be so construed, the wife was not in breach of any agreement when she wrote to her husband at the end of December and went to him asking if she could go back. She was quite entitled to do it, and she was not prevented by any contract from doing it. Therefore, if the matter rested merely on the agreement to live apart for an indefinite period which these parties appear to have entered into in December, 1951, followed by a request by the wife to the husband to let her come back and his refusal, I think that there would be a clear case of desertion on the part of the husband.

However, a further matter has caused the court some anxiety, because the document which is now dated Feb. 26, 1952, came into existence and was

- A signed by both parties in the previous December, at the time when this agreement to separate came about. If the agreement of February, 1952, is to be read as being controlled by the circumstances in which the parties originally separated, then it would be true to say that in February, after the wife's offer to return had been refused, there was a further agreement by the parties to live apart, or, to put it perhaps more accurately, the wife accepted the position
- B and went back to the terms of the agreement to which she had come originally when she and her husband parted. I do not think that that is the true position. After the separation in December the wife, by writing to her husband (as she was entitled to do) and going to see him as she did on Jan. 4, and asking him to take her back, put an end to the consensual agreement because she was no longer willing to abide by it. As I have indicated, she was quite entitled to do this;
- C and the mere fact that the financial provision for her which this man out of his generosity was prepared to make was completed in February does not mean that from that point they were again agreeing to live apart by consent. The document of Feb. 26—the maintenance agreement, as it is called—is entered into by a man who is willing to make payments to his wife, and, he being under an obligation to support her, whether he is in desertion or not, *prima facie*
- D there is ample consideration for the promise to pay; the maintenance agreement thus does not depend for its efficacy on whether the parties were living apart by consent or whether the husband was in fact in the position of a deserter.

- It is said that a generous man was entering into an agreement with his wife for maintenance having previously agreed to part from her. It seems rather hard to saddle him with an accusation of desertion which would not be present
- E to his mind when he handed over the document on Feb. 26. I confess that I am not impressed by that consideration, because, before he handed over that document, his wife had been to see him. She was his wife, he had married her, whether they had agreed to part or not, and she had tried to get back to him. It does not seem to me that that matter can possibly have been absent from his mind when he went on with the financial provision for her maintenance
- F which he had previously agreed to make.

- I think that the commissioner was in error in ignoring the letters which the wife wrote to her husband and the offers which she made to return and in treating them as if they did not exist; so that it is impossible to sustain his finding that the wife was a deserter. In my judgment, on the true view of the facts of this case, supported by the findings of the commissioner, where there
- G are findings, the only conclusion which can properly be reached is that the husband was the deserter: therefore the appeal ought to be allowed, the prayer of the petition rejected, and a decree pronounced on the prayer in the answer, on the ground of desertion.

- MORRIS, L.J.: I think that this case not only is a sad one, but presents
- H difficulties from the legal point of view. I have experienced doubts not shared by my Lords, the line of which I think I must indicate. It seems to me that by the month of December, 1951, both parties realised that there were difficulties which they could not overcome. The suggestion that the wife should leave came from her; but the evidence shows that the husband accepted that suggestion; indeed, I think he says so in so many words in his evidence. He regarded
- I the marriage as having finally broken down. He said that it was quite final, that she would not come back to him, that she had no wish to come back to him. He looked on it as final that he could not live again with her. It was put that the finality was on the wife's side, but I think that a fair reading of the husband's evidence shows that he accepted, or at least recognised, that there was finality on his side as well. To use his words, it was "quite final".

That was a sad state of affairs; and I think that the husband was disposed to behave extremely well. He realised that his wife had had a pension during her widowhood which she had lost on her marriage to him, and very generously,

and guided by decent motives, he was agreeable to paying the amount of that pension. At the start of the marriage he had also lent £1,750; and again I think he behaved very well over that. But, as I read it, the effect of his evidence was that the parting between him and his wife was really a parting mutually agreed to. He was asked: "Did you or did you not mutually agree to separate?" He said "I did agree that my wife should leave the home". A fair reading of his evidence I think shows that, though the suggestion came from her, they both realised that the marriage was not being a success, and would not be made a success, and they both concurred in the suggestion that they should part, which she had made. His feeling further was that that represented so settled a view on the part of both of them that he could not think that there could be a change within a fortnight; and that led him to take the view that he could not regard the advance made by the wife at the end of December and at the beginning of January as genuine. The learned commissioner has found that the wife was perfectly genuine at that time. The parties had gone to solicitors and a maintenance agreement had been drawn up. The husband was to furnish the amount that the wife was receiving prior to her marriage by way of pension. She did not sign the maintenance agreement, merely because she had been so advised by her father; but her husband did sign it. The parting was then on Dec. 16. She went to solicitors who on Dec. 19 wrote saying that they had then explained to their client the purpose of the maintenance agreement and that she had then signed it and had it witnessed; so that the only matter remaining was to exchange the documents. The husband had signed by that time. The wife had signed before Dec. 19.

Then there came this approach by the wife, by her letter and by her visit, which the learned commissioner regarded favourably from her point of view, holding that it would be incorrect to say that she was not genuine. But her effort failed. The position then was that a doubt had arisen in regard to the £1,750. Some suggestion was put forward that the husband had never lent that sum, but that it had been a gift made by him on marriage. The husband said that it was never a gift, but that it was a loan. He again was prepared to behave very generously, and he was willing to forgo part of the loan to get the matter settled. He was willing to forgo £250 of it. Later he said that, not only would he forgo £250, but he would forgo another £50 to enable arrangements to be made for a mortgage on the house in connexion with which the £1,750 had been lent.

This difference led to the passing of a considerable period of time; but finally the husband's suggestion was accepted, that he should have the £1,450, forgoing the £250, and the £50, and that the amount due if the maintenance agreement became effective should be deducted from the £1,450. So the solicitors for the wife wrote on Feb. 19 and asked whether there could be completion. It is at this stage that the difficulties that I have felt occur. It seems to me that, after the wife had made her approach, and after the husband had taken the view that the position could not be so soon changed, the wife recognised that and did not thereafter proceed on the basis that she was dealing with a deserting husband; nor did her solicitors proceed on that basis; but, recognising the husband's position, she and her solicitors proceeded on the basis of resuming negotiations where they had been left off in December; and in December all that was left was the exchange of documents already signed. Now that the matter of the £1,750 had been adjusted and was out of the way, all that then remained was to have the exchange of the documents; and it seems to me that the wife did not proceed on the basis that her husband was a deserting husband, but proceeded on the basis of what had been arranged in December, i.e., of both parties recognising that the marriage was not a success, that there had to be a parting by agreement, and that, on that parting by agreement, the husband was willing to make up to his wife what she had lost financially by

A marrying him. It was on the basis of a consensual separation that the agreements were finally exchanged, and on the basis of the financial arrangement made in December in consequence of a separation mutually agreed.

I have felt it right to express these views and to express the view of the facts that appealed to me; but my Lords take a different view, and, therefore, I only express the doubts based on the view of the facts that I have formed.

B **PEARCE, L.J.:** I agree with what HODSON, L.J., has said. It is a question of fact or of construction what are the terms of a mutual agreement to separate. Here there is no deed to construe. The question here is: Was the oral or implied agreement such that it precluded any future unilateral change of heart on the part of either party? Often in the rather haphazard parting of husband and wife the fact of a mutual agreement to separate has to be deduced from things done and things said in emotion and temper. I think that the court should be slow to decide that a term is imported that the separation shall be for ever and that there shall be no opportunity for any unilateral change of mind, no right ever to ask the other party to return to cohabitation. I see nothing on the facts of this case to prevent the wife from making an approach to the husband and asking for what is *prima facie* the right of any spouse—
C a return to cohabitation. That being so, on the facts with which HODSON, L.J., has dealt, there was a desertion by the husband.
D

There arises the question of whether the exchange in February, 1952, of the maintenance agreement signed in December, 1951, in any way prevents the husband from being in desertion. It seems to me that that turns on this:
E Was the maintenance agreement referable only to a state of separation by consent? If it was equally referable to the position of a deserted wife, the concluding of it or the implementing of it by the exchange of signed copies and receiving arrears under it was not conclusive evidence of any assent by the wife to a separation or any reversion to the previous situation in which she was agreeing to the husband living apart from her. I find nothing in the agreement to make it referable only to separation by mutual consent. It was a piece of
F machinery to regulate the financial affairs of the parties. It did not purport to regulate their matrimonial position. It was in origin a by-product of an agreement to separate; but it was equally apt to be a by-product of desertion.

I would agree with the view taken by MORRIS, L.J., if I thought that the facts showed that the husband went on with that maintenance agreement in the belief (to the wife's knowledge) that the wife's agreement to separation
G still stood, and that had he not so believed he would not have gone on with the maintenance agreement. In that case it seems to me that the wife could not be heard to say that she had withdrawn her consent to their continued living apart; but I see nothing on the facts of this case to drive me to that conclusion. For those reasons, I think that the exchange of signed copies of the maintenance agreement does not prevent desertion running against the husband.

H *Appeal allowed. Prayer of petition rejected. Decree nisi on prayer of wife's answer on the ground of desertion.*

Solicitors: *Burton, Yeates & Hart*, agents for *Nye & Donne*, Brighton (for the wife); *Gamlen, Bowerman & Forward*, agents for *Morland & Son*, Abingdon (for the husband).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

HAMILTON AND ANOTHER v. WEST SUSSEX COUNTY COUNCIL AND ANOTHER. A

[QUEEN'S BENCH DIVISION (Donovan, J.), March 25, 28, 1958.]

Town and Country Planning—Permission for development—Outline permission—Design and siting reserved for subsequent approval—Subsequent application for approval on reserved matters refused on ground that development contrary to planning authority's proposals for the area—Whether outline permission a sufficient valid permission for development—Town and Country Planning General Development Order and Development Charge Applications Regulations, 1950 (S.I. 1950 No. 728), art. 5 (2). B

In 1955 an applicant applied for outline planning permission in accordance with art. 5 (2)* of the Town and Country Planning General Development Order and Development Charge Applications Regulations, 1950. Outline permission for the development, viz., to erect a new cottage on a farm, was granted, the approval of the local planning authority for certain matters, viz., the design and siting of the cottage, being reserved. The approval on these reserved points had, therefore, to be obtained before the development was begun (art. 5 (2) proviso (i)); the outline permission fixed a time limit of two years for obtaining this approval. In 1956 the applicant applied for the necessary further approval. This application was refused and the reason given for the refusal was that the development was contrary to planning proposals for the area. The local planning authority conceded that, unless the 1956 application could be regarded as a fresh application, their reasons for withholding planning permission on that application were wrong. C D E

Held: the outline planning permission had become in the circumstances a good and valid planning permission, entitling the plaintiffs to proceed with the erection of the cottage, because, when the 1956 application was considered on behalf of the local planning authority, they had considered (as the court inferred as a fact) the matters reserved in the 1955 outline permission and, having found no objection to the proposals as regards the reserved matters, could not properly withhold approval. F

[For the Town and Country Planning General Development Order, 1950, art. 5, see 21 HALSBURY'S STATUTORY INSTRUMENTS 148.]

Action.

This was an action by Audrey Joyce Hamilton, a widow, the first plaintiff, G and the Rowland Hill Permanent Building Society, the second plaintiff, for a declaration that an outline planning permission was a good and valid permission under the Town and Country Planning Act, 1947. The outline permission was granted to Mr. Donald Hamilton, on behalf of the first plaintiff, by Chichester Rural District Council, the second defendants, who were acting under powers delegated to them under the Act of 1947 by the local planning authority, West Sussex County Council, the first defendants. H

The first plaintiff was the owner in fee simple of land known as Courts Farm, West Wittering, in the county of Sussex, and the second plaintiff was the mortgagee of Courts Farm under a legal charge dated Dec. 8, 1955. By a written application dated Feb. 12, 1955, made on the appropriate form issued by the first defendants, Mr. Hamilton, on behalf of the first plaintiff, applied to the second defendants for planning permission to develop Courts Farm by the "conversion of two old cottages into one sound ditto and erection of one replacement cottage". I The application stated that the area of land to which it related was "Part of approximately forty acres" and that the application did not involve making any new access to a road. A plan was attached to the application marked "lay-out of cottages, gardens and orchards proposed at Courts Farm House,

* The relevant terms of art. 5 (2) are printed at p. 177, letter I, post.

- A West Wittering", from which it appeared that the plot of land on which it was proposed to build the new cottage was some distance away from the site of the two old cottages; there was no evidence to indicate that the proposed plot for the new cottage was contained in its own curtilage. The application was described, and was accepted by the second defendants, as an outline application for planning permission (see art. 5 (2) of the Town and Country Planning
- B General Development Order and Development Charge Applications Regulations, 1950*).

In a letter covering the application dated Feb. 14, 1955, addressed to the second defendants, Mr. Hamilton wrote:

- C "Courts Farm, West Wittering. I enclose herewith plan showing the ultimate lay-out of the above which as you will see is being treated as an orchard farm. Further fields will possibly be laid down in due course particularly to the south of the estate. There are two cottages at the present time empty at the position marked 'A' on the town planning application plan enclosed, which are in poor order. I am proposing to turn these two cottages into one first-class ditto and to build a replacement at the position marked 'B'... Although it is not a subject of this application, at a later date I hope to be able to allow the villagers of West Wittering to play cricket on the field shown on the lay-out plan. Would you be good enough to inform me whether in broad principle there would be any objection to the cricket pavilion where shown on the plan. This request is not a formal one and is merely to indicate to me whether there is likely to be any objection. I am most anxious that the whole character of this section of West Wittering shall remain broadly as it is and am taking such steps that are within my power to provide the maximum possible protection and improvements."
- D
- E

- In a written permission for development dated Apr. 27, 1955, the second defendants, having first stated therein that the proposal for development concerned was an "outline application for cottage—Courts Farm, West Wittering, Sussex", stated that they permitted the development proposed by Mr. Hamilton "as quoted above" subject, inter alia, to its being carried out in accordance with detailed drawings and written particulars approved by the second defendants, and to any departure from the approved proposals being made the subject of a fresh application. The written permission was stated to be subject
- F
- G to the following further conditions:

- "(1) The permission hereby granted is an outline permission under [art.] 5 (2) of the Town and Country Planning General Development Order, 1950, and the approval of the local planning authority is required in respect of matters reserved in this permission before any development is commenced.
- H "(2) The permission shall become null and void unless satisfactory plans and elevations giving details of the design and siting of the building, are submitted to and approved by the local planning authority within two years of the date hereof."

- By a further application for planning permission, dated Oct. 17, 1956 (referred to hereinafter as "the 1956 application"), made on behalf of the second plaintiff, permission to erect a cottage and garage at Courts Farm was sought, and
- I detailed plans, including plans marked "lay-out plan" "block plan" showing the siting and design of the cottage, were submitted with the application. On these plans, the site of the proposed cottage differed from the site of the "new replacement cottage" shown on the plan which had accompanied the outline application dated Feb. 12, 1955. The 1956 application stated that the area of land to which it related was 3.21 acres and that the development involved a vehicular access to the proposed new garage which was to lead from a private

* S.I. 1950 No. 728.

roadway. By a written refusal of permission to develop dated Nov. 19, 1956, the second defendants refused permission for the erection of the cottage and garage, giving as their reason, that the development was contrary to the planning proposals for the area, but they did not raise any objection to the detailed plans submitted with the 1956 application although the application was considered by the same officers as considered the outline application made in February, 1955, and the documents relating to the outline application, which was granted subject to the second defendants' approval of detailed plans, were in front of those officers. By a form of appeal dated Jan. 28, 1957, the second plaintiff appealed to the Minister of Housing and Local Government against the second defendants' refusal of planning permission, but, subsequently, the Minister decided that he would not hold an inquiry into the appeal until the present proceedings were concluded.

The second plaintiff, viz., the mortgagee of Courts Farm, claimed to have relied on the outline planning permission in granting an advance to the first plaintiff, and both plaintiffs now claimed (1) a declaration that as a necessary inference from the reasons stated in the refusal of planning permission dated Nov. 19, 1956, the defendants were deemed to have approved the plans and elevations submitted with the 1956 application and (2) a declaration that the outline permission dated Apr. 27, 1955, was a good and valid permission within the Town and Country Planning Act, 1947, which entitled the plaintiffs to proceed with the erection of the cottage and garage.

The defendants contended that the proposal contained in the 1956 application departed from the proposal approved in the outline permission granted in April, 1955, because of the different siting of the cottage in the plans submitted with the 1956 application and the fact that the two old cottages proposed to be made into one in the outline application, had not been so converted and were not referred to in the 1956 application; the 1956 application therefore constituted a new proposal for development and the second defendants had considered it on its merits, and refused it. Further, the defendants denied that detailed plans of the design and siting of the cottage had been submitted to or approved by the local planning authority in accordance with the conditions attached to the outline permission. The plaintiffs denied that the 1956 application constituted a fresh proposal for development, and alleged that the outline permission was for the erection of one cottage on the area of land mentioned in the outline application, that the 1956 application was for the erection of a cottage on the same area of land, within the outline permission, and that the siting of the cottage within that area was one of the matters which was expressly reserved by the conditions attached to the outline permission.

L. A. Blundell for the plaintiffs.

N. C. Bridge for the defendants.

Curr. adv. vult.

Mar. 28. **DONOVAN, J.**, read the following judgment: The first issue in this case is the identity of the land in respect of which the outline application was made on behalf of the first plaintiff in February, 1955. She says that it was Courts Farm, West Wittering, as shown on the plan accompanying the application. Both defendants say it is only a very small part of that farm as so shown, namely, a small plot on which the proposed new cottage was to be erected. I will call this for brevity "the small plot".

The importance of the issue is this. If the land the subject of the outline application were Courts Farm, the defendants admit that the reasons given for refusing the further application for planning permission made in October, 1956 (hereinafter called the 1956 application), are wrong and cannot be sustained. The 1956 application was submitted on behalf of the second named plaintiff consequent on the grant of outline permission to the first plaintiff, and it comprised the detailed drawings called for by the terms of the outline permission.

A If on the other hand the land the subject of the outline application were the small plot alone, then the reasons given for the refusal of the 1956 application were not wrong. The reason is that the new cottage was shown in the 1956 application as sited on a different portion of Courts Farm, so that the 1956 application would, on the above hypothesis, be a new application in respect of different land.

B Under the Town and Country Planning Act, 1947, and the Town and Country Planning General Development Order and Development Charge Applications Regulations, 1950* (hereinafter called "the Order of 1950"), it is for the person who wishes to develop land to make application for planning permission; and under art. 5 (1) of the Order of 1950 it is for him to indicate what land it is that he wishes to develop. He must do this by means of particulars and a plan.

C The particulars are to be those required by a form to be issued by the local planning authority, and the plan is to be sufficient to identify the land.

[HIS LORDSHIP considered the outline application, the plans and correspondence, and continued:] In all the circumstances it seems to me quite clear that the land the subject of the outline application† and of the grant of outline permission† was Courts Farm and not the small plot.

D The defendants then raise a further point, also designed to show that the 1956 application was really a new application altogether. They say that on the plan submitted for outline permission a form of access from the proposed cottage to a road was shown, whereas on the final plans a different form of such access is shown. It is said that this alone makes the 1956 application a new one, and art. 5 (2)‡ of the Order of 1950 is relied on in this connexion. The

E point is not foreshadowed in the defence, at least with any particularity, but no objection was raised on this score on behalf of the plaintiffs. The defendants, however, in their outline permission of 1955 made no reservations whatever on the subject of access. Moreover in any event, as the plaintiffs say without contradiction, the new access merely connects with the same road at a different point, and the road itself is a private road on the farm and not a public road at all.

F Obviously where a public road is concerned, matters of access from new buildings concern the planning authority very much; but they hardly do so where the access is simply to a private road on the same land, and I do not think that art. 5 (2) of the Order of 1950 has any application to such a road. It may be that the planning authority took the same view originally, and that this explains why no reservation whatsoever on the subject-matter of access was made when outline permission was granted. In any event I think that the point is without substance for the reason that I have given.

G The defendants concede that if they fail in their contention that the 1956 application was really a fresh application altogether, then their reasons for withholding planning permission were misconceived and wrong. What follows, it is said, is this; that they have never considered the right question, namely, whether the matters reserved in the outline permission have been satisfactorily arranged, and that therefore they should now be given the opportunity of considering whether this is so.

H The matter needs careful consideration, first, because of the extra burden involved for the plaintiffs, who have proceeded quite correctly throughout, and,

I * S.I. 1950 No. 728.

† These were dated Feb. 12, 1955, and Apr. 27, 1955, respectively.

‡ Article 5 (2) of the Town and Country Planning General Development Order, 1950, provides:—"Where an applicant so desires, an application, expressed to be an outline application, may be made . . . for permission for the erection of any buildings subject to the subsequent approval of the authority with respect to any matters relating to the siting, design . . . or the means of access thereto . . . provided that:—(i) where such permission is granted . . . the approval of the authority shall be required with respect to the matters reserved in the permission before any development is commenced."

secondly, because the two years specified in the outline permission as the time within which detailed plans had to be approved, have now expired. The defendants say that they would not take any point on this in the circumstances, seeing that the plans were submitted in time, but this very proper attitude does not of itself confer jurisdiction. When the detailed plans called for by the outline permission were submitted with the 1956 application one of two things happened: either the reserved matters, such as design and siting, were not considered at all, because the defendants decided to reject the application on principle; or they were considered and while the defendants found them unobjectionable they nevertheless decided to reject the application, again on principle. Which of these two things occurred it would have been quite easy for the defendants to prove, but no one went into the witness-box on their behalf, and I am thus left to draw a conclusion from the facts revealed by the documents before me. They are these. (1) The same officers who considered the outline application considered also the 1956 application. (2) With that latter application the second plaintiffs submitted plans and elevations giving details of design and siting of the cottage pursuant to the conditions contained in the outline permission. (3) The previous documents relating to the outline permission were in front of the aforesaid officers when they considered these plans and elevations. They must have known, therefore, that what they were being asked to do was to say whether they approved them pursuant to the aforesaid conditions. The case is not one where the officers concerned for the planning authority inadvertently overlooked the previous grant of outline permission subject to conditions. They had this outline permission and its conditions well in mind at the time. (4) The defendants say in their defence that they considered the application on its merits and decided to refuse. In these circumstances art. 5 (9) (a) of the Order of 1950 imposed on the defendants the obligation to state their reasons in writing, which means all their reasons and not some, and the reason given was simply that the development proposed was contrary to the planning proposals for the area. (5) From start to finish no objection has ever been raised to the design or siting of the cottage, or to the details as shown on the plan submitted with the application of October, 1956. The defendants in their defence refer to the different siting of the cottage not as something that still awaits approval but simply as a fact supporting the argument that the application of October, 1956, was a new application altogether.

On these facts I draw the conclusion that the defendants, when the 1956 application was before them, did consider through their officers those matters which had been reserved in the 1955 outline permission—as indeed was their duty—and found nothing to which they wished to object. The attitude which they took was that though the applicant's proposals were unobjectionable with regard to reserved matters, the work of converting the two old cottages into one had not been done and that this entitled them to consider the whole matter afresh and to refuse permission on grounds of principle. As soon as the defendants came into court this claim was abandoned. They are not now entitled to consider the reserved matters a second time. It is true that they have not formally said, "We approve", but there is nothing which obliges them to use any such particular expression. If they could find no objection after examining the applicant's proposals they could not properly withhold approval.

In these circumstances I grant the second declaration* asked for by the plaintiffs, which seems to me to cover the whole matter.

Declaration accordingly.

Solicitors: *Kenneth Brown, Baker, Baker* (for the plaintiffs); *Lees & Co.* (for the defendants).

[Reported by WENDY SHOCKETT, Barrister-at-Law.]

* The terms of the second declaration asked for in the statement of claim are stated at p. 176, letter D, ante.

A

EDWARDS v. EDWARDS.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Sachs, J.), March 25, 26, 27, 1958.]

B

Solicitor—Professional misconduct—Litigation—Improper continuance of proceedings—Change of position on discovery—Irrelevance of civil aid certificate—Solicitors to pay costs personally—R.S.C., Ord. 65, r. 11—Legal Aid and Advice Act, 1949 (12 & 13 Geo. 6 c. 51); s. 1 (7) (b).

C

Husband and Wife—Maintenance—Application to High Court—Costs—No inquiry by wife's solicitors as to husband's income and liabilities—Failure of application—Liability of wife's solicitors to pay husband's costs—Matrimonial Causes Act, 1950 (14 Geo. 6 c. 25), s. 23.

D

The parties were married in 1946 and there was one child, born in 1954. In 1956 the wife was receiving £5 10s. a week from the husband and was also allowed to purchase goods from two stores and to charge the husband's accounts there. These purchases totalled about £2 a week. In September, 1956, the wife consulted solicitors about her marriage. She saw a partner in the firm who advised her to increase the purchases which were charged to the husband's accounts at the two stores. She increased her purchases to an average of £10 per week for the last quarter of 1956, but did not tell the husband that she had done so. Thus out of nearly £400 available income of the husband in that quarter she and the child had the benefit of about £277. On Oct. 8, 1956, the solicitor had an interview with the husband relating to the validity of the marriage and possibilities of divorce, finance being also mentioned. On Oct. 30, 1956, the husband told the solicitor on the telephone that he was not prepared to admit adultery. The wife was thus left to take such action as she thought fit. The husband left the matrimonial home at the end of November, 1956, the wife continuing to reside there. She obtained a civil aid certificate and on Jan. 4, 1957, instituted proceedings under s. 23 of the Matrimonial Causes Act, 1950, on the ground of wilful neglect to provide reasonable maintenance for her. Although the wife's solicitor knew at that time that a firm of solicitors might well be acting for the husband, no inquiry as to the husband's means was made of them, but the wife by affidavit in support of her application for maintenance formally put the husband to proof as to his means and assets and further stated that on the advice of her solicitor she had charged during the last few months

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about £3 10s. weekly to the husband's accounts at the two stores. By affidavit in answer the husband accurately set out his assets and liabilities and the figures were never challenged by the wife. They showed his aggregate income to be £1,567, but to be subject to expenditure (subsequently found in the aggregate to be £637) for mortgage interest and other liabilities inescapable if the matrimonial home where the wife was living was to be maintained. Nevertheless on Feb. 1, 1957, the wife swore a further affidavit putting the husband to proof "as to his income over the past three years and as to his capital assets of all kinds including the values of his life policies, bank accounts, stocks and shares and bonds". An order was made for full discovery of documents covering the previous two and a half years. On Mar. 29 the husband filed an affidavit of documents which was, at the wife's solicitor's request, supplemented on Apr. 5. On Apr. 15 the wife's solicitor inspected the documents disclosed. The documents showed that it would not be possible successfully to challenge the commitments payable out of the husband's income, and also that the wife's expenditure charged to the accounts at the two stores was, during the quarter preceding the application for maintenance, about £10 weekly, not £3 10s. The wife's solicitors' inspection of documents took over two hours; he demanded three copies each of a large number of documents which were delivered to him. In March and May, 1957, the husband closed the two accounts at the stores,

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with the consequence that the wife's income was reduced to £5 10s. weekly. On May 17, 1957, the husband's solicitors wrote to the area committee of the Law Society as they considered that there was no justification for the proceedings which would involve their client in considerable expense. They sent a copy of this letter to the wife's solicitor. On May 23, 1957, the wife's solicitor attended before the area committee and the certificate was not revoked. On Oct. 8, 1957, the wife's solicitors entered the case for trial and on Oct. 21, after a two-day hearing, it was dismissed on the ground that there had been no wilful neglect to maintain prior to the issue of the summons. Among the documents included in court bundles and not used was one bundle of copies of documents comprising 110 pages. The husband applied for an order that the wife's solicitors should personally bear the costs incurred by him.

Held: (i) the wife's solicitors would not be ordered to pay the husband's costs of the proceedings under s. 23 of the Matrimonial Causes Act, 1950, *ab initio*, since, though the wife's solicitor had not sought from the husband's solicitors before action the appropriate information about his income and liabilities (as was a normal practice), there had not previously been any reported case on the special character in this respect of proceedings under s. 23, and until the amount of the husband's inescapable expenditure was known the chances of success of the proceedings would not be easy to judge.

(ii) in the exercise of the court's inherent and discretionary jurisdiction over solicitors (as also of such relevant jurisdiction as was conferred by R.S.C., Ord. 65, r. 11) the wife's solicitors would be ordered to pay the husband's costs, as between party and party, of the proceedings as from Aug. 1, 1957, because after discovery the position should have been appraised in the light of the documents disclosed, of the consequence of the closing of the accounts at the stores, and of the fact that neglect to maintain had to be established as at the date of the institution of the proceedings; but the wife's solicitor had made no such appraisal.

Myers v. Elman ([1939] 4 All E.R. 484) applied.

(iii) the fact that the wife was legally aided did not, in the circumstances of this case, alter the position because, by s. 1 (7) (b) of the Legal Aid and Advice Act, 1949, the rights of other parties were not to be prejudiced by the fact that an opponent was legally aided, and the inherent jurisdiction exercised at (ii) above existed for the protection of opponents in litigation; similarly the decision of the area committee in May, 1957, not to terminate the civil aid certificate was irrelevant and evidence of the opinion of the committee would be inadmissible in proceedings as between the wife's solicitor and the husband.

Hollington v. Hewthorn & Co., Ltd. ([1943] 2 All E.R. 35) followed on the latter point.

(iv) the expense to which the husband was put in copying documents, as a result of the excessive demands made by the wife's solicitor, should be paid by the wife's solicitors.

(v) the wife's solicitors would pay all the husband's costs after Oct. 21, 1957, as between party and party, and, for guidance on the legal aid taxation of the wife's costs after that date and up to the time of the change of her solicitors, it was intimated that no costs should be allowed in respect of the issues before the court at the present hearing and one half of the costs of the transcript should be paid by the wife's solicitors.

[**Editorial Note.** Though in the present case the fact that the wife was legally aided was not relevant to the result, yet there may be circumstances in which the fact that a party was legally aided would be a factor relevant to the question of the party's solicitor being made personally liable for costs; see p. 187, letters F and G, post.

A The observations of the registrar concerning what is proper and reasonable in relation to the requiring copies of documents where many are disclosed on discovery are set out at p. 183, letter F, to p. 184, letter C, post; this passage from the registrar's report was adopted by SACHS, J. (see p. 185, letter I, post).

B As to solicitor's liability to pay costs occasioned by misconduct or default, see 31 HALSBURY'S LAWS (2nd Edn.) 269, para. 290; and for cases on the subject, see 42 DIGEST 343-348, 3875-3952.

For the Legal Aid and Advice Act, 1949, s. 1, see 18 HALSBURY'S STATUTES (2nd Edn.) 533.]

Cases referred to:

- (1) *Myers v. Elman*, [1939] 4 All E.R. 484; [1940] A.C. 282; 109 L.J.K.B. 105; 162 L.T. 113; 2nd Digest Supp.
- C (2) *Francis v. Francis & Dickerson*, [1955] 3 All E.R. 836; [1956] P. 87; 3rd Digest Supp.
- (3) *Hollington v. Hewthorn & Co., Ltd.*, [1943] 2 All E.R. 35; [1943] 1 K.B. 587; 112 L.J.K.B. 463; 169 L.T. 21; 2nd Digest Supp.
- (4) *Ingram v. Ingram*, [1956] 1 All E.R. 785; [1956] P. 390; 3rd Digest Supp.
- D (5) *Re Dartnall*, *Sawyer v. Goddard*, [1895] 1 Ch. 474; 64 L.J.Ch. 341; 72 L.T. 404; 42 Digest 345, 3915.

Application.

This was an application made by the husband, the respondent in proceedings brought by the wife under s. 23 of the Matrimonial Causes Act, 1950, that the wife's solicitors should personally bear the whole or part of the costs of the proceedings.

E The facts, stated by SACHS, J., in his judgments on Oct. 22, 1957, and Mar. 27, 1958, were as follows:

The parties were married in 1946 in Belgrade, the wife being Yugoslavian by birth. There was one child born on Sept. 30, 1954. In 1955 the husband purchased on mortgage the freehold of a house at Kew Gardens, which was the matrimonial home. Whilst there, the wife received £5 10s. a week from the husband and also used to purchase goods from two London stores (Barkers and Whiteleys) which were charged to the husband's accounts at an average cost of £2 a week. By 1956, the state of the marriage had deteriorated and in September, 1956, the wife consulted solicitors about her marriage. She saw a partner in the firm (in this report the partner is referred to as "the wife's solicitor" and the firm are referred to as "the wife's solicitors") and he advised her to increase her purchases of goods from the two stores on the husband's accounts. Without telling the husband, she increased her charges on those accounts to an average over the next three months of £10 a week, and in fact for the quarter ended Dec. 31, 1956, the wife and the child had benefits in cash and kind to a total of £277 out of the husband's available £400. On Oct. 8, 1956, the wife's solicitor had an interview with the husband in which questions relating to the validity of the marriage and the possibilities of a divorce were discussed, and also, as a subsidiary matter, the financial issues. The wife's solicitor did not, however, tell the husband of the wife's increased purchases charged to his accounts. The husband told the wife's solicitor that he would probably ask his solicitor to communicate with him. On Oct. 30, 1956, the husband told the wife's solicitor that he was not prepared to admit adultery and the wife was left to take what action she thought fit. On Nov. 6, 1956, the wife applied for legal aid for proceedings under s. 23 of the Matrimonial Causes Act, 1950. At the end of November, the husband left the matrimonial home; the wife continued to reside there. On Dec. 11, 1956, a civil aid certificate was granted to the wife. On Dec. 13, 1956, the wife's solicitor wrote to the husband's solicitors asking them to confirm that they had instructions to accept on behalf of the husband service of s. 23 proceedings. The husband's solicitors replied that they would take instructions. In reply, on Dec. 18, 1956, the wife's solicitor wrote to the husband's solicitors a

letter described by SACHS, J., as "intemperate" and "unfortunate" and "likely to give the impression that the solicitors who wrote it not only did not desire to discuss the matter in the usual way but were really anxious to embark on litigation". On Jan. 4, 1957, the originating summons for an application under s. 23 was issued and on the same day the wife swore an affidavit in support of her application in which she stated that the husband's income from his appointment was at least £1,250 and that she estimated his journalistic income at not less than £250. She stated that the husband owned the freehold of the matrimonial home but she did not refer to the mortgage or to the endowment policy, the existence, but not the amount, of both of which items of expenditure by the husband were known to her solicitor; she stated that during the past few months she had increased the sums which she had charged against the two stores accounts and said: "On the advice of my solicitor I spent a little more, amounting to possibly £3 10s. per week on the two accounts together." She concluded by formally putting the husband to proof as to his means and assets. On Jan. 23, 1957, the husband swore an affidavit in which he stated that as from October, 1956, his salary had been £1,430 a year, that his journalistic income was about £100 a year and that he also had £37 from investments; making a total, gross, of £1,567. He stated that the freehold was subject to a mortgage for £2,860, the interest on which was £150 and that the premium on the endowment policy was £240 a year. He also stated that he had continued to pay all the outgoings in respect of the matrimonial home "including rates, taxes, light, heat, telephone etc., which in all amounted to approximately £160". These figures shown by the husband were accurate and were never challenged by the wife. On Feb. 1, 1957, the wife swore a further affidavit in which she stated:

"I put the [husband] to proof as to his income over the past three years and as to his capital assets of all kinds including the values of his life policies, bank accounts, stocks and shares and bonds. I further put the [husband] to proof as to the rent paid by him at [the address where he was then living]."

On Feb. 7, 1957, counsel for the wife having been asked to advise both on evidence and generally wrote an opinion dealing mainly with matters other than the sufficiency of the financial provisions, but also dealing briefly with that point and with discovery, and advised favourably as regards the financial point. On Feb. 15, 1957, orders for mutual discovery were made. On Mar. 29, 1957, the husband filed an affidavit of documents which, at the request of the wife's solicitor, he supplemented on Apr. 5. On Apr. 15 the wife's solicitor inspected the documents disclosed, the inspection taking two to two and a half hours, and he made a demand for three copies each of a large number of documents which were delivered to him on May 10, at a cost of £64 11s. 6d. In March, 1957, the husband's account at Barkers was closed and in May, 1957, he closed his account at Whiteleys. On May 17, 1957, the husband's solicitors wrote to the area committee as they considered that there was no justification for the present proceedings which would involve their client in considerable costs; they sent a copy of this letter to the wife's solicitors. On May 23, 1957, the wife's solicitor attended before the area committee and the certificate remained in force. On July 12 the wife's solicitor had a three hour conference with the wife in hospital. On Aug. 2, 1957, the wife's solicitor took out a summons for directions. On Sept. 20 leave was given on the summons for directions to supplement the affidavits by oral evidence. On Oct. 8, 1957, the wife's solicitor entered the case for trial. On Oct. 15 and 16, 1957, the wife's solicitor delivered to counsel the papers constituting his brief. On Oct. 18, 1957, the case came on for trial. The trial lasted two days and in the course thereof it transpired that substantially the only figures in dispute were (i) the husband's earnings from journalism in the year 1956-57; (ii) what amounts he was being called on to pay off from his

A bank overdraft and (iii) the monthly totals charged by the wife to the husband's accounts at the two stores after the date of her solicitor's advice relating thereto. On Oct. 21, 1957, the wife's application was dismissed on the ground that during the period preceding the issue of the summons the husband had not failed to provide reasonable maintenance for the wife and the child. The question of costs was adjourned until the next day. On Oct. 22, 1957, counsel for the husband submitted that the wife's solicitors should pay personally to the husband (i) any costs properly incurred by the husband's solicitors in connexion with what was described as astonishingly large bundles of documents and (ii) either the whole of the remaining costs incurred by the husband, or so much of them as were incurred after the proceedings should have been discontinued; and it was submitted that the proceedings were so unreasonably initiated or, alternatively, so unreasonably continued that the court could and should exercise its inherent jurisdiction to make the orders prayed for. SACHS, J., having heard argument by counsel for the husband and for the wife, directed that the husband's solicitors should lodge for taxation the party and party bill and that the wife's solicitors should lodge their bill for taxation in accordance with Sch. 3 to the Legal Aid and Advice Act, 1949, and referred the matter (pursuant to the inherent jurisdiction of the court over solicitors as officers of the court and R.S.C., Ord. 65, r. 11 and other relevant rules) to the registrar for inquiry and report. His LORDSHIP directed the wife's solicitors "to show cause as to the incurring of those costs in relation to and arising out of the copying of the documents" referred to by counsel for the husband. On Dec. 20, 1957, Mr. Registrar WILKINSON made his report

E "as to the extent to which . . . it was necessary to make copies of documents disclosed; what number of copies was necessary for each side; and to what extent, if any, the [husband's] solicitors were caused unnecessary expense."

The findings concerning necessary copies of documents and numbers of copies, which were adopted by SACHS, J., were as follows*:

F "The wife's solicitor inspected all the bundles of documents disclosed at the opposing solicitor's office for two to two and a half hours. In my opinion he could, in that time, have come to the following conclusions— (i) that hire-purchase agreements and the like were totally irrelevant; (ii) that uncompleted documents, mortgage agreements etc., that did not deal with the house, were useless; (iii) that the cheques themselves were useless; (iv) that further consideration must be given to the bank sheets, paying-in slips and counterfoils, and to the two charge accounts; (v) that the documents verifying the charges on the house must be examined and checked with the affidavit; and (vi) that all documents relating to income tax and journalistic work must be carefully examined.

G "I consider that he was entitled to ask for one copy of the documents mentioned in (iv), (v) and (vi); or to ask that the originals be lent to him for consideration in his office. In my opinion he could, after further consideration, have dispensed with further copies of the counterfoils, the charge accounts earlier than the period beginning September, 1956, and all the receipts for the charges on the house, as they were no longer in dispute. The last were a bundle that was not put in. He was justified in asking for two more copies of all the bank sheets and paying-in slips for the full period; the two charge accounts from Sept. 1, 1956; all the correspondence; and all the documents relating to income tax and to journalistic work outside the husband's salaried post. The husband's solicitor would then have known that these were the documents which would be supplied to counsel.

I "I agree with counsel for the wife's contention that a solicitor cannot

* This passage was approved and adopted by SACHS, J., see at p. 185, letter I, post.

always decide at the first inspection at his opponent's office what documents are relevant to the case, and may need a copy to consider and dissect later. But in two hours he could easily have decided that a great many of the documents shown were irrelevant; and later, with one copy, could have dispensed with some of the others. It is not right to have more than one copy until it is decided that a document must be used at the hearing.

"As to the argument based on the fact that the husband's solicitors made six copies, it was only natural that they should assume, from the unqualified demand for three copies of everything, that everything would be given to the wife's counsel and might be used. If so, it was essential that the husband's counsel and solicitor should have copies. There is no regulation or practice that they must protest; and in actions in general they are protected by the fact that, if they win the case, the other party is condemned in their costs. The wife's solicitors had the conduct of the suit, and it was for them to say which documents they intended to use if they did not mean to use all for which they had asked in triplicate. Moreover, the apparent intention to use everything was emphasised by the application for an appointment to agree the paging, when everything was paged—presumably for use."

On Jan. 24, 1958, the registrar made a supplementary report in which he set out the reductions which he would make in the wife's bill and the husband's bill if his conclusions and submissions were accepted; inter alia, he concluded that the husband's bill could have been £43 less*. On Nov. 8, 1957, there was a change of solicitors for the wife and on Mar. 5, 1958, her civil aid certificate was amended to include the present application as to costs.

The matter came before SACHS, J., again on Mar. 25, when her former solicitor and counsel were called as witnesses; and the wife was represented by different counsel.

R. F. G. Ormrod and *Roger Gray* for the husband.

R. H. W. Dunn for the wife.

John Latey, Q.C., and *J. Stevenson* for the solicitors who acted for the wife in the maintenance proceedings (referred to in this report as "the wife's solicitors").

SACHS, J., stated the facts and continued: The claims made in the course of the applications of counsel for the husband were that the wife's solicitors should be held personally liable to the husband for all the costs of the present proceedings having regard to their lack of any reasonable chance of success and the way in which they were initiated and conducted. Alternatively, that they ought thus to be liable for the costs after completion of discovery, when the lack of such chances became even more apparent; and, in the further alternative, that they should in any event pay the costs of and arising out of the copying of unnecessary documents regard being had to the provisions of R.S.C., Ord. 65, r. 11. The number of pages in the various bundles numbered over three hundred and in some of them there were photostats of quite a number of documents. They included one bundle of a hundred and ten pages never used at trial, and this and another one which was also not used at trial constituted, it was submitted, fantastic bundles. In addition, it became relevant to consider whether any guidance should be given to the registrar as regards the costs which the wife's solicitors claim under the legal aid taxation, both in so far as these arose out of copying which attracted the provisions of R.S.C., Ord. 65, r. 11, or out of any other of the matters of complaint particularised on Oct. 22 under the informal procedure referred to in *Myers v. Elman* (1) ([1939] 4 All E.R. 484).

It is convenient first to deal with the question of the documents, their copying, and the costs that arose out of this aspect of the case. I do not propose to deal in detail with the various factors affecting this portion of counsel for the husband's

*The figures from which this result was reached are stated in the footnote† at p. 185, post.

A application, but one of them does need mention as it shows something of the general attitude adopted in the conduct of this case. The solicitor for the wife has stated that by June or July, 1957, he was, after examining the documents, aware that there would be no dispute as to what sums the husband had in fact paid annually in regard to the outgoing of £160 for rates, fuel, light, etc. referred to in the husband's affidavit of Jan. 23: and in fact none of these items
B was disputed at trial. Yet though he had the conduct of the proceedings the solicitor for the wife did not inform the husband's solicitors of the fact that these figures were agreed as such. On the contrary, on Oct. 15, he caused all the documents relating to this type of expenditure to be included in the court bundles and numbered. It was with the aid of documents relating to that type of expenditure and to other irrelevant matters that one bundle came to have a hundred
C and ten unused and unusable pages numbered and placed with counsel's briefs. A more flagrant case of wasteful procedure is not easy to think of and it serves to show how costs were run up without regard to propriety. Similar comments are applicable to documents relating to expenditure on mortgage interest and other undisputed items.

On this part of the case I have the very valuable assistance of the report of
D a particularly experienced registrar. It was a report made after a full hearing. The wife's solicitor, however, has in the course of the present hearing before me re-stated in evidence at some length the same facts as were put before the registrar and then caused to be submitted that almost every line—certainly every other line—in the effective part of the report was to be treated as being erroneous. Not unnaturally had I, with my far smaller experience of these
E matters, been dealing with each of these detailed points for the first time, I might have concluded that a few further documents in one or two classes could have been copied than the registrar felt was proper, and I most certainly would have considered that in other classes more could have been eliminated than the registrar (who did not have a complete shorthand note of the evidence before him) has found should have been discarded, but I would unhesitatingly have adopted the same general approach. In particular I would not have been attracted
F by the submission that the wife's solicitor, after doing so relatively little from mid May to the end of September for a client who he said badly needed the benefit of a court order, could saddle the husband with unnecessary costs because he became involved in a rushed approach to the matter in October. I cannot help noting that on Feb. 5, 1957, in instructions to counsel, there appears this
G phrase:

"There is a summons for security returnable next Monday, Feb. 11, and immediately after this is heard it is proposed to enter the case for hearing and perhaps counsel will endeavour to let instructing solicitors have those papers back together with his advice on evidence by Friday, Feb. 8."

H In fact the proceedings were not entered until Oct. 8. As to the alleged inability of the solicitor to sort out the papers sufficiently in two to two and a half hours, it is worth mentioning that an extra hour or so at a charge of at the highest a guinea or so would in any event have paid ample dividends in saving copying.

Accordingly, I adopt broadly and without hesitation the relevant part*
I of the learned registrar's report and its careful and detailed findings. Equally I accept the registrar's supplementary report on detailed items†. I was invited

* The relevant passages from the report to which the judgment here refers, are set out at p. 183, letter F, to p. 184, letter C, ante.

† In the registrar's report the costs incurred by the husband, on the basis that the report was accepted, were computed at £108 odd up to Aug. 1, 1957, and £105 odd thereafter until and including Oct. 21, 1957 (i.e., covering the hearing on maintenance). The difference between the aggregate of costs for these periods, computed on the basis that the registrar's report was not accepted, and the aggregate computed on the basis that it was accepted, was £43.

by counsel for the wife's solicitors to deal with this portion of the matter in a final way on a broad basis. I would myself have made some further reduction on the footing that if conducted in the way that I have indicated the case would have been concluded in a single court day; but again it seems proper to adopt the report of one who has such wide experience. The result is that whatever may be the conclusions reached on the other issues raised on behalf of the husband, the wife's solicitors must pay to him the £43, and my prima facie view is that this of itself would lead to an order that they should pay one third of the costs of Oct. 22, all the costs of the hearing before and the report of the registrar, and, having regard to the re-opening of the issues by evidence on Mar. 25, two fifths of the costs relating to the present hearing. In addition I record my view that as regards the taxation of the wife's bill the registrar's findings in the supplementary report proceed on the proper basis to be applied.

There now fall to be dealt with the main applications made on behalf of the husband, that the solicitors for the wife should be personally called on to pay all the costs of the husband or alternatively those costs which he incurred after discovery. This application raises matters of serious import, particularly as there appears to be no previous authority in relation to an application of this kind made against a solicitor acting for an assisted person. The jurisdiction invoked is that discussed in *Myers v. Elman* (1), where its origin and nature are explained in the speeches of VISCOUNT MAUGHAM ([1939] 4 All E.R. at p. 488), LORD ATKIN (*ibid.*, at p. 497) and LORD WRIGHT (*ibid.*, at pp. 507, 508). It is there made clear that the jurisdiction is one that the court by virtue of its inherent powers exercises over solicitors in their capacity as officers of the court. The relevant duty of the solicitor covers "all those against whom they are concerned", quotes LORD MAUGHAM (*ibid.*, at p. 489)*. It is a "duty owed to the court to conduct litigation before it with due propriety", per LORD ATKIN (*ibid.*, at p. 497). The conduct complained of must, before it attracts the above jurisdiction, be such as to involve

"... a failure on the part of a solicitor to fulfil his duty to the court and to realise his duty to aid in promoting, in his own sphere, the cause of justice",

per LORD WRIGHT (*ibid.*, at p. 509). The jurisdiction is exercised not to punish the solicitor but to protect and compensate the opposite party.

It is, of course, axiomatic, but none the less something which in the present case should be mentioned, that the mere fact that the litigation fails is no reason for invoking the jurisdiction; nor is an error of judgment; nor is even an error merely because it is of an order which constitutes or is equivalent to negligence. There must be something that amounts, in the words of LORD MAUGHAM (*ibid.*, at p. 490) to "a serious dereliction of duty", something which justifies according to other speeches in that case, the use of the word gross. It is not, however, normally necessary to establish mala fides or other obliquity on the part of the solicitors, though it may be that if mala fides is established that might turn the scale in a particular case. It is right at this stage to make it clear that no imputation whatever is made against the honesty of the wife's solicitor.

No definition or list of the classes of improper acts which attract the jurisdiction can, of course, be made, but they certainly include anything which can be termed an abuse of the process of the court and oppressive conduct generally. It is from the authorities clear, and no submission to the contrary has been here made, that unreasonably to initiate or continue an action when it has no or substantially no chance of success may constitute conduct attracting an exercise of the above jurisdiction. Once a sufficient degree of dereliction of duty is established the exercise of the jurisdiction is, as counsel for the wife's solicitors submitted in the course of his most helpful address, a matter of discretion. I accept that view. I also agree with his submission that the jurisdiction is one to be exercised

* Quoted from LORD HATHERLEY, L.C., in *Re Jones* ((1870), 6 Ch. App. 497 at p. 499).

A sparingly and that the court can to some extent bear in mind the repercussions of making an order. On the other hand, that cannot affect the duty of the court to protect litigants from being improperly damnified. Suffice it to say that any application made to the court in relation to this jurisdiction is naturally one which causes anxious scrutiny of all the circumstances.

B I now turn to the question whether the fact that the solicitor is acting under a civil aid certificate affects the position. Generally speaking I can see no reason in principle why that should make any difference. Further, it is to be noted that s. 1 (7) (b) of the Legal Aid and Advice Act, 1949, provides that save as set out in the Act or regulations made thereunder

C "the rights conferred by this Part of this Act on a person receiving legal aid shall not affect the rights or liabilities of other parties to the proceedings or the principles on which the discretion of any court or tribunal is normally exercised."

To my mind that provision applies to issues of the type now before me. Of course, where the lay client has been granted a certificate under which he is either making no or no substantial contribution, that demonstrates that the client may well have little if anything to lose if the proceedings fail, that in all probability the opposing party, assuming him to be unassisted, will, even if successful, have to bear his own costs without any real prospect of recouping them, and that the more the prospects of success diminish the greater become the chances that no one will benefit from the litigation except those retained to conduct it. That means no more than that factors which may occur in any litigation are thrown into more prominence when the lay client is receiving legal aid and that accordingly the solicitor to the assisted person is to that extent put on automatic notice that there is or may come into being a situation that needs careful watching to see that the litigation is conducted with the due propriety to which LORD ATKIN referred. That this notice is widely acted on by the legal profession is well known.

F I have used the words "generally speaking" in relation to the lack of difference as regards legal aid cases, partly because there may be exceptional cases, in which the fact that the solicitor had been intentionally instrumental in improperly obtaining a civil aid certificate might of itself give rise to special considerations. These might also arise if, for instance (as happened in one case) the solicitor even unintentionally omitted to inform the certifying committee of an obviously vital fact such as a previous decision of an appellate tribunal between the same parties on substantially the same facts. It was, however, no part of the case made on behalf of the husband or in his applications that the wife's solicitor acted improperly in furthering the application for or continuance of the civil aid certificate and the present case falls to be decided without reference to what might be the effect of such exceptional considerations. A second reason for using the words "generally speaking" relates to the special provisions of the regulations which refer to cases where it becomes unreasonable to continue the litigation, a matter to which further reference will be made later. Before examining further the facts of this particular case it is, having regard to the infrequency of applications such as the present, proper to say that their very rarity is of itself an implicit tribute to the high standard adopted by those concerned to implement and act under the legal aid system.

I The issue next to be decided is whether the wife's solicitors were in such grave fault in initiating the proceedings at the time when and in the manner in which this was done as to make it right that they should bear the costs of so doing. First, however, it is to be observed that this is not an ordinary action which is being considered. It is a form of proceedings involving certain special factors, especially as regards its initiation. A plaintiff seeking judgment in debt or damages has to get the case on its feet by admissible evidence. A wife applying under s. 23 of the Matrimonial Causes Act, 1950, can, however, by an affidavit stating what in truth is no more than an optimistic belief "put the husband to

proof" of his income and assets, and without having further to rely on affirmative admissible evidence can cause him great inconvenience and considerable expenses of discovery, and then have him cross-examined in court. This standard practice as regards "putting to proof" is exemplified in text-book precedents—compare *RAYDEN ON DIVORCE* (7th Edn.), at pp. 1244-5, and in the wife's affidavits in this case. It stems from and is necessary by reason of the difficulties which a wife often has in testifying accurately to her husband's income. It results, however, in the court's process having something of an inquisitorial element. A B

Further, a plaintiff who fails in an ordinary action is normally ordered to pay costs, but a husband not only has to pay the costs of a successful applicant, he is on occasion ordered to pay those of an unsuccessful wife. In any event, unless the wife has appropriate assets, he is not normally awarded costs where the applicant fails. So by the type of affidavit which I have mentioned he is put to perils of considerable expense. This procedure can of its nature be liable to abuse, and danger of abuse has not diminished since the Legal Aid and Advice Act, 1949, has enabled wives to press forward with their applications with greater ability to pursue the litigation to its end. It is accordingly right that those who put in motion the above procedure, and not least any solicitor concerned, should be under a duty to be properly cautious before so doing. It is thus not unexpected to find that, in accordance with the reputation of their profession for honourable conduct, solicitors of standing when acting for wives have made it their normal practice in cases such as the present, where the wife has possession of the matrimonial home and is in receipt of regular sums from the husband, to seek from the husband's solicitors before starting proceedings appropriate information as to the husband's income and inescapable liabilities so as to diminish the chances of starting litigation which may prove to be unnecessary or oppressive. Indeed, the wife's solicitor said that this was the invariable practice of his firm and, so far as I could understand him, gave no reason for failing to take that course on this occasion. Thus to my mind it seems that a solicitor who in such circumstances fails, without some overriding reason, to conform to the above practice can hardly be surprised if complaint is made against him. C D E F

What happened in the present case was that the solicitor for the wife had a long interview on Oct. 8 with the husband and later had the telephone communication from him on Oct. 30, which was first referred to when the wife's solicitor gave evidence for the second time. I am not at all happy as to having been given a full account of what happened on the earlier date. Suffice it to say that my preference for the husband's evidence as to it as expressed at the original hearing has now been reinforced by the appearance of the costs entry of Oct. 30. It is clear that the money aspect on Oct. 8 was then, as he said, a subsidiary one: and that though the solicitor indicated his client's lack of satisfaction with her financial position, it was never made sufficiently plain to the husband that this was going to be the subject of litigation, far less that he was expected to provide information as to his means. I must refer again to the fact that, although the wife's solicitor knew that Messrs. Kershaw might well be acting for the husband, and so assumed, no letter was written to that firm before the one which, on Dec. 13, asked them whether they would accept service of the proposed proceedings. It is thus apparent that no inquiries were made with a view to eliciting information of the husband's financial position, despite the wife's solicitor being aware that there was a mortgage on the matrimonial home and that the husband was under a necessity to pay policy premiums in connexion with an insurance relating thereto. Further, no attempt was made to secure documents to check what were the actual increased amounts which the wife had been surreptitiously charging to the two accounts, after receiving advice. In view of the wife's solicitor's statement as to the inquiries that were invariably made in G H I

A this sort of case according to the normal practice of his firm, it is hard to understand why none was embarked on during the six weeks that followed Oct. 30. Further, the letter of Dec. 18 was written in a strain which was to bedevil much of this litigation and which was hardly likely to assist the interests of reason. Moreover it is the fact that if proper inquiries had been made and appropriate answers given it would have become extremely difficult to say that there was any
B reasonable chance of success for a summons issued in December, 1956, or January, 1957.

In these circumstances it is hard to come to any conclusion but that the commencement of the litigation at that time and in that manner was unreasonable. On the other hand there had not been previously any reported case in which the distinction between s. 23 proceedings and an ordinary action had
C been referred to; so the propriety of making certain inquiries in cases such as the present may not perhaps have been appreciated in its true light. Until the wife's solicitor actually knew the figures of the husband's inescapable expenditure, the paucity of chances of success would not be easy to apprehend and it may be that without guidance of the type above referred to a solicitor might have thought he was entitled to strike before making inquiries of the husband. Taking this
D factor into account I am not prepared to hold that the wife's solicitor's action at this stage was such as to make it right to order his firm to pay costs *ab initio*. Accordingly it becomes unnecessary to consider the effect in relation to the period up to the end of January of counsel's advice given on Feb. 7. Nor is it necessary to consider the submissions of counsel for the husband how the absence of certain material, which could with reasonable diligence have been placed before
E counsel, might have affected the cover it gave to the instructing solicitors.

The next question is whether at some stage in the proceedings it became plain, on the material available, that they had no prospects of success which would justify its continuance. It is axiomatic that on discovery it may become obvious that litigation, originally not improperly initiated, is yet bound to fail. It is one of the best known duties of a solicitor to examine closely whatever is disclosed on
F the husband's affidavit of documents to see whether the relative prospects of success or failure have been altered thereby. To few proceedings is this axiom more applicable than those taken under s. 23 of the Matrimonial Causes Act, 1950. As regards legal aid proceedings it is to be noted that s. 1 (6) provides as follows:

G "A person shall not be given legal aid in connexion with any proceedings unless he shows that he has reasonable grounds for taking, defending or being a party thereto, and may also be refused legal aid if it appears unreasonable that he should receive it in the particular circumstances of the case."

Further, it is well known to both branches of the profession that there are special provisions in the general regulations* to ensure that solicitors are in a
H position to cease acting in litigation when once it becomes apparent that the chances referred to in the above s. 1 (6) no longer exist. So in such proceedings there is nothing to necessitate their continuing to conduct them when once such continuation becomes unreasonable. A fortiori if the chances of success become non-existent or virtually non-existent it becomes difficult to see how it can remain justifiable to continue to put the opposing party to increasing costs.

I Now the present case is a classic one of a change in position on discovery. Not only did hope of challenging the essential outgoing expenditure (£637 per annum, see p. 1 of the registrar's report) vanish, but it became visible that the wife had been charging on the accounts not an average of £3 10s. per week but of £10 per week for the three months before the summons was issued. In addition there had been disclosed documents relating to the receipts from and income tax returns as to the husband's journalistic earnings. Further on May 17 the

* Legal Aid (General) Regulations, 1950, reg. 14 (7): 5 HALSBURY'S STATUTORY INSTRUMENTS 214.

solicitors for the husband by their letter to the area committee as transmitted A
to the wife's solicitor had put the latter on guard. The position cried aloud for
careful appraisalment in the light of proper and sufficient analysis of the docu-
ments disclosed on discovery. For it is elementary that the "wilful neglect to
maintain" must be established as at the date the proceedings start; it is ele-
mentary that the courts look at the benefit received by the wife in kind as well
as in cash, and it is elementary that the court has regard to the inescapable B
financial commitments of the husband.

The wife's solicitor says that he was seriously concerned and it is clear that by
May 23 he not only ought to have known but did know enough to realise that
there had been an important and adverse change in the prospects of success.
But what was done was not to make the appropriate analyses of what appeared
from all the documents—that never seems to have been done—nor to consult C
counsel. In fact he chose to go whilst in an angry mood to the area committee
without any written submission, without on his own evidence having made the
analyses, and without any advice from counsel. I am aware that on Feb. 7
counsel in the brief way which I have mentioned did deal favourably with the
question of the wife's prospect of obtaining an order. To rely on that in the
circumstances as they arose in mid-May is not good enough; nor did I gather D
that the wife's solicitor did rely on it at that stage; nor did counsel submit that
he properly could. He chose to form in an incensed frame of mind a strong opinion
that there remained a good case and that he would proceed. No careful and
considered appraisalment with properly examined figures was ever made.
Unfortunately the opinion thus formed by the wife's solicitor was wrong; but
it was worse than that. It was an opinion that a solicitor examining the matter E
with the aid of proper use of the material I have mentioned could not reasonably
have reached once he had been into the situation with appropriate care. The
opinion indeed turned out, when the facts were analysed sufficiently, to be grossly
wrong; chances of success did not really then exist at all. To come to that con-
clusion one has only to bear in mind the points which I have referred to as being
elementary and then to examine the figures as stated in my judgment where I F
found that the wife was receiving for herself and the three and a half year old
child the benefit of £277 out of an available £400 or less in the last quarter of
1956; or those set out in the registrar's report, for anyone with knowledge of
this Division's practice to appreciate that point. (In parenthesis I should perhaps
add that the above figure of £400 was arrived at before taking into account
expenses, tax liability or the bank's demands for overdraft repayments and that G
there was no sign of any sufficient windfall from journalistic earnings which could
possibly so affect their average as to outweigh all the factors which I have men-
tioned.) Indeed, I feel sure that if counsel for the wife had ever been given a real
opportunity for giving a reasoned opinion after having had the documents
carefully considered and the figures appearing from them analysed, he could have
come to no other opinion than that these proceedings were, to use a phrase of the H
husband's solicitors in their letter of May 17 "doomed to failure".

Further, there was another point which in itself called for a reconsideration of
the situation at about this period. The accounts at Barkers and Whiteleys had
been closed, albeit in the circumstances set out in the letter of May 17, when the
wife's charging of the Whiteleys account between Mar. 27 and Apr. 8 with £33 16s.
is stated to have brought the matter to a head. The wife thus, by the end of I
May, appears to have been receiving £5 10s. per week and no more, and was in
a worse physical condition than previously. This was quite a different situation
from that obtaining immediately before Jan. 4. Clearly there fell for con-
sideration in those circumstances whether there should not be taken out a further
summons alleging wilful neglect to maintain as at this later date; and in
conjunction with that there would have naturally to be considered the question
of discontinuance of the earlier proceedings. Any experienced counsel would
immediately have taken this question into account and it would have been

- A even more obvious that the continuance of the current proceedings should be abandoned. Although this point was alluded to in my judgment, the wife's solicitor did not suggest in his further evidence that any thought of this nature had crossed his mind and I am left to conclude that it did not occur to him. Unfortunately no such opinion of counsel was taken. The first time after discovery that counsel saw the papers was very shortly before Oct. 18, the date fixed for the hearing. Then he got his brief and accompanying papers sent down in two lots (I was not told which came first) just in advance of a conference on Oct. 16. It was not thought fit to let me see the contents of the brief and all I can say is that even at this late stage counsel seems to have been left to make his own analyses, and the solicitor's estimate of the time properly needed to analyse all the papers he had had copied was something in the area of thirty hours. That is not the sort of way to get an opinion of the beneficial type to which I referred in *Francis v. Francis & Dickerson* (2) ([1955] 3 All E.R. 836). Moreover the most substantial costs had been incurred, and their increase by fighting the case for the first day would be relatively small. The opportunities in relation to issuing a fresh summons referable to a later date of alleged neglect and returnable by the date fixed for hearing of the original summons had passed.
- D Counsel faced with such a position is in a predicament and may well find himself taking a line to which he would not have committed himself if given the sort of opportunity that I have previously mentioned. It is symptomatic of this sort of position that at the hearing the court had difficulty in eliciting what figures were and what figures were not in dispute. This applied to several matters at various stages of the hearing but is best exemplified by the necessity which the court was put to as regards eliciting that figures in one document relating to journalistic fees (1954-55 £183 and 1955-56 £54) were not being challenged. To put counsel in the position of having to give a snap opinion in such a case when months had been allowed to pass after discovery invites comment. It could not produce any cover for the past and it was rightly not submitted to be something to be taken into account as regards the costs of the hearing. The question thus arises as to the date at which the wife's solicitor ought to have concluded that the case should not continue. No detailed argument was addressed to me by either side as to which date should be taken between May 10, when the copies of the many documents arrived, and the first part of August when the summons for directions was taken out. It seems hardly to lie in the mouth of the wife's solicitor to say that he attended the area committee on May 23, on an occasion when he was not in a position to have made himself fully aware of the effect of discovery, although in fact I cannot see from his own evidence how by then he had confirmed to himself any of the figures with any accuracy. There is also much to be said for not adopting a date more than a month after May 10; but there is certainly no reason why he should not have taken all reasonable steps to inform himself or alternatively to get counsel's opinion by Aug. 1.

- H One further point and one of some general concern remains to be dealt with. It was argued to be of importance that the area committee, after being informed by the husband's solicitors in their letter of May 17 that in the latter's view the proceedings could not succeed, took no step to terminate the civil aid certificate after having heard the wife's solicitor. On that fact it was sought to found the submission that the continuance of those proceedings by the wife's solicitor could not thereafter be held to be unreasonable in that he was entitled to rely and act on the fact that the certificate was not revoked.
- I To my mind such a submission cannot be sustained. The position between the legal aid fund and a solicitor is one thing: that between the same solicitor and an opposing party is quite different. Here again s. 1 (7) (b) of the Act of 1949 shows that the rights of such other parties cannot be prejudiced by the fact that an opponent is receiving legal aid. Proceedings before a committee constituted under the Act of 1949 neither constitute nor are intended to constitute any

sort of trial or other process affecting the rights of an opposing party. Further, as I think counsel for the wife's solicitors agreed, it would seem most undesirable that on an issue such as is now before me there should be investigated exactly what took place and what was said before the area committee. The position might naturally have been different had the issue been raised that there was an improper procurement of legal aid which could result in the court's inherent jurisdiction as regards an officer of the court to be invoked. Counsel for the wife's solicitors, by his submission, made it plain that what was really sought to be relied on was the opinion of the area committee. This opinion, expressed after having heard one side on materials which may be placed before it is, if properly obtained, conclusive as between the solicitor and the Law Society as regards the former's claims on the legal aid fund. As between the solicitor and an opposing party it was naturally conceded by counsel for the wife's solicitors not to be binding on the court. However, I go further and hold that it is no more admissible in evidence than the opinion of any other third party (compare *Hollington v. Hewthorn & Co., Ltd.* (3), [1943] 2 All E.R. 35). It was submitted that in the past few years solicitors have come to view with respect and to rely on the opinions of these committees, or to be exact of their sub-committees, because of the stature of those composing them. The argument proceeded that the impact of their decisions on the mind of a solicitor was relevant and that the same line of reasoning could be applied as that in *Ingram v. Ingram* (4) ([1956] 1 All E.R. 785), a decision relating to a very special field, that of the relations between husband and wife. Once, however, it is realised that the area committee is not a judicial tribunal, that its decision is of necessity *ex parte*, that the person appearing on behalf of his client before the committee is the solicitor himself, and that much may depend on precisely what material and arguments he adduces, it becomes apparent how fallacious is the argument that such an opinion should be allowed to weigh to the disadvantage of the opposing litigant. The opinions of certifying committees, area sub-committees and area committees are no more admissible in evidence than that of other extraneous persons on matters on which the court forms its own conclusions objectively and without expert evidence.

For a number of generations solicitors have been given special and indeed generous cover when they obtain the advice of properly instructed counsel. It is in my view neither necessary from the professional angle nor permissible in principle to provide a proliferation of further umbrellas. It was urged that there could have been fears that the fee for consulting counsel might be disallowed on the legal aid taxation. In this particular case I cannot think there was any prospect of such a disallowance. Apart from all other factors it would, having regard to the letter of May 17 from the opposing solicitors, have been impossible to disallow the fee even on a party and party basis. I cannot accept that there was any real fear as regards this. In the above circumstances I ruled against questions as to what was said to and by the area committee when the wife's solicitor attended. I also ruled against the question asking whether the wife's solicitor relied on their opinion; but I permitted the latter question to be put *de bene esse* and that in turn led to the wife's solicitor being similarly cross-examined on the point. I must accordingly record that I would find myself in considerable difficulty over accepting his evidence that in this particular case the decision of the area committee was a really material factor affecting his continuance of the litigation. At that stage he was much incensed with his opposing solicitor, was determined not to abandon the proceedings and was probably unable to look at the position objectively. Having seen and heard him on this point I have regretfully concluded that he was probably in any event intending to carry on, on the strength of his own opinion, with this litigation.

It having been established that the conduct of the wife's solicitor was of that serious nature to which the speeches in *Myers v. Elman* (1) refer, and that the matter is thus one on which there is jurisdiction to make an order against that solicitor, the question of discretion arises. It is urged that all that was done was

- A intended for the benefit of the lay client. Assuming that to be so how can that justify oppressive procedure running the husband into ever-increasing costs? The jurisdiction of the court is intended to protect defendants from precisely that sort of oppression. To my mind this is a case where the solicitor throughout was bent on pressing on with litigation regardless of all other factors. In the earliest stages his disregard for other factors to some extent appears from the way he started proceedings after advice to the wife to run up accounts without telling her to inform her husband. At the later stages the cause of that disregard may not be a matter which it is necessary to determine, but in so far as it is relevant I have no doubt that his feelings against his opposing solicitor accounted for a good deal. In the witness-box those feelings emerged time and again, as did his great difficulty in appreciating, or indeed remembering, matters which tended against the particular point he was pursuing. It was from this and not from conscious intention that stemmed a general unreliability of testimony and also a certain amount of the above disregard. In those circumstances it seems to me that the husband ought to be indemnified and that he should be protected against the consequences of proceedings being continued after the beginning of August. On principle I would have thought that the wife's solicitors should be ordered to pay the costs from then on a solicitor and client basis, but no authority has been cited for making an order other than for party and party costs.
- D

- On the figures in the registrar's report that entails a payment of £105 in addition to the £43 previously mentioned* as regards party and party costs: the £105 relates solely to costs up to and including those of Oct. 21†. (That still leaves the husband to bear his own costs to the extent of £108.) If the solicitors to the wife wish despite the above figures being available to have a further and formal taxation as to the £105 I am inclined to think that they are entitled to insist on it subject to questions of the incidence of the further costs. There is also the question whether I should give any further guidance to the registrar on his taxation of the wife's solicitors' bill as submitted under Sch. 3 to the Legal Aid and Advice Act, 1949. This includes just over £200 profit costs up to Oct. 21 (subject to the fifteen per cent. reduction made under the schedule). In this connexion I have had in mind authorities such as *Re Dartnall, Sawyer v. Goddard* (5) ([1895] 1 Ch. 474), but having regard to the area committee's decision, it seems to me that I should give no further guidance nor indicate that the solicitors should bear any costs of proceedings prior to Oct. 21, than those which I have dealt with earlier in relation to the excessive documents.
- E
- F

- G [After discussion on the question of the costs incurred since Oct. 21, 1957, i.e., relating to the inquiry, SACHS, J., said:] Exercising my discretion in accordance with the recognised principles I order the wife's solicitors to pay all the costs. As to the legal aid taxation, my guidance to the registrar is that as from the period after Oct. 21 and up to the notice of change of solicitors there should be no costs allowable in respect of the issues which have been dealt with today. As regards the transcript I think one half of that should be paid by the wife's solicitors. All costs which I have ordered the wife's solicitors to pay to the husband are on a party and party basis and the orders are made against the firm and not against any particular individual.
- H

Order accordingly.

Solicitors: *Donald A. Kershaw & Co.* (for the husband); *Patersons, Snow & Co.* (for the wife on the proceedings as to costs); *Walter, Burgis & Co.* (for the wife's former solicitors).

[Reported by A. T. HOOLAHAN, Esq., Barrister-at-Law.]

* See p. 186, letter B, ante.

† See footnote†, p. 185, ante.

RAYFIELD *v.* HANDS AND OTHERS.

[CHANCERY DIVISION (Vaisey, J.), March 25, 26, April 2, 1958.]

Company—Articles of association—Contract between members and directors—Provision that directors “will take . . . at a fair value” shares offered to them—Companies Act, 1948 (11 & 12 Geo. 6 c. 38), s. 20 (1).

The articles of association of a private limited company which was incorporated in 1941 provided by art. 11 that “Every member who intends to transfer shares shall inform the directors who will take the said shares equally between them at a fair value . . .” The qualification of directors was the holding of one share in the company. In April, 1955, the plaintiff, a member of the company, informed the directors for the time being of his intention to transfer his shares, but the directors refused to purchase them.

Held: the directors were bound in contract to purchase the plaintiff's shares at a fair value (to be ascertained by an inquiry, if necessary) for the following reasons:

(i) having regard to the Companies Act, 1948, s. 20 (1)*, art. 11 constituted an enforceable contract between the directors (as members of the company) and the other members of the company on which the plaintiff was entitled to rely without joining the company as a party.

Dean v. Prince ([1954] 1 All E.R. 749) applied.

Smith v. River Douglas Catchment Board ([1949] 2 All E.R. 179) considered.

(ii) the use of the word “will” in art. 11 did not import an option or choice on the part of the directors by contrast to the word “shall” used earlier in the same article;

Per CURIAM: the conclusion to which I have come may not be of so general an application as to extend to the articles of association of every company, for it is material to remember that this private company is one of that class of companies which bears a close analogy to a partnership (see p. 199, letter I, post).

[As to how far articles of association of a company constitute a contract, see 6 HALSBURY'S LAWS (3rd Edn.) 127-129, paras. 267-270; and for cases on the subject, see 9 DIGEST (Repl.) 85-87, 361-369.]

For the Companies Act, 1948, s. 20 (1), see 3 HALSBURY'S STATUTES (2nd Edn.) 477.]

Cases referred to:

- (1) *Re Hartley Baird, Ltd.*, [1954] 3 All E.R. 695; [1955] Ch. 143; 9 Digest (Repl.) 607, 4021.
- (2) *Holmes v. Keyes (Lord)*, ante, p. 129.
- (3) *Welton v. Saffery*, [1897] A.C. 299; 66 L.J.Ch. 362; 76 L.T. 505; 9 Digest (Repl.) 303, 1909.
- (4) *Re Leicester Club & County Racecourse Co., Ex p. Cannon*, (1885), 30 Ch.D. 629; 55 L.J.Ch. 206; 53 L.T. 340; 10 Digest (Repl.) 974, 6712.
- (5) *Smith v. River Douglas Catchment Board*, [1949] 2 All E.R. 179; [1949] 2 K.B. 500; 113 J.P. 388; 2nd Digest Supp.
- (6) *Drive Yourself Hire Co. (London), Ltd. v. Strutt*, [1953] 2 All E.R. 1475; [1954] 1 Q.B. 250; 3rd Digest Supp.
- (7) *Carlill v. Carbolic Smoke Ball Co.*, [1893] 1 Q.B. 256; 62 L.J.Q.B. 257; 67 L.T. 837; 57 J.P. 325; 12 Digest (Repl.) 59, 323.
- (8) *Clarke v. Dunraven (Earl), The Satanita*, [1897] A.C. 59; 66 L.J.P. 1; 75 L.T. 337; 12 Digest (Repl.) 74, 413.
- (9) *Hickman v. Kent or Romney Marsh Sheep-Breeders' Assocn.*, [1915] 1 Ch. 881; 84 L.J.Ch. 688; 113 L.T. 159; 9 Digest (Repl.) 85, 361.

* This sub-section is printed at p. 197, letter B, post.

- A (10) *Dean v. Prince*, [1953] 2 All E.R. 636; [1953] Ch. 590; *revsd.* C.A., [1954] 1 All E.R. 749; [1954] Ch. 409; 9 Digest (Repl.) 589, 3898.
 (11) *Borland's Trustee v. Steel Brothers & Co., Ltd.*, [1901] 1 Ch. 279; 70 L.J. Ch. 51; 9 Digest (Repl.) 100, 446.
 (12) *Re Yenidje Tobacco Co., Ltd.*, [1916] 2 Ch. 426; 86 L.J.Ch. 1; 115 L.T. 530; [1916] H.B.R. 140; 10 Digest (Repl.) 863, 5683.

B Action.

In this action the plaintiff, a holder of shares in Field-Davis, Ltd., claimed against the directors of the company (among other things) (i) that a fair value of his shares might be determined by the court; (ii) an order on the defendants to purchase his shares at their fair value in equal proportions or in such proportions as the defendants might agree; and (iii) if necessary, an inquiry as to the fair value of the said shares.

R. B. S. Instone for the plaintiff.

M. J. Albery, Q.C., and Paul V. Baker for the defendants.

Cur. adv. vult.

- Apr. 2. VAISEY, J., read the following judgment: The plaintiff, Mr. Frank Leslie Rayfield, is the registered holder and beneficial owner of 725 fully paid ordinary shares of £1 each in the capital of a company named Field-Davis, Ltd., to which I will refer as "the company". The defendants, Messrs. Gordon Wyndham Hands, Alfred William Scales and Donald Davis, are also members of the company and are now and have been at all material times its sole directors.

- [His LORDSHIP referred to the claims made in the action by the plaintiff, and continued:] The company was incorporated on Sept. 11, 1941, under the Companies Act, 1929, as a company limited by shares. Its share capital is £4,000 divided into four thousand ordinary shares of £1 each, of which two thousand nine hundred shares have been issued and are all fully paid up. The business of the company appears to be that of builders or contractors, and its other objects are set out in detail in the usual way in its memorandum of association.

- The company's articles of association, on the terms, proper construction, and effect of which the questions which arise in this action largely turn, is a document very inartistically drawn by a person who was not (as I was informed) legally expert, though it would be hardly fair to attribute all the difficulties in the case to his faulty draftsmanship. So far as material for the present purpose the articles provide as I will now mention. Table A in Sch. 1 to the before-mentioned Act of 1929 was to apply except where its regulations were excluded; and the company was to be a private company with a membership limited in the usual way to a maximum of fifty. Then comes art. 6, which is in a common form, and reads thus:

- "(6) No shares in the company shall be transferred to a person not a member of the company so long as any member of the company may be willing to purchase such shares at a fair value."

Article 9 provides:

"The directors may at any time in their absolute discretion refuse to register any transfer of shares."

- I Under the head "Directors", art. 10, art. 11 and art. 12 read as follows:

"(10) The number of directors of the company shall not be more than four. The following persons shall be the first directors of the company, namely:— [the defendant] Alfred William Scales and Alfred Frederick Scales both of 172, Burnt Ash Lane, Bromley, Kent, builders. (11) Every member who intends to transfer shares shall inform the directors who will take the said shares equally between them at a fair value, but subject to the above no person shall hold more than one thousand shares in the capital of the

company. (12) In the event of death of any director his shares are to be taken up equally between the remaining directors who will pay a fair value therefor together with all moneys due to the deceased up to the time of his death."

Note in passing the words which I have just read, "who will pay a fair value therefor". Article 14 provides that the qualification of a director shall be the holding of not less than one share in the company, and that a director may act before acquiring his qualification, but a director who is not already qualified must obtain his qualification within two months after his appointment.

It is art. 11 with which I am mainly concerned in the present case, in the following circumstances. On or about Apr. 4, 1955, the plaintiff, by a notice in writing bearing that date, informed the defendants as the directors of the company of his intention to transfer his shares to them as provided by art. 11. The defendants were and are, however, unwilling and contend that they are not liable to take and pay for the plaintiff's shares. They say that art. 11 imposes no enforceable liability on them, and they base their contention first on the wording of art. 11 itself, arguing that on its true construction it does not purport to impose any liability on the company's directors. It is admitted that the words "every member . . . shall inform" the directors does create an obligation but it is argued by the defendants that the words "the directors . . . will take the shares" imports in some way the idea of an option or choice or volition on the part of the directors having regard to the inherent difference (not always observed) in the English language between the words "shall" and "will".

I appreciate the force of that argument, but I cannot accept it. In this context, while the word "shall" clearly imports compulsion and obligation, the word "will" indicates as it seems to me a resultant prospective eventuality, in which the member has to sell his shares and the directors have to buy them, each being under an obligation to bring that eventuality into effect. There is thus in the language of art. 11 a mutual obligation. It has been said that articles of association ought not to be construed too meticulously. See *Re Hartley Baird, Ltd.* (1) ([1954] 3 All E.R. 695), where WYNN-PARRY, J., said (*ibid.*, at p. 696):

"In my view, interpreting such a commercial document as articles of association, the maxim *ut res magis valeat quam pereat* should certainly be applied, and I propose to interpret these articles in the light of that maxim."

I am not aware that this maxim has ever been put into English, but I suggest that it directs us to "validate if possible". And see also *Holmes v. Lord Keyes* (2) (*ante*, p. 129) in which JENKINS, L.J., said (*ante*, at p. 138, letter F):

"... articles of association of the company should be regarded as a business document and should be construed so as to give them reasonable business efficacy . . . in preference to a result which would or might prove unworkable."

I hold that the defendants' case so far as it depends on the construction of the company's articles of association fails, but I have not overlooked the arguments based on the undoubted difficulty of giving effect to art. 11 in other circumstances, for example, where the member desiring to transfer his shares is himself a director, or where several intimations of intention to sell are given simultaneously. In my judgment, the article ought not to be invalidated for the purposes of a case (such as this) where it is perfectly easy to give effect to it.

Another point was taken which I hold to be equally insubstantial, viz., that the plaintiff has not in terms pleaded his ability and willingness to carry out his part of the bargain. That is a rule of pleading which applies principally, if not exclusively, to actions between vendors and purchasers of real estate: see 31 HALSBURY'S LAWS (2nd Edn.) 421, para. 504. I should in the circumstances have

A allowed the statement of claim to be amended to comply with the rule, if it had seemed to me to be necessary, which I do not think that it is.

The next and most difficult point taken by the defendants, as to which it would appear that there is no very clear judicial authority, is that art. 11, as part of the company's articles of association, does not do what it looks like doing, that is to create a contractual relationship between the plaintiff as shareholder and
B vendor and the defendants as directors and purchasers. This depends on the Companies Act, 1948, s. 20 (1), which reads as follows:

C "Subject to the provisions of this Act, the memorandum and articles shall, when registered, bind the company and the members thereof to the same extent as if they respectively had been signed and sealed by each member, and contained covenants on the part of each member to observe all the provisions of the memorandum and of the articles."

This sub-section re-enacted corresponding provisions in the earlier Companies Acts, but it seems that these provisions are for the purposes of the present case substantially identical with the sub-section which I have just read. In the circumstances, I was referred to what the text-books have to say on the subject, and I think I ought to summarise their statements.

D In BUCKLEY ON THE COMPANIES ACTS (13th Edn.), at p. 53, allusion is made to the

E "large number of apparently conflicting judicial decisions and dicta as to the exact nature of the contractual relations established by the memorandum and articles both as between the company and the members and as between the members inter se",

and it is further expressly pointed out that there are decisions or dicta both to the effect that the articles do, and also to the effect that they do not, constitute a contract between the members inter se. The variety of the judicial views on the matter is not I think overstated here. GORE-BROWNE'S HANDBOOK ON JOINT STOCK COMPANIES (41st Edn.), at p. 45, states that the effect of s. 20 (1):

F "... is to create an obligation binding alike on the members in their dealings with the company, on the company in its dealings with the members as members, and on the members in their dealings with one another as members; ... and even a member cannot enforce the provisions for his benefit in some other capacity than that of member: e.g., he cannot assert a right to be appointed solicitor, secretary or director by reason of provisions contained only in the articles."

G In PALMER'S COMPANY PRECEDENTS (16th Edn.), Part 1, at p. 458, the matter is discussed on general lines, and the effect of some of the cases is summarised, and the following quotation is cited from the speech of LORD HERSCHELL in *Welton v. Saffery* (3) ([1897] A.C. 299 at p. 315):

H "It is quite true that the articles constitute a contract between each member and the company, and that there is no contract in terms between the individual members of the company; but the articles do not any the less, in my opinion, regulate their rights inter se."

I find that statement somewhat cryptic.

In 6 HALSBURY'S LAWS (3rd Edn.), at p. 129, para. 269, it is stated:

I "While the articles regulate the rights of the members, inter se, they do not, it would seem, constitute a contract between the members, inter se, but only a contract between the company and its members, and, therefore, the rights and liabilities of members as members under the articles can only be enforced by or against the members *through the company*."

I will consider this proposition later on.

Now the question arises at the outset whether the terms of art. 11 relate to the rights of members inter se (that being the expression found in so many of the

cases), or whether the relationship is between a member as such and directors as such. I may dispose of this point very briefly by saying that in my judgment the relationship here is between the plaintiff as a member and the defendants not as directors but as members. A

In *Re Leicester Club & County Racecourse Co., Ex p. Cannon* (4) ((1885), 30 Ch.D. 629), PEARSON, J., referring to the directors of a company said (*ibid.*, at p. 633) that they "continue members of the company, and I prefer to call them working members of the company . . .", and later the judge said (*ibid.*): B

"... the directors cannot divest themselves of their character of members of the company. From first to last . . . they are doing their work in the capacity of members, and working members of the company . . ."

I am of opinion therefore that this is in words a contract or quasi-contract between members, and not between members and directors. C

I have now to deal with the point for which there is considerable support in the cases, that the notional signing and sealing of the articles creates a contractual relation between the company on the one hand and the corporators (members) on the other, so that no relief can be obtained in the absence of the company as a party to the suit. The defendants' case in so far as it is based on this point seems to be met by two recent decisions of the Court of Appeal. I refer first to *Smith v. River Douglas Catchment Board* (5) ([1949] 2 All E.R. 179), and to the judgment of DENNING, L.J., in that case, which was a case of a covenant made, not by or with, but for the benefit of, the plaintiffs and thereby enabling them to sue without the intervention of the covenantee. The Law of Property Act, 1925, s. 56, was referred to in terms which it is not necessary for me to repeat here. This same principle is further exemplified by *Drive Yourself Hire Co. (London), Ltd. v. Strutt* (6) ([1953] 2 All E.R. 1475); see especially the judgment of DENNING, L.J. (*ibid.*, at p. 1481 et seq.). The case of the plaintiff may also be said to rest on the well-known decision of *Carlill v. Carbolic Smoke Ball Co.* (7) ([1893] 1 Q.B. 256), to which I need not refer except to say that it seems to me to be relevant here. To the like effect is *Clarke v. Dunraven (Earl), The Satanita* (8) ([1897] A.C. 59) on which the plaintiff here also relied. D

In general discussions on the effect of s. 20 of the Act of 1948 to be found in the cases, I have considered the dissentient speech of LORD HERSCHELL in *Welton v. Saffery* (3), and the comprehensive review of the earlier authorities by ASTBURY, J., in *Hickman v. Kent or Romney Marsh Sheep-Breeders' Asscn.* (9) ([1915] 1 Ch. 881). Among the numerous dicta cited in the judgment in that case, one which seems to me to be helpful and convincing is that of MELLISH, L.J.,* which reads as follows (*ibid.*, at p. 891): E

"... the articles of association are simply a contract between the shareholders inter se in respect of their rights as shareholders. They are the deed of partnership by which the shareholders agree inter se". F

Strangely enough the case (*Dean v. Prince* (10), [1954] 1 All E.R. 749) which comes perhaps nearest to the present is one in which the point under s. 20 of the Act was not taken, and either disregarded or ignored, but I cannot say that it was overlooked, as the decision was a decision of the Court of Appeal. In that case the articles of association of a private company carrying on a light engineering business provided that a deceased director's shares should be purchased by the surviving directors at a price to be certified by an auditor as a fair value. A director who held a controlling interest in the company died. The auditor, having made a certified valuation, stated in writing that for the purpose of his valuation he had not regarded the company as a going concern but that he had valued on a "break-up" basis, because in his opinion the shares had no value on any other basis, having regard to the losses made by the company. On appeal G

* Dictum of MELLISH, L.J., in *Pritchard's Case* ((1873), 8 Ch. App. 956 at p. 960); 9 Digest (Repl.) 85, 362. H

A from HARMAN, J., who held that the valuation was invalid and not binding because the auditor had proceeded on the wrong basis and had not attributed any special value to the shares in question although they carried the control of the company, it was held (i) that the auditor was right in not attributing a special value to these shares on account of their carrying control. The shares of the company should be valued as a whole and the total then divided rateably amongst all the shares equally; (ii) that the auditor had correctly rejected the "going concern" basis of valuation, as the company had no expectation of profit-making. The decision of HARMAN, J. ([1953] 2 All E.R. 636) was reversed on the question of valuation, and in the course of his reserved judgment, WYNN-PARRY, J., sitting as a member of the Court of Appeal, said ([1954] 1 All E.R. at p. 761):

C "... the auditor, in my view, has to have regard to the realities of the situation, he must take into account that the other directors, and not merely one of them, are bound to purchase the shares in question."

To show how close is the similarity between *Dean v. Prince* (10) and the present, I will read from the report of the case before HARMAN, J., the article which was in question there ([1953] 2 All E.R. at p. 637):

D "In the event of the death of any member his shares shall be purchased and taken by the directors at such price as is certified in writing by the auditor to be in his opinion the fair value thereof at the date of death and in so certifying the auditor shall be considered to act as an expert and not as an [arbitrator] and accordingly the Arbitration Act, 1889, shall not apply. Unless they otherwise agree the directors shall take such shares equally between them."

E I will refer, in passing, to another case closely bearing on the point now under consideration, viz., *Borland's Trustee v. Steel Brothers & Co., Ltd.* (11) ([1901] 1 Ch. 279). There, there was a provision in a company's articles of association compelling a shareholder at any time during the continuance of the company to transfer his shares to particular persons at a particular price. It was held that those provisions were not void as being repugnant to absolute ownership nor as tending to perpetuity, and it was also held that there was nothing in such a provision to defeat the rights of a trustee in bankruptcy. The case was decided by FARWELL, J., who made a number of remarks which bear on this question. I do not propose to refer to them in detail except where he says (*ibid.*, at p. 290):

G "... these articles are nothing more or less than a personal contract between Mr. Borland [the director who went bankrupt] and the other shareholders in the company under s. 16 of the Companies Act, 1862",

that section being the section which corresponded at that date to s. 20 of the Act which is now in force.

H On the whole, if the proper way to construe the articles of association of a company is as a "commercial" or "business" document to which the maxim "validate if possible" applies, I think that the plaintiff in this action ought to succeed. Not one of the judges in *Dean v. Prince* (10) showed any signs of shock or surprise in the assumption there made of a contract between directors being formed by the terms of a company's articles. I am encouraged, not I hope unreasonably, to find in this case a contract similarly formed between a member and member-directors in relation to their holdings of the company's shares in its articles. The conclusion to which I have come may not be of so general an application as to extend to the articles of association of every company, for it is, I think, material to remember that this private company is one of that class of companies which bears a close analogy to a partnership; see the well-known passages in *Re Yenidje Tobacco Co., Ltd.* (12) ([1916] 2 Ch. 426*). Nobody, I suppose, would doubt that a partnership deed might validly and properly provide

* See, e.g., *ibid.*, at pp. 430, 431.

for the acquisition of the share of one partner by another partner on terms identical with those of art. 11 in the present case. I do not intend to decide more in the present case than is necessary to support my conclusion, though it may be that the principles on which my conclusion is founded are of more general application than might be supposed from some of the authorities on the point. A

I will make an appropriate declaration of the plaintiff's rights, or will order the defendants to give effect to them, and if necessary there must be an inquiry to ascertain the fair value of the shares. I am asked not to decide what is the proper date at which the value of the shares is to be fixed, but to leave these to be either agreed or decided hereafter. There must be liberty to apply. The plaintiff's costs down to and including this judgment must be paid by the defendants. As to any subsequent costs, I reserve the question of their incidence. B

Order accordingly. C

Solicitors: *Simpson, Palmer & Winder* (for the plaintiff); *Mark Lemon* (for the defendants).

[*Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.*]

LOEW'S INCORPORATED v. LITTLER AND OTHERS.

[COURT OF APPEAL (Jenkins, Romer and Ormerod, L.JJ.), February 28, March 3, 4, 5, 6, 7, April 1, 1958.] D

Copyright—Assignment—Assignment before July 1, 1912, for whole term of copyright—Extension of terms of copyright by Copyright Act, 1911—Notice requiring assignment of statutory extension not given—Rights of assignee during statutory extension—Whether exclusive rights—Copyright Act, 1911 (1 & 2 Geo. 5 c. 46), s. 24 (1), proviso (a) (ii). E

Copyright—Agreement for sale of sole rights in opera—Proviso for reverter of rights on failure of purchaser to produce as stipulated—Opera produced as stipulated—Whether rights transferred by agreement personal to purchaser or transferable rights. F

The right which an assignee of copyright (assigned before July 1, 1912) had under proviso (a) (ii) to s. 24 (1)* of the Copyright Act, 1911, to continue, after the term of the original copyright had expired, "to perform the work in like manner as theretofore" during the remainder of the longer term of copyright under the Act of 1911 was not an exclusive right, even though the right originally assigned was exclusive; if the right, however, included a right to authorise others to perform the work, so also did the right under proviso (a) (ii). See p. 208, letter I, to p. 209, letter A, post. G

By an agreement dated Nov. 30, 1905, governed by German law, the two authors and the composer of a comic opera, "The Merry Widow", agreed with German agents for its exploitation. The agreement conferred on the agents rights which enabled them to transfer rights of copyright in the opera, which rights would be transferable by an assignee. By an agreement dated Feb. 27, 1906, of which the proper law was English law, the German agents agreed to sell to E. (a well-known producer of musical plays) who agreed to purchase "the sole rights of production in the English language" in Great Britain and elsewhere, he paying a weekly sum for performances and undertaking to produce the opera in London or New York within a stipulated time. The agreement contained no limit in point of time of the rights that it conferred, but contained a provision for the reversion of the rights to the German agents if E. did not adhere to its terms. E. was referred to throughout the agreement by name, not as "licensee" or "assignee", and there was no reference to any successor in title to him. The opera was produced in H

* Section 24 (1) is printed at p. 207 letter I, and p. 208, letters A to D, post. I

- A London within the permitted time. E. died in 1915 and after divers assignments such rights of his as were assignable became vested in the appellants. The survivor of the two authors died in 1940 and the composer died in 1948. The production of the opera had been revived from time to time. Under the law prior to the Copyright Act, 1911, the duration of copyright was the life of the author and seven years after his death. Under s. 24 (1) of the Act of 1911 the substituted rights conferred by that enactment passed to the authors on Feb. 23, 1947, and to the composer on Oct. 24, 1955, subject to, in the circumstances of this case, such right as was preserved to the appellants under s. 24 (1), proviso (a) (ii).

Held: (i) the agreement of 1906 conferred on E. a right that was transmissible, not personal to him, and which accordingly did not lapse on his death.

Messenger v. British Broadcasting Co. ([1929] A.C. 151) followed.

(ii) the rights remaining (after Feb. 22, 1947, as regards the words of the opera and after Oct. 23, 1955, as regards the music) in the appellants by virtue of the agreement of 1906 and subsequent assignments and of the Copyright Act, 1911, s. 24 (1), proviso (a) (ii), were such rights as the appellants, originally had to continue to produce and perform the opera (including the right to authorise others to perform it) except that rights thus remaining in the appellants were not sole rights.

Appeal allowed.

[**Editorial Note.** The Copyright Act, 1911, s. 24, was repealed on June 1, 1957, and is not reproduced in the Copyright Act, 1956; see *ibid.*, s. 50 (2), s. 51 (2) and Sch. 8, and the Copyright Act, 1956 (Commencement) Order, 1957 (S.I. 1957 No. 863). This repeal is subject to transitional provisions which, so far as relevant to the substituted rights conferred by s. 24 of the Act of 1911, are in Sch. 7, paras. 34-38 of the Act of 1956. The effect of the present decision should be considered with paras. 35, 38 of Sch. 7.

As to the rights of assignees of copyright, under assignments made before July 1, 1912, during the time when, but for the Copyright Act, 1911, the copyright would have expired, see 8 HALSBURY'S LAWS (3rd Edn.) 440, para. 800.

For the Copyright Act, 1911, s. 24 (1), see 4 HALSBURY'S STATUTES (2nd Edn.) 800.]

Case referred to:

- (1) *Messenger v. British Broadcasting Co.*, [1928] 1 K.B. 660; 97 L.J.K.B. 251; 138 L.T. 571; *affd.* H.L., [1929] A.C. 151; 98 L.J.K.B. 189; 140 L.T. 227; Digest Supp.

Appeal.

The appellants appealed against the decision of VAISEY, J., dated Oct. 25, 1957, dismissing their claim against the respondents, and allowing the respondents' counterclaim against them, in respect of their rights under two agreements for the assignment of copyright dated Nov. 30, 1905, and Feb. 27, 1906, respectively, and under the Copyright Act, 1911, s. 24 (1), proviso (a) (ii). The case is reported only on the points arising on the construction of the 1906 agreement and under the Act. The facts appear in the judgment.

Charles Russell, Q.C., and *F. E. Skone James* for the appellants.

K. E. Shelley, Q.C., *G. T. Aldous, Q.C.*, and *D. W. Falconer* for the respondents.

Cur. adv. vult.

Apr. 1. **JENKINS, L.J.:** The judgment about to be read by ORMEROD, L.J., is the judgment of the court in this case.

ORMEROD, L.J.: The question at issue in this appeal is the ownership of the English stage performing rights of a well-known musical play known in

this country as "The Merry Widow". The appellants are a company incorporated in the United States of America, and on May 5, 1955, they issued a writ against the respondents, Emile Littler and others, claiming (inter alia) an injunction to restrain the respondents and each of them from infringing the appellants' copyright in the said play. By an order made on May 4, 1956, it was ordered that the claim of the appellants against the respondents Otto Blau, Anna Amalia Hebein, Fritz Stein and Felix Bloch Erben, and the counterclaim of the first three of the said respondents against the appellants for a declaration (inter alia) that they are the owners of the said copyright should be tried before the claim of the appellants against the other respondents. These issues were tried by VAISEY, J., and on Oct. 25, 1957, he held that the appellants' claim must fail, and the respondents' counterclaim succeed. It is from this decision that the appellants now appeal.

The music of the play was composed by Franz Lehar, and the words were written by Victor Leon and Leo Stein, to whom we shall refer as "the authors". Leo Stein died on July 25, 1921, and his interests are now vested in the respondent Fritz Stein. Victor Leon died on Feb. 23, 1940, and his interests are vested in the respondent Anna Amalia Hebein. Franz Lehar died on Oct. 24, 1948, and his interests are vested in the respondent Otto Blau.

The appellants' title to the rights claimed by them depends on the construction of two agreements. The first one, dated Nov. 30, 1905, to which we shall refer as the "1905 agreement", was made between the authors and Felix Bloch Erben, a firm of musical and dramatic agents carrying on business in Berlin. The second one, dated Feb. 27, 1906, to which we shall refer as the "1906 agreement", was made between Felix Bloch Erben and George Edwardes. The place of fulfilment of the 1905 agreement within the meaning of art. 29 of the German Code of Civil Procedure was stated in the agreement to be Berlin, and it was agreed between the parties that it must be construed according to German law, but that the 1906 agreement should be construed in accordance with the law of this country. There is an agreed translation before the court of the 1905 agreement, which was made in the German language, and art. 1 of the translation reads as follows:

"Messrs. Lehar, Leon and Stein hand over the operetta 'The Merry Widow' in three acts written and composed by them respectively to the firm of Felix Bloch Erben for the sole and exclusive distribution to all theatres in this country and abroad and transfer to it the rights of public performance and recital of the said work, which rights, as they hereby affirm, are exclusively vested in them as authors, as well as the rights of translation, into foreign languages in accordance with Articles 11, 12 and following of the German Reich Law of June 19, 1901 as their legal successor, in such a way that the firm of Felix Bloch Erben shall solely and exclusively be entitled during the period of this agreement to exercise the said rights either by itself or by its agents abroad without any restriction."

We should also at the same time refer to certain other articles in that 1905 agreement. Article 3 reads as follows:

"The entire income which may be obtained by the distribution to theatres of the work mentioned in s. 1 shall be paid by Messrs. Felix Bloch Erben of Berlin to the authors after deduction of the following distributor commissions, that is to say":

The article goes on to set out the various payments and commissions to be made. Article 4 reads:

"Accounts shall be rendered by Messrs. Felix Bloch Erben for each calendar month during the first half of the following month, that is to say, as to fifty per cent. to Mr. Lehar, thirty per cent. to Mr. Leon and twenty per cent. to Mr. Leo Stein."

A Article 5 reads:

"The duration of this agreement is fixed so as to coincide with the duration of the legal rights of protection of the work mentioned in s. 1. The stamp duty costs of this agreement shall be paid by the contracting parties in equal shares."

B Article 8 reads:

"Whichever of the contracting parties wilfully contravenes any clause of this agreement shall pay to the other party a contractual penalty of five thousand marks by the payment of which the obligation to fulfil the agreement will not be eliminated. The parties waive the right to have this penalty reduced by the court in accordance with s. 343 of the Civil Code."

C Lastly, art. 9 reads:

"The place of fulfilment for both parties within the meaning of art. 29 of the Code of Civil Procedure will be Berlin."

It is the contention of the appellants that under this agreement, Felix Bloch Erben were empowered to grant to suitable persons a transmissible right to produce and perform the play in Germany and other countries. The respondents, on the other hand, contend that Felix Bloch Erben had no power under the 1905 agreement to confer on a transferee any right other than the right of performance during the life of the transferee, and this was the view taken by the learned judge.

By the 1906 agreement Felix Bloch Erben transferred to George Edwardes certain rights for the production and performance of the play in the English language in Great Britain and elsewhere. The relevant clauses of the agreement are as follows:

"(1) The said Felix Bloch Erben agrees to sell and the said George Edwardes agrees to purchase the sole rights of production in the English language in Great Britain and Ireland and the British Colonies and in the United States of America and Canada of 'Die Lustige Witwe', comic opera in three Acts by Victor Leon, Leo Stein and Franz Lehar. (2) The said George Edwardes agrees to pay to the said Felix Bloch Erben for performances of the said opera in London the sum of £35 a week, and for performances of the said opera in New York an equal sum of £35 a week. (3) The said George Edwardes agrees to pay to the said Felix Bloch Erben for performances of the said opera in the Provinces of the United Kingdom and the United States and Canada, [and then it sets out the various sums to be paid in respect of performances of various classes.] (4) The said George Edwardes further agrees to pay to the said Felix Bloch Erben for the sole rights of production in the English language in Great Britain and Ireland and the British Colonies and in the United States of America of the opera mentioned in para. 1 a sum of £1,000 on account of above fees, which sum is to be paid to the said Felix Bloch Erben at the signature of this agreement. (5) The said George Edwardes agrees to produce the said opera in three acts and not to make any more alterations or add more songs and other musical numbers than are necessary to ensure the success of the said opera on the English speaking stage. (6) The said George Edwardes agrees to produce or cause to be produced the said opera in London or New York not later than May 1, 1907. (7) Should, however, for some reason or other the said George Edwardes be prevented from producing the said opera in London or New York on or before May 1, 1907, the said Felix Bloch Erben agree to grant to the said George Edwardes an extension of term of one year from the said date for the ultimate date of production of the said opera in London or in New York upon payment by the said George Edwardes to the said Felix Bloch Erben of a further sum of £200 on account of above fees."

Then there is nothing more of importance until cl. 10, which reads:

"In the event of the said George Edwardes failing to adhere to the terms set forward in this agreement all rights and interests in the said opera in the country in which it has not been produced within the stipulated period shall there and then revert to the said Felix Bloch Erben who shall not be liable to return to the said George Edwardes any sums paid by him to them in respect thereof."

George Edwardes caused the play to be translated into English with suitable adaptations, and added certain lyrics, and produced it at Daly's Theatre, London, the first performance taking place on June 8, 1907. The production had a long and successful run, and has since been revived in London and the provinces from time to time. George Edwardes died on Oct. 4, 1915, and after various assignments such rights as existed on his death became vested in the appellants. It is to be noted that after the death of George Edwardes his successors continued to pay to Felix Bloch Erben the royalties specified in the 1906 agreement, and the correspondence which is before the court between Felix Bloch Erben and the various successors to George Edwardes, and between the respective solicitors and agents of the parties shows that Felix Bloch Erben and the successors to the authors were aware of (and certainly took no objection to) the assignments which took place after the death of George Edwardes. Further, by an agreement dated July 23, 1929, Lehar, Leon and Fritz Stein, as the personal representative of Leo Stein, transferred to Metro-Goldwyn-Mayer Pictures certain rights in relation to the exhibition of motion pictures of the play; and in the warranty clause it was set out that the stage performing rights had been granted to the late George Edwardes; and by an agreement dated Mar. 30, 1930, made between Felix Bloch Erben and Metro-Goldwyn-Mayer, and also relating to the transfer of motion picture rights, the continuing existence of the rights granted to George Edwardes by Felix Bloch Erben is clearly recognised.

The questions to be decided were set out succinctly by the learned judge in his judgment. After stating the issues at some length, he said:

"To put the matter more shortly, could Felix Bloch Erben transfer the rights so as to make them freely and unrestrictably transferable by any person into whose hands such rights might have come, and, if they could, did they in fact do so?"

Two experts in German law were called before the learned judge to give evidence on the provisions of the German law relevant to the construction of the 1905 agreement, Mr. Ernest Joseph Cohn on behalf of the appellants, and Dr. Frederick Alexander Mann on behalf of the respondents. [His LORDSHIP reviewed their evidence. It had been argued on behalf of the appellants, before VAISEY, J., that the 1905 agreement enabled Felix Bloch Erben to do what was reasonable to carry out their duty to exploit the play, and thus enabled them to transfer a slice of the copyright in such a way as to give the assignee a transmissible interest. It had been argued for the respondents that German law did not give commission agents, such as Felix Bloch Erben were under the 1905 agreement, the right to pass on a transmissible interest, but that they could only transfer a right to produce and perform the play during the life of the transferee or at most during the continuance of a production originated by the transferee in his lifetime. VAISEY, J., had concluded that Felix Bloch Erben had no power under the 1905 agreement to transfer more than a right which would terminate on the death of the transferee. His LORDSHIP continued:] We find that we cannot agree with the conclusions of the learned judge on this part of the case. As we see it, the duty of the court is to determine from the witnesses the principles of German law which govern the construction of the agreement, and then to apply these principles to decide the nature and extent of the powers granted to Felix Bloch Erben. There is a good deal of common ground in the evidence of the two German lawyers. They were both agreed that Felix Bloch Erben could not make an assignment in toto. They were also agreed that the 1905 agreement

- A created a commission agency which put on Felix Bloch Erben the duty of exploiting the play by finding suitable persons to produce it in Germany and elsewhere, and of doing what was reasonable to carry out that duty. Mr. Cohn expressed the view that to enter into an agreement which passed to the transferee a transmissible right was reasonable, and indeed that it was carrying out the very purpose of the 1905 agreement. Dr. Mann held the contrary view. The reason
- B why Dr. Mann was of the opinion that it could not be a reasonable exercise of the powers of Felix Bloch Erben to grant a transmissible interest appears from his evidence to have been founded on passages from German text-book writers. We feel bound to say, having considered carefully the translations of the passages which were put in evidence, and the answers of Dr. Mann when he was cross-examined about them, that we could find no sufficient authority or unanimity
- C of view amongst these writers which would justify a construction which appears on the face of it to be contrary to the plain meaning of the words of the document.

- It may well be, as the learned judge found, that the 1905 agreement is a contract of personal service, but it is agreed that the service which Felix Bloch Erben contracted to render was to exploit the play by finding suitable persons to produce it. It was agreed by both witnesses that George Edwardes was a
- D producer of the highest reputation, so far as plays of this type were concerned; and it is a reasonable inference that Felix Bloch Erben, in seeking a producer in this country, would be anxious to obtain his services. It would be surprising if an impresario of the standing of George Edwardes would be willing to go to the expense of having the play translated and adapted for performance in England, and the further expense of a production at Daly's Theatre, if the right
- E he had acquired was to last only so long as he should live, and not carry with it any right of transmission. In order to obtain production of the play by producers of standing, it would, of course, be necessary to enter into agreements with them, and no doubt after negotiation terms would be agreed which satisfied, so far as possible, the wishes of both parties. To enter into such agreements, therefore, seems on the face of it a reasonable way for Felix Bloch Erben to
- F perform their personal service, and in our judgment, having given careful consideration both to the evidence, and the document itself, they were justified in so acting.

- It was the view of both Mr. Cohn and Dr. Mann that the subsequent conduct of the parties could be taken into account in ascertaining the intention of a document, although Mr. Cohn said that this would only be so if the meaning of
- G the document was not clear on the face of it. If support was necessary for the conclusion to which we have come as to the meaning of the agreement, it could surely be found by applying this principle. The conduct of the authors and their representatives and of Felix Bloch Erben is, in our view, consistent only with the view that in the minds of the parties the powers given in the 1905 agreement to Felix Bloch Erben were not limited as the learned judge has found, but enabled
- H Felix Bloch Erben, if circumstances so warranted, to transfer rights which were themselves transferable.

- The next question is whether Felix Bloch Erben did in fact by the 1906 agreement transfer to George Edwardes a transmissible right, or whether the rights so conferred were personal to George Edwardes, and lapsed on the day of his death, Oct. 4, 1915. The learned judge, after discussing the various devolutions of
- I what he described as the "paper title" from the late George Edwardes, and the fact that the respondents had been content to accept the assignees from time to time on the footing that there had been a valid succession to the position held by George Edwardes, said:

"I hold, however, that on its true construction the 1906 document did not convey to George Edwardes anything more than a personal interest terminable on his death, however much it may have been considered reasonable and convenient to act on the assumption that it did."

Counsel argued on behalf of the appellants that the agreement, which contained in cl. 1 the words, "The said Felix Bloch Erben agrees to sell and the said George Edwardes agrees to purchase the sole rights of production in the English language" etc., constituted an agreement to assign. The rights were by their nature transferable, and there was nothing in the document expressing a contrary intention. He pointed out that George Edwardes purchased the sole right of performance; that there was no limit in point of time to the agreement; and that the words in the agreement were not mere words of licence to George Edwardes. Therefore, submitted the appellants, there must be a transfer of the copyright so far as it related to this country for the entire period. A
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The appellants cited in support of their contention *Messenger v. British Broadcasting Co.* (1) ([1928] 1 K.B. 660). This was a case where the plaintiff, André Messenger, granted to George Edwardes the sole and exclusive right of representing or performing a play called "Les Petites Michus" in this country. The full terms of the agreement are set out in the report (*ibid.*): C

"(1) The licensors hereby grant the licensee the sole and exclusive right of representing or performing the play in the United Kingdom of Great Britain and Ireland, America, and the British Colonies and Dominions. (2) The copyright in the music of the play shall remain the property of the said André Messenger, and he shall be at liberty to use the English lyrics for sale with the music. (3) The play shall be adapted for the English stage at the expense of the licensee. (4) The licensee shall in consideration of the rights hereby granted pay to the licensors the following royalties or fees [and then are set out the various royalties.] (5) If the play be not produced in London by the said George Edwardes within three months from this date, all rights of representation as aforesaid shall revert to and become again the absolute property of the licensors. (6) The licensee agrees not to interpolate into the score any piece or number not composed by the said André Messenger without the said André Messenger's permission, but the said André Messenger agrees to furnish and compose such alterations and additional numbers required for the English version as the said George Edwardes may reasonably require. (7) The said André Messenger shall assist at such rehearsals as may be agreed and shall conduct the orchestra on the occasion of the first production of the play at Daly's Theatre aforesaid."

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Then cl. 8 refers to the keeping of proper books of account, and so on.

In May, 1920, George Edwardes's successors assigned to George Edwardes (Daly's Theatre), Ltd. "so far as they lawfully could" the benefit of the contract. In October, 1926, George Edwardes (Daly's Theatre), Ltd. granted to the British Broadcasting Co., Ltd., the right to give a performance by wireless telegraphy. McCARDIE, J., held ([1927] 2 K.B. 543) that the licence to George Edwardes was personal to himself, and could not be assigned. In the Court of Appeal the decision of McCARDIE, J., was reversed, and in a short judgment SCRUTTON, L.J., said ([1928] 1 K.B. at p. 663): G
H

"That document, properly construed, conferred rights upon Mr. George Edwardes, which were not merely personal to himself, but rights which he could assign . . ."

The decision of the Court of Appeal was affirmed by the House of Lords ([1929] A.C. 151). After discussing the contentions raised by the appellants on the various clauses of the agreement, LORD HAILSHAM, L.C., continues (*ibid.*, at p. 155): I

"But even if I were wrong on this construction and if the payments to the licensors were limited to four per cent. of the gross receipts of the performances at theatres, I should still be unable to treat that expression as limiting or cutting down the plain grant which is contained in cl. 1. That, in my view, plainly operates as an assignment to Mr. George Edwardes of

- A the sole and exclusive right of representation within the area named in the clause, and I think that that view of the clause is strengthened, not only by the expression in cl. 2, which stipulates that the copyright in the music shall remain the property of M. Messenger, but also by the language of cl. 5, which provides that in the event of non-production within three months 'all rights of representation as aforesaid shall revert to and become again the absolute property of the licensors'. That seems to me inept language in which to describe the mere cessation of a licence, and is much more apt to describe the reversion to the licensors of rights which had been assigned by cl. 1.'
- B

- The respondents' contention was that the agreement* was personal to George Edwardes, and gave him no right to transmit any of the rights acquired under it. It was pointed out that nowhere in the agreement were the words "his successors or assigns" added to the name of George Edwardes. The respondents particularly relied on cl. 5 and cl. 6 of the agreement in which George Edwardes agreed to produce the play, or cause it to be produced, in London or New York not later than May 1, 1907, and argued that under the agreement George Edwardes, and George Edwardes only, was entitled to produce, and was under a duty to do so. They sought to distinguish *Messenger v. British Broadcasting Co.* (1) mainly by
- D emphasising that in the 1906 agreement each clause referred to George Edwardes personally, whereas in the agreement in *Messenger v. British Broadcasting Co.* (1) he was referred to by name only in cl. 5 and cl. 6 and in the other clauses was referred to merely as "the licensee". Whether George Edwardes would have been entitled to delegate his duty under the agreement to produce the play within the specified time is a question which does not arise in this case. The fact was
- E that he did produce the play. The question is whether he had under the agreement acquired rights which were intended to subsist for the whole period of the copyright, and could be transmitted if so desired.

- We can find no real distinction between this case and *Messenger v. British Broadcasting Co.* (1). It should be noted that cl. 10 of the agreement, which provides that all rights and interest "shall there and then revert" to Felix Bloch Erben, is in very similar terms to cl. 5 of the agreement in *Messenger v. British Broadcasting Co.* (1), the language of which was held by LORD HAILSHAM to be inept in which to describe the mere cessation of a licence. In our judgment, the appellants' contention is the right one, videlicet, that the 1906 agreement did confer on George Edwardes a transmissible right.
- F

- The remaining question for consideration is the nature of the rights (if any) remaining in the appellants by virtue of the provisions of the Copyright Act, 1911. Prior to the passing of that Act the period during which the copyright existed in a work was the life of the author and seven years after his death. Of the two joint authors of the play, Leon was the second to die. He died on Feb. 23, 1940, and apart from the Act of 1911 the copyright in the words would have expired on Feb. 23, 1947. Lehar died on Oct. 24, 1948, and so the copyright in the music
- H would have expired on Oct. 24, 1955. The Copyright Act, 1911, extended the period to fifty years after the death of the author, and therefore the copyright in both music and words is still in existence. Provision was made in the Act for rights acquired before it came into force. In s. 24 of the Act it is set out as follows:

- I " (1) Where any person is immediately before the commencement of this Act † entitled to any such right in any work as is specified in the first column of Sch. 1 to this Act, or to any interest in such a right, he shall, as from that date, be entitled to the substituted right set forth in the second column of that schedule, or to the same interest in such a substituted right, and to no other right or interest, and such substituted right shall subsist for the term for which it would have subsisted if this Act had been in force at the date

* Viz., the agreement of Feb. 27, 1906.

† I.e., July 1, 1912, for this purpose: as provided by s. 37 (2) (a).

when the work was made and the work had been one entitled to copyright thereunder:

" Provided that—(a) if the author of any work in which any such right as is specified in the first column of Sch. 1 to this Act subsists at the commencement of this Act has, before that date, assigned the right or granted any interest therein for the whole term of the right, then at the date when, but for the passing of this Act, the right would have expired the substituted right conferred by this section shall, in the absence of express agreement, pass to the author of the work, and any interest therein created before the commencement of this Act and then subsisting shall determine; but the person who immediately before the date at which the right would so have expired was the owner of the right or interest shall be entitled at his option either—(i) on giving such notice as hereinafter mentioned, to an assignment of the right or the grant of a similar interest therein for the remainder of the term of the right for such consideration as, failing agreement, may be determined by arbitration; or (ii) without any such assignment or grant, to continue to reproduce or perform the work in like manner as theretofore subject to the payment, if demanded by the author within three years after the date at which the right would have so expired, of such royalties to the author as, failing agreement, may be determined by arbitration, or, where the work is incorporated in a collective work and the owner of the right or interest is the proprietor of that collective work, without any such payment."

It was not disputed that in the event of the appellants being held to have a transferable right, this was a case coming within the proviso—that is, a case where an author had, before the commencement of the Act, assigned his right or any interest therein for the whole term of the right. The first option set out in the proviso could not apply as the appellants had not given notice within the prescribed time. The question, therefore, to be determined is what are the rights remaining in the appellants under the terms of the second option. The submission of the appellants is that the words entitling them "to continue to reproduce or perform the work in like manner as theretofore" mean that they are to be regarded as continuing to have the rights granted to them under the 1906 agreement, and therefore to have for the remainder of the extended term the sole right of the stage production and performance in this country. If the appellants are right in this, it means that under the second option, without giving notice or taking any other steps, they are in the same position as they would have been if they had given the prescribed notice under the first option and obtained an assignment of the rights subject to the payment of royalties which were either agreed, or determined by arbitration. This construction, in our judgment, cannot be right.

The respondents, on the other hand, submit that as the appellants have failed to give the required notice to exercise the first option, their right to continue to reproduce or perform under the second option does not amount to anything more than the continuation for the length of the run of any production which was in being on the date when the copyright would have expired but for the passing of the Act. They submitted, too, that the appellants had, since before the original date of expiry of the copyright, done nothing more than authorise the production of the play. They had not themselves reproduced or performed it, and the words of the option did not carry any right to authorise a performance. This is, in our view, taking too narrow a view of the words of the statute.

The option does not, in our judgment, give the appellants the sole right to produce and perform in this country which they had under the 1906 agreement, but it does, we think, mean that the appellants still have such rights to continue to produce and perform the play as they originally had. This would include the

A right to authorise others to perform it also; but it may well be that if the appellants have no longer the sole right to produce, this will be of little value to them.

For these reasons we are of the opinion that this appeal should be allowed.

Appeal allowed: leave to appeal to the House of Lords granted.

Solicitors: *Wright & Webb* (for the appellants); *Kenneth Brown, Baker, Baker*

B (for the respondents).

[*Reported by* HENRY SUMMERFIELD, ESQ., *Barrister-at-Law.*]

C BAYLIS BAXTER, LTD. v. SABATH.

[COURT OF APPEAL (Jenkins, Parker and Pearce, L.JJ.), April 15, 16, 1958.]

Costs—Disallowing costs of successful plaintiff—Evidence of plaintiff's witness rejected—Evidence of defendant also rejected—Plaintiff a company—Discretion of trial judge—Jurisdiction of Court of Appeal—Supreme Court of Judicature (Consolidation) Act, 1925 (15 & 16 Geo. 5 c. 49), s. 31 (1) (h), s. 50 (1)—R.S.C., Ord. 65, r. 1.

Costs—Appeal to Court of Appeal—Appeal as to costs without leave of trial judge—Discretion of trial judge—Jurisdiction of Court of Appeal—Supreme Court of Judicature (Consolidation) Act, 1925 (15 & 16 Geo. 5 c. 49), s. 31 (1) (h), s. 50 (1)—R.S.C., Ord. 65, r. 1.

In an action brought by a company for money due, in which the defendant counterclaimed for arrears of alleged salary, the company's witness P., who had effective control of the company, gave evidence of which the trial judge formed an unfavourable view. Neither did the judge attach much weight to the evidence of the defendant. Having decided the claim and counterclaim in favour of the plaintiff company, the judge, in the exercise of discretion under s. 50 of the Supreme Court of Judicature (Consolidation) Act, 1925, and R.S.C., Ord. 65, r. 1, made no order as to costs, on the ground that his view of P.'s evidence should be reflected in the matter of costs. On appeal by the plaintiff company as to costs without the leave of the judge, the company contended that costs should have followed the event because the judge's view of the defendant's evidence had also been unfavourable and the company should not be penalised by reason of the view taken of P.'s evidence.

Held: under s. 31 (1) (h)* of the Supreme Court of Judicature (Consolidation) Act, 1925, appeal on costs without leave lay only in an exceptional case where the decision on costs had been an arbitrary, not a judicial, decision or had been based on grounds wholly irrelevant to the incidence of costs; in the present case the judge's exercise of his discretion was a judicial exercise of discretion based on a reason connected with the case, and the appeal could not properly be entertained notwithstanding that the plaintiff was a separate legal entity from P.

Principle stated by VISCOUNT CAVE, L.C., in *Donald Campbell & Co., Ltd. v. Pollak* ([1927] A.C. at p. 811) followed; observations of LORD GREENE, M.R., in *Hong v. A. & R. Brown, Ltd.* ([1948] 1 All E.R. 185) explained.

Hudsons, Ltd. v. De Halpert ((1913), 108 L.T. 416) disapproved.

Per PARKER, L.J.: where a counterclaim amounts to an equitable set-off, it is only right that the claim and cross-claim should be dealt with as one, and no valid distinction can be drawn between the way in which the discretion over costs should be exercised in regard to the claim and in regard to the counterclaim (see p. 216, letter F, post).

Appeal dismissed.

* Section 31 (1) (h) is printed at p. 212, letter G, post.

[As to the discretion of the judge to deprive a successful plaintiff of costs, see 26 HALSBURY'S LAWS (2nd Edn.) 96-98, paras. 181-183; and as to appeals as to costs, see *ibid.*, 98, para. 185.] A

For the Supreme Court of Judicature (Consolidation) Act, 1925, s. 31 (1) (h), s. 50, see 5 HALSBURY'S STATUTES (2nd Edn.) 357-359 and 18 HALSBURY'S STATUTES (2nd Edn.) 486.]

Cases referred to:

- (1) *Hudsons, Ltd. v. De Halpert*, (1913), 108 L.T. 416; Digest (Practice) 893, 4355.
- (2) *Hong v. A. & R. Brown, Ltd.*, [1948] 1 All E.R. 185; [1948] 1 K.B. 515; [1948] L.J.R. 1816; 2nd Digest Supp.
- (3) *Campbell (Donald) & Co., Ltd. v. Pollak*, [1927] A.C. 732; 96 L.J.K.B. 1132; 137 L.T. 656; Digest (Practice) 861, 4061.
- (4) *Ritter v. Godfrey*, [1920] 2 K.B. 47; 89 L.J.K.B. 467; 122 L.T. 396; Digest (Practice) 854, 4002.
- (5) *The Young Sid*, [1929] P. 190; 98 L.J.P. 97; 141 L.T. 234; Digest Supp.

Appeal.

The plaintiff company appealed, without the leave of the trial judge, against the decision of McNAIR, J., dated June 14, 1957, to make no order as to costs after giving judgment in favour of the plaintiff company both on its claim against the defendant and on the defendant's counterclaim against the plaintiff company. The facts appear in the judgment of JENKINS, L.J.

D. L. McDonnell for the plaintiff company.

A. R. Barrowclough for the defendant.

JENKINS, L.J.: This is an appeal by the plaintiffs, a limited company called Baylis Baxter, Ltd., from a judgment of McNAIR, J., dated June 14, 1957; and the appeal relates only to the terms of that judgment in regard to costs. The action was an action commenced by specially indorsed writ for the sum of £1,253 10s., moneys claimed as due from the defendant to the plaintiff company on a running account kept with the company by the defendant. The defendant's defence was to the effect that his indebtedness on the running account had included loans totalling £2,500 which were made on terms that they were only to be repayable when a claim which the defendant had, or claimed that he had, against the Czech Foreign Compensation Commission in respect of the expropriation of his assets in Czechoslovakia, should have been paid in full. Secondly, the defendant alleged that he was employed by the plaintiff company at a salary of £500 a year, and he claimed £1,083 13s. 4d. as due to him in respect of arrears of that salary; and, having paid £169 6s. 8d. to the plaintiff company after action brought, he said that there was nothing due to them because the balance of £1,083 13s. 4d. represented the arrears of salary claimed by him to be due to himself from the plaintiff company, for which amount he entered a counterclaim.

At the conclusion of the hearing, the learned judge found for the plaintiff company both on the claim and on the counterclaim. That meant that he gave judgment in favour of the plaintiffs for the £1,083 13s. 4d., representing the balance due (according to the plaintiff company) after allowance had been made for the payment of the £169 6s. 8d. since action brought. However, although the learned judge held the plaintiff company entitled to succeed, he held that no order should be made as to costs. It is contended for the plaintiff company that the learned judge erred in dealing with the costs in that way and that there was no sufficient reason for departing from the ordinary rule that costs should follow the event.

The details of the action and the relationship between the parties are somewhat complicated, but it is not necessary to go into them at any length for the purposes of this appeal. The history of the matter involves two companies, namely, the plaintiff company itself and another company called British Overseas & Export

- A Trading Co., Ltd. The businesses of these companies were associated, and the moving spirit behind them (if I may so describe him) was a Mr. Otto Popper. The defendant was employed by one or other or both of these companies on terms which I need not attempt to define with precision. The defendant apparently had a drawing account with both companies. It seems that the £2,500 to which I have referred was originally advanced by the British Overseas & Export
- B Trading Co., Ltd., which apparently also advanced to the defendant a further sum of £1,200. It appears that these sums were subsequently transferred to the debit of the defendant's drawing account with the plaintiff company by means of a payment in account by the plaintiff company to the British Overseas & Export Trading Co., Ltd. of the appropriate amount. The substantial issues in the case were: first, whether the loan of £2,500, to which I have referred, was made
- C on the condition which I have mentioned, to the effect that it was only to be repayable on payment of the defendant's claim against the Foreign Compensation Commission; and secondly, whether, as the defendant claimed, he was employed by the plaintiff company at a salary of £500 a year, the allegation that he was so employed being the basis of his counterclaim for £1,083 13s. 4d. The first issue, as I have stated it, was complicated by the fact that the plaintiff company
- D alleged, and sought to prove, not merely that the loan was made without the condition relied on by the defendant, but that the loan was never in fact made at all; and the plaintiff company further alleged and sought to prove that there was no transfer of the amounts owing to the British Overseas & Export Trading Co., Ltd. from the defendant with the assent of either of the companies or of Mr. Popper, as I understand it.
- E Now the learned judge, on the issue as to the £2,500 loan, wholly rejected Mr. Popper's evidence to the effect that there was no loan at all; and he also wholly rejected Mr. Popper's evidence that there was no transfer of this indebtedness to the plaintiff company; but he found in favour of the plaintiff company on this issue on the ground that the bargain included nothing amounting to a legally binding condition to the effect that the liability to repay was only to arise when the defendant's claim against the Foreign Compensation Commission should have been met. On the other hand, the learned judge rejected the defendant's evidence in regard to his employment by the plaintiff company at the salary of £500 a year; and, speaking generally, he attached little weight or credibility to the evidence of Mr. Popper, and likewise attached little weight or credibility to the evidence of the defendant.
- F We were referred, in the course of the argument, to the greater part of the judgment and to the criticisms made by the learned judge of the evidence tendered on either side. I have sufficiently stated the main matters on which the learned judge rejected the evidence, and I need only refer to that part of the judgment which deals with the question of costs. McNAIR, J., said this:
- G
- H "As regards costs, Mr. McDonnell [counsel for the plaintiff company], I have formed a view unfavourable to your clients as regards the evidence of Mr. Popper, which I have expressed in the course of my judgment, and I think that that should be reflected in the matter of costs. I have in mind to say that there should be no costs either way. I propose to say—judgment to be entered for the sum indicated without costs in view of the impression I have formed as to Mr. Popper's evidence.
- I McDonnell: Might I address your Lordship on that? Your Lordship has formed a no more favourable view of the evidence of the defendant. In my respectful submission the unfavourable views that your Lordship has formed of both Mr. Popper and the defendant should cancel each other out. In my submission the proper order would be the usual one that, as the plaintiff has succeeded—
- McNAIR, J.: The plaintiffs have not succeeded by reason of any evidence they have brought before me.

this was not a matter by reference to which the judge, acting judicially, could properly determine the question of costs adversely to the plaintiff company. Then counsel for the plaintiff company says that there was no material on which the learned judge could exercise his discretion in the way he did as there was nothing on which he could found himself apart from the way in which the opposing witnesses gave their evidence, a consideration which, as I have already put it, cancelled itself out because both sides were equally culpable.

That is *Hong v. Brown* (2), and that is the way in which counsel for the plaintiff company seeks to use it. Any discussion of this topic at this date must inevitably, however, begin with a reference to *Donald Campbell & Co., Ltd. v. Pollak* (3) ([1927] A.C. 732). In that case the earlier decisions were reviewed, particularly by VISCOUNT CAVE, L.C., in a very full speech; and quite clearly the intention and effect of the decision was to curtail the latitude which in earlier cases had been held to exist in the matter of entertaining appeals on the question of costs notwithstanding the provisions of s. 31 (1) (h) of the Judicature Act, 1925, or its precursors in earlier Acts. I need only read from LORD CAVE's speech his summary of the position. LORD CAVE said this (*ibid.*, at p. 811):

"My Lords, it appears to me that the true view is substantially that taken by LORD STERNDALE in the above quoted passage in his judgment in *Ritter v. Godfrey* (4) ([1920] 2 K.B. 47), although I would express it in somewhat different language. A successful defendant in a non-jury case has no doubt, in the absence of special circumstances, a reasonable expectation of obtaining an order for the payment of his costs by the plaintiff; but he has no right to costs unless and until the court awards them to him, and the court has an absolute and unfettered discretion to award or not to award them. This discretion, like any other discretion, must of course be exercised judicially, and the judge ought not to exercise it against the successful party except for some reason connected with the case. Thus, if—to put a hypothesis which in our courts would never in fact be realised—a judge were to refuse to give a party his costs on the ground of some misconduct wholly unconnected with the cause of action or of some prejudice due to his race or religion or (to quote a familiar illustration) to the colour of his hair, then a Court of Appeal might well feel itself compelled to intervene. But when a judge, deliberately intending to exercise his discretionary powers, has acted on facts connected with or leading up to the litigation which have been proved before him or which he has himself observed during the progress of the case, then it seems to me that a Court of Appeal, although it may deem his reasons insufficient and may disagree with his conclusion, is prohibited by the statute from entertaining an appeal from it."

Now the statement of principle contained in the judgment of LORD GREENE in *Hong v. Brown* (2) is more shortly expressed than is the passage which I have just read from LORD CAVE's speech: it is less explicit and therefore might be capable of a wider interpretation; but for my part I cannot accept the view that LORD GREENE intended to depart in any way from the conclusion expressed by LORD CAVE in that passage. Accordingly, I regard that passage as providing the test to be applied in the present case and in other similar cases; and in so far as *Hudsons, Ltd. v. De Halpert* (1) or any other of the earlier cases is inconsistent with *Donald Campbell & Co., Ltd. v. Pollak* (3) then in my view such case cannot be regarded as authoritative.

Applying LORD CAVE's test in the present case, it seems to me that the present appeal must fail. It cannot be said here that the learned judge's decision as to costs was not based on "some reason connected with the case". It was based on the view, unfavourable to the plaintiff company, which the learned judge had formed as regards the evidence of Mr. Popper. That, I have no doubt, was a reason "connected with the case", and quite clearly not one of those entirely extraneous or irrelevant reasons to which LORD CAVE referred. This too was a

A case in which the judge, "deliberately intending to exercise his discretionary powers, acted on facts connected with or leading up to the litigation which had been proved before him or which he had himself observed during the progress of the case". I think that the learned judge here, during the progress of the case, observed the unsatisfactory character of Mr. Popper's evidence and considered that this was a matter proper to be taken into account in determining the incidence of costs. If that is right, then the consequence follows that this court is prohibited by the statute from entertaining an appeal from the learned judge's order, even though this court might regard his reasons as insufficient and might disagree with his conclusion.

I should add a reference to *The Young Sid* (5) ([1929] P. 190), in which SCRUTON, L.J., emphasised the restrictive character of the test laid down in *Donald Campbell & Co., Ltd. v. Pollak* (3).

The matter as it now stands really comes to this, that in a case of this sort—that is to say, in a case in which it is sought to appeal, without leave, from an order relating solely to costs—such an application should not be entertained, in view of the express terms of s. 31 (1) (h) of the Judicature Act, 1925, unless the circumstances are such that this court can say, in effect, "In this case the learned judge did not in truth exercise his discretion at all". It is only in a case of that kind that this court has jurisdiction to entertain such an appeal. That means that in order that an appeal may properly be entertained the case in question must be one of the type, to which LORD CAVE referred by way of illustration, where the decision of the learned judge was based on some misconduct wholly unconnected with the cause of action or on some wholly irrelevant consideration such as the colour of the parties' hair—in other words, one might say, cases in which the decision has been purely arbitrary as distinct from judicial, or has been based on considerations which are clearly wholly irrelevant to the determination of the question as to the incidence of costs. It is a wrong method of approach to begin by criticising the order made by the learned judge on the ground that it was not a proper exercise of the discretion, and, founding oneself on that, to go on to say that, because the mode in which discretion was exercised is open to criticism, therefore the case is one in which an appeal will lie without the leave of the judge notwithstanding the clear injunction to the contrary contained in the section.

It is only in exceptional cases of the kind that I have endeavoured to describe that such an appeal can lie at all; and notwithstanding the clear and persuasive argument of Mr. McDonnell (counsel for the plaintiff company) he has failed to convince me that the present case is a case of that exceptional character. What view this court might have formed of the manner in which the learned judge exercised his discretion if the matter was open to review, it is entirely unnecessary and irrelevant to say. In my view this appeal should be dismissed, simply on the ground that it is not an appeal which can properly be entertained having regard to the terms of the statute. Accordingly, I would dismiss this appeal.

PARKER, L.J.: I agree; and I would only add a few words in deference to Mr. McDonnell's argument on behalf of the plaintiff company.

Section 31 (1) (h) of the Supreme Court of Judicature (Consolidation) Act, 1925, prohibits any appeal on costs only, in a case where costs are left to the discretion of the judge, unless leave is given by the judge himself. No provision is there made for leave being given by this court in a case where the judge has refused leave, and, that being so, the section *prima facie* imposes an absolute prohibition in such a case. This prohibition is a re-enactment of a similar prohibition which appeared in s. 49 of the Act of 1873; and while this court thereafter, in order to mitigate the severity of the prohibition, opened the door rather wide to appeals, that door was firmly closed by the decision of the House of Lords in *Donald Campbell & Co., Ltd. v. Pollak* (3) ([1927] A.C. 732). As a result of that decision, the only cases where an appeal on costs only can be

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I should add a reference to *The Young Sid* (5) ([1929] P. 190), in which SCRUTTON, L.J., emphasised the restrictive character of the test laid down in *Donald Campbell & Co., Ltd. v. Pollak* (3).

- C The matter as it now stands really comes to this, that in a case of this sort—that is to say, in a case in which it is sought to appeal, without leave, from an order relating solely to costs—such an application should not be entertained, in view of the express terms of s. 31 (1) (h) of the Judicature Act, 1925, unless the circumstances are such that this court can say, in effect, "In this case the learned judge did not in truth exercise his discretion at all". It is only in a case of that kind that this court has jurisdiction to entertain such an appeal. That means that in order that an appeal may properly be entertained the case in question must be one of the type, to which LORD CAVE referred by way of illustration, where the decision of the learned judge was based on some misconduct wholly unconnected with the cause of action or on some wholly irrelevant consideration such as the colour of the parties' hair—in other words, one might say, cases in which the decision has been purely arbitrary as distinct from judicial, or has been based on considerations which are clearly wholly irrelevant to the determination of the question as to the incidence of costs. It is a wrong method of approach to begin by criticising the order made by the learned judge on the ground that it was not a proper exercise of the discretion, and, founding oneself on that, to go on to say that, because the mode in which discretion was exercised is open to criticism, therefore the case is one in which an appeal will lie without the leave of the judge notwithstanding the clear injunction to the contrary contained in the section.

- F It is only in exceptional cases of the kind that I have endeavoured to describe that such an appeal can lie at all; and notwithstanding the clear and persuasive argument of Mr. McDonnell (counsel for the plaintiff company) he has failed to convince me that the present case is a case of that exceptional character. What view this court might have formed of the manner in which the learned judge exercised his discretion if the matter was open to review, it is entirely unnecessary and irrelevant to say. In my view this appeal should be dismissed, simply on the ground that it is not an appeal which can properly be entertained having regard to the terms of the statute. Accordingly, I would dismiss this appeal.

H PARKER, L.J.: I agree; and I would only add a few words in deference to Mr. McDonnell's argument on behalf of the plaintiff company.

- I Section 31 (1) (h) of the Supreme Court of Judicature (Consolidation) Act, 1925, prohibits any appeal on costs only, in a case where costs are left to the discretion of the judge, unless leave is given by the judge himself. No provision is there made for leave being given by this court in a case where the judge has refused leave, and, that being so, the section *prima facie* imposes an absolute prohibition in such a case. This prohibition is a re-enactment of a similar prohibition which appeared in s. 49 of the Act of 1873; and while this court thereafter, in order to mitigate the severity of the prohibition, opened the door rather wide to appeals, that door was firmly closed by the decision of the House of Lords in *Donald Campbell & Co., Ltd. v. Pollak* (3) ([1927] A.C. 732). As a result of that decision, the only cases where an appeal on costs only can be

brought without leave are the extreme and, happily, rare cases where it can be said that the judge had no materials connected with the case on which he could exercise his discretion in the way he did. In the passage to which my Lord has referred, SCRUTTON, L.J., in his usual way, stated the matter emphatically and concisely. Counsel for the plaintiff company, however, relied to a large extent on the words of LORD GREENE, M.R. (to which my Lord has also referred), in *Hong v. A. & R. Brown, Ltd.* (2) ([1948] 1 All E.R. 185). For my part I think that, in referring to the word "judicially" and in saying that the discretion must be exercised judicially, he is using that word in contradistinction to "arbitrarily", in the sense of the illustrations given by LORD CAVE in *Donald Campbell & Co., Ltd. v. Pollak* (3).

That being the position, it seems to me quite impossible in this case to say that there was nothing connected with the case which would enable the judge to deprive the plaintiffs of their costs. He clearly took a very unfavourable view of Mr. Popper and found that his evidence was unreliable. It is true that he also found that the defendant's evidence was unreliable. However, that does not mean that the adverse view of Mr. Popper's evidence was, as it were, cancelled out. Indeed, it is clear that Mr. Popper in his evidence was charging the defendant with dishonesty, for which there was no justification whatsoever. Even so, counsel for the plaintiff company goes on to argue that the company and Mr. Popper were two separate legal entities and that the judge in effect was penalising the company for the sins of Mr. Popper; and in that connexion he referred to *Hudsons, Ltd. v. De Halpert* (1) ((1913), 108 L.T. 416). Like my Lord, I very much doubt whether the decision in that case, in so far as it is based on that principle, can be correct. A company can only give evidence by its responsible officers, and if one of those officers gives evidence which is subject to criticism then it seems to me that the company itself must accept responsibility.

Finally, counsel for the plaintiff company pointed out, with some force, that in regard to the counterclaim at any rate Mr. Popper's evidence was wholly accepted, whereas the defendant's evidence was wholly rejected; and in those circumstances he says that there could be no material on which the judge could deprive the plaintiffs of the costs of the counterclaim. I think for myself that the answer to that is that in a case such as this, where the counterclaim amounts to an equitable set-off, it is only right that the judge should deal with the claim and cross-claim as one, and looked at in that way it seems to me that no valid distinction can be drawn between the way in which he should exercise his discretion in regard to the claim and in regard to the counterclaim.

For those reasons, and for the reasons given by my Lord, I also would dismiss this appeal.

PEARCE, L.J.: I agree.

Appeal dismissed.

Solicitors: *P. Cromwell* (for the plaintiff company); *Herbert Oppenheimer, Nathan & Vandyk* (for the defendant).

[Reported by HENRY SUMMERFIELD, Esq., Barrister-at-Law.]

A

WARD v. WARD.

[SCARBOROUGH DISTRICT REGISTRY (His Honour Judge McKee, sitting as a Special Commissioner in divorce), September 20, 1957, February 10, 1958.]

Divorce—Cruelty—Child-bearing—Refusal of wife to bear children—Refusal of sexual intercourse—Wife's loss of interest in husband—Injury to husband's health—Intentional acts of wife.

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The parties were married in 1953 and there were no children. The husband was a marine engineer and lived with his wife when on leave. The husband was anxious to have children and before the marriage he had told the wife of his desire. After the marriage the wife refused to allow the husband to have sexual intercourse unless he used a contraceptive, and even then she in fact allowed intercourse on only about twenty occasions during the marriage. Whenever the husband raised the question of having children the wife gave pretexts such as that they would wait until they had their own home or until their own home was properly furnished. On his return to his ship from leave the husband wrote to the wife making it clear that he was upset by her attitude and that his fondness for children was being frustrated. In January, 1957, the husband returned home on leave and when he again raised the question of children she said that she had lost all interest in him, that she had never loved him and had only married him to get away from home and that she would not allow him to have any more sexual intercourse. She then moved to a separate bedroom. In March, 1957, the parties went together to consult a doctor, but the wife was adamant in her attitude. As a result of the wife's conduct, the husband became nervous, suffered from insomnia, and was unable to make decisions which caused him anxiety and inconvenience in his work. On a petition by the husband for divorce on the ground of the wife's cruelty,

Held: the wife was guilty of cruelty in law since the husband had suffered substantial injury to his health which, though not desired by the wife, was in fact caused by her intentional refusal to bear his children (which she knew caused him distress), coupled with her cruel statement in January, 1957, of her feelings towards him and of her motives in marrying him; and the husband was, therefore, entitled to a decree.

Forbes v. Forbes ([1955] 2 All E.R. 311) applied.

[As to cruelty on the part of the wife, see 10 HALSBURY'S LAWS (2nd Edn.) 650, para. 955, note p; and for cases on the subject, see 27 DIGEST (Repl.) 307, 308, 2538-2552; and for cases on the subject of intention presumed from acts, see *ibid.*, 296, 2415, 2416.]

Cases referred to:

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- (1) *Russell v. Russell*, [1897] A.C. 395; 66 L.J.P. 122; 77 L.T. 249; 61 J.P. 771; 27 Digest (Repl.) 307, 2551.
- (2) *Jamieson v. Jamieson*, [1952] 1 All E.R. 875; [1952] A.C. 525; 1952 S.C. (H.L.) 44; 116 J.P. 226; 3rd Digest Supp.
- (3) *Kaslefsky v. Kaslefsky*, [1950] 2 All E.R. 398; [1951] P. 38; 114 J.P. 404; 27 Digest (Repl.) 296, 2413.
- (4) *Squire v. Squire*, [1948] 2 All E.R. 51; [1949] P. 51; [1948] L.J.R. 1345; 112 J.P. 319; 27 Digest (Repl.) 296, 2415.
- (5) *Fowler v. Fowler*, [1952] 2 T.L.R. 143; 3rd Digest Supp.
- (6) *Lang v. Lang*, [1954] 3 All E.R. 571; [1955] A.C. 402; 119 J.P. 368; 3rd Digest Supp.
- (7) *Waters v. Waters*, [1956] 1 All E.R. 432; [1956] P. 344; 120 J.P. 105; 3rd Digest Supp.
- (8) *Ingram v. Ingram*, [1956] 1 All E.R. 785; [1956] P. 390; 3rd Digest Supp.
- (9) *Knott v. Knott*, [1935] All E.R. Rep. 38; [1935] P. 158; 104 L.J.P. 50; 153 L.T. 256; 99 J.P. 329; 27 Digest (Repl.) 695, 6643.

(10) *Forbes v. Forbes*, [1955] 2 All E.R. 311; [1956] P. 16; 119 J.P. 403; A 3rd Digest Supp.

(11) *King v. King*, [1952] 2 All E.R. 584; [1953] A.C. 124; 3rd Digest Supp.

Petition.

This was a petition by the husband for divorce on the ground of the wife's cruelty.

The parties were married in April, 1953, when the husband was twenty-six years of age and the wife nineteen. There were no children. The husband was a marine engineer and at the wife's insistence he agreed to continue to go to sea. When the husband was home on leave, the parties lived together first at a flat belonging to the wife's aunt and later, since 1955, at a house bought by the husband on mortgage. Throughout the marriage the husband was very anxious to have children, and he had made his desire known to the wife before marriage telling her that he thought that she would make an excellent mother. The wife, however, throughout the marriage refused to allow the husband to have sexual intercourse unless he wore a contraceptive, giving various excuses for not wanting a family, e.g., while at the aunt's flat she said that they ought to wait until they had a home of their own, and when they were in their own house she said that they ought to wait until it was furnished to her satisfaction; in fact she allowed him to have sexual intercourse only on rare occasions (about twenty times during the marriage). In January, 1957, the husband returned home on leave. After about a week the wife allowed him to have sexual intercourse, but when the husband once again raised the question of having children she replied that she did not love him, and that she had only married him to leave home and that she had no intention of having a child. Thereafter she refused the husband any sexual intercourse at all and slept in a separate bedroom. The husband was in a highly nervous state and on Mar. 1, 1957, on the advice of his solicitor the husband persuaded the wife to go with him to see a doctor, in order that the doctor could discuss with the wife her attitude about not having children and also so that the doctor could see the husband's state of health. The wife remained adamant in her attitude and shortly afterwards she left the matrimonial home and never resumed cohabitation with the husband. In the same month the husband also consulted his shipping company's doctor about his health.

On Mar. 11, 1957, the husband presented a petition for divorce on the ground of the wife's cruelty: as particulars of cruelty he alleged that:

"The [wife] has throughout the marriage refused to have sexual intercourse with the [husband] without the use of a contraceptive and has refused to bear him a child and has persisted in the course of conduct knowing that the [husband] desired a child and that her conduct was affecting his health . . ."

The suit was undefended and came before His Honour JUDGE MCKEE sitting as a special commissioner in divorce at York on Sept. 20, 1957. The husband had been recalled to his ship on Sept. 5, and his evidence was by leave given on affidavit. A doctor was called and stated that when the parties consulted her the wife was quite adamant in her refusal to have sexual relations with the husband and that she saw no chance of resuming them; that the husband told her he was intensely miserable and becoming a nervous wreck and that he appeared to her to be much more distressed than the wife; that the wife told her that the husband was away for long periods at sea, that she had completely lost all interest in him, that the whole business of sexual relations was distasteful to her and that she utterly lacked any interest in the husband. At the conclusion of the hearing the commissioner adjourned the case for argument by the Queen's Proctor. At the resumed hearing at Leeds on Feb. 10, 1958, the husband was called in person and was cross-examined. He stated that he had persuaded the wife to come with him to see the doctor by telling her that, if she

A wanted a divorce and to be rid of him, she had better come to the doctor with him; he also stated that he had visited his own shipping company's doctor for his nervous condition for the first time in March, 1957. As to his state of health, he found that on returning to his ship from leave he could not sleep for about three weeks, that he found it difficult to make decisions, and he developed a cough and a stammer; he stated that on several occasions after the end of a leave he had written to the wife discussing the problem and mentioning the effect of her conduct on his health.

C. D. Chapman and T. R. Nevin for the husband.

The wife was not represented and did not appear.

C J. R. Cumming-Bruce for the Queen's Proctor: In order to constitute cruelty there must be actual or apprehended injury to health (*Russell v. Russell* (1), [1897] A.C. 395), and the conduct which had that effect might either be accompanied by an actual intention to be cruel, or might consist of a series of intentional acts from which a cruel intention should be inferred. In deciding on the inference to be drawn from deliberate acts, the court might presume that a person intended the natural and probable consequences of his acts; where there had been gross brutality, such a presumption might readily arise, though it remained rebuttable, but in a case not of gross brutality but of the refusal of one spouse to accept the responsibility of matrimony, either as to sexual intercourse or as to the conception of children, the presumption that that spouse intended the natural and probable consequences of his or her acts applied, though it was far more difficult for the court to determine what those consequences were likely to have been. In other words, it was not to be assumed that the presumption necessarily arose where a wife had refused to accept the responsibility of marriage and the husband had suffered. The following cases were referred to: *Jamieson v. Jamieson* (2) ([1952] 1 All E.R. 875), *Kaslefsky v. Kaslefsky* (3) ([1950] 2 All E.R. 398), *Squire v. Squire* (4) ([1948] 2 All E.R. 51), *Fowler v. Fowler* (5) ([1952] 2 T.L.R. 143), *Lang v. Lang* (6) ([1954] 3 All E.R. 571), *Waters v. Waters* (7) ([1956] 1 All E.R. 432), *Ingram v. Ingram* (8) ([1956] 1 All E.R. 785), *Knott v. Knott* (9) ([1935] All E.R. Rep. 38), and *Forbes v. Forbes* (10) ([1955] 2 All E.R. 311), and it was submitted that the facts in the last-cited case were similar to those in the present case, except that in *Forbes v. Forbes* (10) the wife had taunted the husband with his desire for children thereby showing evidence of a "deliberate malignation". Finally, it was submitted that if the court found that the wife was wholly selfish in her determination to subject her spouse and her marriage to her personal wish not to have children and not to have normal intercourse and if that was a quite "unjustifiable" attitude (per LORD NORMAND in *King v. King* (11), [1952] 2 All E.R. 584 at p. 586) and if it were the case that these intentional refusals did have the effect of serious injury to his health, then the court could hold that there was a cruel intention on the part of the wife which caused injury to the husband's health, and that the wife's conduct accordingly amounted to cruelty in law.

H T. R. Nevin, for the husband, relied on *Forbes v. Forbes* (10) ([1955] 2 All E.R. 311), and distinguished *Fowler v. Fowler* (5) ([1952] 2 T.L.R. 143) on the ground that the husband in the present case drew the wife's attention to the effect that the wife's conduct was having on him. The source of the trouble lay in the selfishness of the wife, who must be taken to have intended the natural and probable consequences of her acts (*Squire v. Squire* (4), [1948] 2 All E.R. 51).

I MR. COMMISSIONER McKEE: First of all, I would like to thank learned counsel for the assistance which they have given me in this case.

When this matter was before me in York, I felt considerable doubt about it because this picture there presented to me was of a husband who spent long periods away from his very young wife. His marriage, at its commencement, had been happy, although there had been some sexual difficulty, but by the

beginning of 1957 his wife was entirely refusing sexual intercourse and was refusing ever to bear children. At an interview with the doctor, which I then understood was an interview for the purpose of seeing if the wife could be persuaded to take a different view, the wife had said that her husband was away for long periods at sea, and that she had completely lost all interest in him. She said that the whole business of sex was distasteful to her and that she was utterly lacking in any interest in her husband. The picture which I got was of a shy young wife who, as time went on, saw less and less of her husband, and who gradually, to use a phrase that I used to counsel for the husband, "fell out of love" with him until he became repugnant to her and she ceased to have any desire for sexual intercourse with him. In those circumstances, I found it extremely difficult to say that cruelty was proved, or to say exactly what the position was, and I asked for the assistance of the Queen's Proctor, which I have been given in full measure.

Today, I have had the advantage of seeing the husband in person and hearing his evidence; and I accept his evidence as being that of a truthful man. He was not hesitant to give answers that no doubt he felt might well have been against him, and I think he was completely truthful. The picture that I have now got is, to my mind, a very different one from the picture that I had in York. Before this young couple married, the husband had made clear to the wife his desire for children. He had told her that he thought that she would make a splendid mother, and I gather that that was one of the reasons that induced him to marry her. It is significant that at that time it was his idea that they should not get married for some two years, until she was twenty-one; but she desired to get married immediately. On their honeymoon, the wife did not, I think, refuse sexual intercourse in so many words, but wore a sanitary protection which made intercourse impossible between them during that period. The wife was living in a flat with an aunt, and when, on his next leave, the husband discussed having children, the wife proceeded to give the excuse that she did not want to have children while they were living in a flat. She did not want to have children until they had got a house of their own, which might be a perfectly truthful and understandable attitude for a woman to take.

A house of their own was procured in about the middle of 1955, some two years after the marriage, and the husband's savings were used to furnish it. The furniture, however, was not all new furniture, and when next the husband raised the question of having children because they had now their own house, he said the answer was, "No, we don't want children yet. We really cannot afford a child, because now I want the house to be well furnished. I want it furnished with new things and we cannot afford a child until that is done". When the husband went on his next voyage, the wife, in fact, took the opportunity, while he was away, to sell some of the furniture of whose design she disapproved, and on his return, pointed out, once again, that they still had not got a fully furnished home. This went on until March, 1956, when the husband went on a voyage which was to last for seven months. He had chosen such a long voyage, rather than a shorter one, because she said that if he went on a shorter voyage, it did not give her time to turn round. I suppose by that she meant that it did not give her time to get the home together and build it up. In any event, to satisfy her wishes, he went on a seven months' voyage which, in fact, turned out to be longer than seven months; it lasted right up to January, 1957, some eight or nine months. He then returned.

Now the wife had, throughout the married life, when he was on leave, allowed him intercourse on only rare occasions, and then had insisted on his use of a contraceptive. He told me that he had argued with her about this but every time she had given one of the excuses to which I have already referred. He told me, too, that after his return to his ship, he found that he was nervous; that he was suffering from insomnia; that he was unable to make decisions; and that as an engineer in charge of the engines of a ship, and the personnel in the

A engine room, this caused him anxiety and inconvenience. He told me that he wrote to his wife on his return to his ship from leave. It was not clear whether he was pointing out that her refusal to have intercourse was affecting his nerves, or whether he was pointing out to her his bitter disappointment and frustration at her refusing to bear children; but I think that it is at least clear that he was bringing to her mind that he was very upset by her attitude; that his fondness
B for children was being entirely frustrated, and, no doubt, that he had taken every step which he could to satisfy her demands and to put her into the position, as regards her house and furniture and so on, into which she demanded to be put before she was prepared to bear his children.

When he came back in 1957, the wife had hardened in her attitude very considerably. She then told him that she had only married him to get away
C from home, that she had no real affection for him; and, I think, she was saying, in effect, that she never had any real affection for him. She was not prepared to let him have intercourse and she was not prepared to bear any children. She also told him that she wanted a divorce. On that, the husband consulted his solicitor, and on the advice of his solicitor they went to see a doctor. I think that the object of that visit was possibly twofold. Primarily it was to let the
D doctor see the nervous state in which the husband then was, and to put before the doctor what he alleged was the cause of that state, namely, his wife's refusal to have intercourse or to bear children so that the doctor would be available to give evidence as to that. Secondly, I think that there may have been some lingering hope in the husband's mind that it was just possible that his wife might, on seeing the doctor, change her mind. However, when she got before the
E doctor, the doctor's description of her attitude is that she was adamant that she was not going to bear any children and she was not going to have any sexual intercourse. The doctor's evidence with regard to the husband was that he was distressed; that he was nervous, and that he was in a much worse state than his wife, who seemed upset, but not particularly distressed.

Those I believe to be the facts in the present case. I entirely accept the
F law as submitted by counsel for the Queen's Proctor, and applying the law to those facts, I have to decide, first: Was the husband's health materially injured? I think it was. It struck me as very curious, when he gave his evidence, that he never complained that his health was affected while he was actually living with his wife, but that his health was affected when he got back to his ship. However, I think that that may be accounted for in this way. His wife, at one
G time, rather softened towards him—I think it was on his second leave (September, 1953) that she became more affectionate and had shown some warmth towards him. That had happened once while he was with her, and I have little doubt that he was a man of considerable patience, and he was hoping, all the time that he was with her, that once again that was going to happen. In fact it did not. When he got back to his ship and realised that once again his efforts
H had failed and that he was no better off as regards his relationship with his wife than he had been before, then the reaction came on him. That all built up until January, 1957, when, on coming home from a long voyage, no doubt hoping, as he had been for many months, that once again his wife would soften towards him and they could get together, he was met with what, in the circumstances, was really a cruel remark by his wife—the statement that she had no affection
I for him; that she had only married him to get away from home—and this was combined with absolute refusal to carry out two of the fundamental duties of married life. That was the final straw, and it accounted for his state when he appeared before the doctor. I think that there was substantial injury to his health.

Then I have to consider what was the wife's intention in refusing to have intercourse with the husband, and in refusing to bear his children. If one might use a vulgar phrase, I think it had been her intention, when marrying him, to use him as a "meal ticket"—someone who was prepared to support her, to

look after her, to take her away from her home in which, apparently, she had not been very happy. It was not her desire to drive him away. I have little doubt that it was not her desire to injure his health, but she quite intentionally refused to bear his children, and she knew that that was causing him distress, and had caused him distress over a number of years. When he came back in the beginning of 1957, she added to that refusal, not taunts, as in *Forbes v. Forbes* (10) ([1955] 2 All E.R. 311), but what I have already described as cruel statements of her feelings towards him and of her motives in ever marrying him.

I am satisfied that those acts were deliberate. I am satisfied that she knew what she was doing; that she knew they caused distress to her husband, but that she was so selfish that she was quite prepared to cause injury to her husband rather than give way herself. If her statement was true, that the only reason she married the husband was because she wanted to get away from home and never had any affection for him, one can well understand how that attitude came about. Applying the law, which has been so ably put to me, to the facts of this case, I find that cruelty here is made out, and that the husband is entitled to his decree.

Decree nisi.

Solicitors: *Whitfield, Bell & Smith*, Scarborough (for the husband); *Queen's Proctor*.

[*Reported by A. T. HOOLAHAN, Esq., Barrister-at-Law.*]

BAILEY v. AYR ENGINEERING & CONSTRUCTIONAL CO., LTD. AND ANOTHER.

[COURT OF APPEAL (Jenkins, Parker and Pearce, L.JJ.), April 18, 1958.]

Building—Building Regulations—Falling material or article—Whether includes part of structure which becomes detached—Building (Safety, Health and Welfare) Regulations, 1948 (S.I. 1948 No. 1145), reg. 90 (1).

The plaintiff was employed by electrical sub-contractors to fix wires inside an open brick shaft in a building which was under construction. At the material time this shaft ran up to the fifth floor and was built up eighteen inches above that floor, on which no one was working when the plaintiff began work. The top of the shaft was not covered. Three employees of other sub-contractors, who supplied and installed ironwork, in trying to manhandle some iron railing between the fourth and fifth floors, lost control of the railing, which hit the top of the brick shaft and knocked loose a block of masonry from it. This masonry fell down the shaft on to the plaintiff, whom it injured. By reg. 90 (1)* of the Building (Safety, Health and Welfare) Regulations, 1948, any place on the site of the operations at which any person is habitually employed must be covered in such manner as to protect any person who is working in that place from being struck by any falling material or article.

Held: (i) the plaintiff's employers were not in breach of their duty at common law, because it was not reasonably foreseeable that masonry of the shaft would be broken and knocked down the shaft.

(ii) neither were the plaintiff's employers liable to him for breach of statutory duty under reg. 90 (1), because the "falling material or article" against which that regulation required cover to be provided did not include material which had become part of the structure of the building (see p. 226, letter B, post).

* Regulation 90 (1) is printed at p. 225, letter G, post.

A Per CURIAM: the inside of the shaft was a "place on the site of the operations at which any person is habitually employed" within the meaning of reg. 90 (1) (see p. 225, letter I, post).

Kearns v. Gee, Walker & Slater, Ltd. ([1936] 3 All E.R. 151) applied.
Appeal allowed.

B [As to the special regulations for safety, etc., in building operations, see 17 HALSBURY'S LAWS (3rd Edn.) 127, para. 206, particularly text and notes (u) (x).]

For the Building (Safety, Health and Welfare) Regulations, 1948, reg. 90 (1), see 8 HALSBURY'S STATUTORY INSTRUMENTS 245.]

Case referred to:

C (1) *Kearns v. Gee, Walker & Slater, Ltd.*, [1936] 3 All E.R. 151; [1937] 1 K.B. 187; 106 L.J.K.B. 16; 155 L.T. 519; 24 Digest (Repl.) 1075, 328.

Appeal.

The first defendants, the plaintiff's employers, appealed against as much of the decision of LLOYD-JACOB, J., dated July 18, 1957, as held them liable to the plaintiff for £573 ls. 9d. damages for personal injury and costs, and thirty per cent. liable as between themselves and the second defendants, who were also found liable to the plaintiff. The second defendants cross-appealed against LLOYD-JACOB, J.'s decision as to costs as between the defendants.

H. I. Nelson, Q.C., and *R. E. Hopkins* for the first defendants, the employers.
D. P. Croom-Johnson, Q.C., and *J. Hornsby* for the second defendants.

E *F. B. Purchas* for the plaintiff, the workman.

JENKINS, L.J.: I will ask PARKER, L.J., to deliver the first judgment in this case.

F PARKER, L.J.: This is an appeal by the first defendants from a judgment of LLOYD-JACOB, J., given on July 18, 1957, under which he awarded the plaintiff a sum of £573 ls. 9d. damages in regard to personal injuries, both against the first defendants and against the second defendants, with costs. There are two appeals in this case, the first being the appeal by the first defendants against the finding of liability to the plaintiff, and the second an appeal by the second defendants in regard to costs only as between themselves and the first defendants.

G The facts here are in quite a short compass. In the summer of 1954 a large block of flats was being erected, known as Highbury Quadrant, at Highbury New Park, London. There was a number of contractors on the site (the head contractors being Messrs. Terson) and, amongst others, the first defendants, who are electrical engineers, and the second defendants, who, as their name shows, supplied ironwork—in this case certain railings for the staircases, and installed them. The building was a building of some five storeys; and, as I understand it, the brickwork had been almost entirely completed and the staircases were erected. The staircases, which went from half-landing to half-landing, did not go round a lift shaft, as so often happens, but went round something rather like a brick chimney, into which there were openings at each half-landing. The object of that brick chimney was twofold: first, that it should serve the purpose of a chute for the disposal by the tenants of the flats of their refuse, there being on each half-landing a door through which they could throw out the refuse. That was to go down an earthenware pipe. Behind the earthenware pipe, forming, as it were, the back part of this chimney, was an open shaft with an entrance at the bottom on the half-landing between the ground floor and the first floor, and the back of that shaft was designed to carry up the electric supply wires, the gas piping, and the plumbing for the service of the different flats. At the material date, this chimney did not go completely up to the roof, as it was ultimately going to do, but went up to the fifth floor. It did not end flush with

that fifth floor, but was built up rather like a parapet for a further eighteen inches. A

On June 16, 1954, the plaintiff (who was then a young man under twenty-one years of age and an apprentice) went with a Mr. Evans, who was in charge of him, to the site to begin bringing up the electric wires in a conduit through the back of this shaft. He entered the shaft through the opening which I have described on the half-landing between the ground floor and the first floor, and inserted a ladder and began to Rawlplug the interior of the shaft to carry up the conduit pipe. Mr. Evans, who apparently was a rather stout man, was unable to get into the shaft, and he remained outside giving directions. After some twenty minutes or half an hour had elapsed, this unfortunate plaintiff was struck on his back by a large block of masonry, something like eight or ten bricks still firmly joined together with cement: indeed, it may be said that he was very lucky not to have been hit on the head and killed. He suffered injuries in respect of which this action is brought. It was later found that the cause of this fall was that three employees of the second defendants had meanwhile been taking up to the fifth floor a section of iron railings, to form part of the staircase railing. The section was some two and a half hundredweight in weight and some thirteen or fourteen feet long: what they did was to raise it outside the building by means of a pulley and bring it into the building on the fourth floor: then their intention was to manhandle it from the fourth floor on to the fifth floor, from which it was going to be erected. Apparently in the process of manhandling this rather cumbersome object up the last flight of stairs they lost control (as the judge found) of this heavy piece of metal, and, acting as a sort of battering ram, it broke down the top of the shaft and this considerable block of masonry thereby fell on the plaintiff. B C D E

In those circumstances, the plaintiff brought these proceedings. He claimed against the first defendants, as his employers, that they had been guilty of a breach of their duty at common law, and also that they were in breach of a statutory duty under reg. 90 of the Building (Safety, Health and Welfare) Regulations, 1948. He also joined the second defendants, alleging that they had been guilty of a breach of their common law duty, the duty owed to their neighbours; and also that they were in breach of reg. 94 of those regulations. The only appeal here in regard to liability is an appeal by the first defendants. It is quite clear that in manhandling these railings the three people concerned, or one or more of them, were guilty of negligence for which their employers are liable, and there is no appeal in regard to that whatsoever. However, the learned judge also held that the plaintiff's employers, the first defendants, were guilty of a breach of both their common law duty and their statutory duty, and, as between them and the second defendants, held them thirty per cent. to blame. F G

To deal first with the duty at common law, an employer must take reasonable steps so to conduct his operations as not to expose his workmen to unnecessary risk. It is said (and the judge so held) that the first defendants, through Mr. Evans, were in breach of their duty in that they did not take proper steps, either by putting a cover over the top of the shaft or by putting up warning notices, in order to save the plaintiff from injury. The first question is whether a reasonable employer could properly foresee, in the circumstances of this case, any injury to his workmen. Quite clearly no one could reasonably have contemplated the actual accident which occurred. Nobody could reasonably contemplate that other contractors' men would take a bit of metal and bang down part of the structure on the workman, but of course that is not the test. The question is: could a prudent employer reasonably foresee injury through objects coming down this shaft on to the plaintiff working at the bottom. H I

Counsel for the second defendants says that there is a risk always of objects going down shafts—for instance a lift shaft during the course of construction of a building—and causing serious injury. Indeed the risk is well known. It is,

- A however, important to look at the exact facts of this case. The top of the shaft did not, as I have said, form a hole flush with the floor through which loose materials or tools might slip or be kicked and fall. The top of the shaft was built up some eighteen inches above the floor, and, unless people were working there and conducting some operation there, I cannot see how Mr. Evans should reasonably contemplate that somebody would go and drop something down it.
- B The evidence was that he went up at the very beginning to the fifth floor, partly to see whether the work could be done from the top rather than from the bottom, but also to make sure (as he said) that there was no one working there. He found that whereas there were various contractors' men in the flats there was no one working on this fifth floor at all; and I cannot see, at that stage at any rate, why he should contemplate that anybody would drop material down the chute, much less break down the parapet and send the masonry down.
- C The matter does not, however, end there, because while the plaintiff was so engaged Mr. Evans in fact saw these railings being raised by means of a rope outside the building: he knew quite clearly that they were going to be brought into the building and affixed—he was not certain where. Granted, however, that he saw that and realised that these railings would have to be affixed to the structure
- D higher up, again I can see no ground on which it could be suggested that he ought to have contemplated that those men would have caused something to go down this shaft. The learned judge, in one part of his judgment, said this:

E “I myself entertain no doubt whatsoever that no employer should suppose that any of their employees can be required to insert themselves into an open shaft, particularly of the height of this shaft, unless they have taken pains to see that all means of access to that shaft are protected against the intrusion of any object.”

- F That is a very emphatic statement, and it ignores the question whether it can reasonably be foreseen that any objects will be intruded; because if it cannot be reasonably foreseen that any objects will be intruded then there can be no duty to cover the aperture or to give notice. For my part, I do not think that the plaintiff in this case made out his claim against the employers for breach of common law duty.

There remains the claim under reg. 90 (1). That reads as follows:

- G “Any place on the site of the operations at which any person is habitually employed shall be covered in such manner as to protect any person who is working in that place from being struck by any falling material or article.”

Although that regulation is by no means clearly worded, it has remained in that form since 1926, when it first appeared as para. 31 of the building regulations of that year, made then under the Factory and Workshop Act, 1901.

- H Two questions really arise on that regulation: one whether the place where the plaintiff was working was a “place on the site of the operations at which any person is habitually employed”, and secondly, whether this block of masonry which was broken off from the structure of the building can be said to be “any falling material or article” within that regulation. As regards the meaning of the word “habitually”, the matter was considered by this court in *Kearns v. Gee, Walker & Slater, Ltd.* (1) ([1936] 3 All E.R. 151). I need not refer to the facts of that case: it is enough to say that the court approached the matter on the basis that the regulation is defining the place and not the person which is to be protected; and the question here is not whether this plaintiff was “habitually employed” there but whether this was (if I may put it in this way) an “habitual” place of employment, or a contemplated place of employment, where men would work, not casually, but habitually. Looked at in that way, it is a question of degree, and I do not think that I would be prepared to differ from the learned judge, who held that, in the circumstances of this case, the place of work of the plaintiff was a place of work to which that regulation applied. This shaft

was intended to be used for electrical wires, gas piping, and water pipes, and that would entail the various trades concerned going, as part of their job, from time to time into the shaft to effect the necessary work. A

The question remains whether this block of masonry can be said to be "any falling material or article" within that regulation. There is no doubt that those words are wide and, on the face of them, unqualified; but I find it impossible to construe this regulation as applying to material which has become part of the structure and affixed to the freehold. It seems to me that this regulation is applying to things such as scaffold materials, and tools, and also to materials such as bricks and the like, which have not become affixed to the structure but which it is intended should be affixed to the structure—and, of course, the ordinary builders' debris. It is relevant just to glance at para. 2 of that very regulation, which is referring to "scaffold materials, tools and other objects and material (including waste material)". It is provided that that B C

"shall not be thrown, tipped or shot down from a height where they are liable to cause injury, but shall be properly lowered."

Then, when it goes on to deal with demolition, it deals specifically with "part of a structure", because it goes on D

"in any place where proper lowering is not practicable and also where any part of a structure is being demolished or broken off adequate steps shall be taken, where necessary, to protect persons employed from falling or flying debris."

Finally, it is to be observed that in reg. 94 provision is made for safeguarding workmen from the collapse of the structure. E

Regulation 90 is designed to protect men working at sites where the men habitually do work from what I may call falling materials and debris of that kind and not from a collapse of the structure, whether it be a chimney, a roof, or (as in this case) part of a shaft. If in fact this plaintiff had been hit by a hammer or a loose brick falling down the shaft the first defendants would have been liable to him for breach of that regulation. Accordingly this is a case where they cannot say they were not in breach of the regulation at all, because it was their duty to take steps to put up some umbrella, albeit only an umbrella designed to prevent materials and debris and tools from falling down. Be that as it may, and assuming, as I do, that they were in breach, it was not that breach which caused the injuries in this case, but the fact that this block of masonry, something which is completely outside the regulation, fell in the way I have described. F G

In those circumstances, I have come to the conclusion that the first defendants' appeal succeeds and that they are under no liability to the plaintiff, whether at common law or under the regulation. That being so, the second defendants' appeal in regard to costs does not arise in this case.

For those reasons, I would allow the first defendants' appeal and dismiss the second defendants' appeal. H

PEARCE, L.J.: I agree.

JENKINS, L.J.: I also agree; and, although we are differing from the learned judge, I find nothing that I can usefully add to the reasons given by PARKER, L.J.

Appeal of first defendants allowed. Appeal of second defendants dismissed. I

Solicitors: *Hextall, Erskine & Co.* (for the first defendants, the employers); *Watson, Sons & Room* (for the second defendants); *Rowley, Ashworth & Co.* (for the plaintiff, the workman).

[Reported by HENRY SUMMERFIELD, Esq., Barrister-at-Law.]

A

NOTE.R. v. MEDICAL APPEAL TRIBUNAL FOR SOUTH WALES DISTRICT, *Ex parte* GRIFFITHS.

B [QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Hilbery and Donovan, JJ.), April 16, 1958.]

Industrial Injury—"Organ of the body"—*Injury to leg*—*Previous injury to other leg*—*Whether legs were two similar organs, the functions of which would be interchangeable or complementary*—*National Insurance (Industrial Injuries) (Benefit) Regulations, 1948 (S.I. 1948 No. 1372), reg. 2 (5).*

C

[As to disablement benefit, see SUPPLEMENT to 34 HALSBURY'S LAWS (2nd Edn.) para. 1467.

For the National Insurance (Industrial Injuries) (Benefit) Regulations, 1948, reg. 2 (5), see 15 HALSBURY'S STATUTORY INSTRUMENTS 324.]

D

Cases referred to:

(1) *R. v. Medical Appeal Tribunal, Ex p. Burpitt*, [1957] 2 All E.R. 704; [1957] 2 Q.B. 584.

(2) *Re Gilmore's Application*, [1957] 1 All E.R. 796; sub nom. *R. v. Medical Appeal Tribunal, Ex p. Gilmore*, [1957] 1 Q.B. 574.

E

Motion for certiorari.

The applicant, Richard Griffiths, a colliery conveyor operator, who had sustained a disabling injury to his right leg in a colliery accident while subject to disability due to injuries received in the 1914-18 world war to his left leg, moved for certiorari to quash a decision of the Medical Appeal Tribunal for the South Wales District, dated Mar. 21, 1957, on the ground that the tribunal did not make an assessment of the disability arising from the condition of his left leg while making an assessment of the disability from the injury to his right leg, having regard to the provisions of reg. 2 (5) of the National Insurance (Industrial Injuries) (Benefit) Regulations, 1948.

F

G. G. Baker, Q.C., and *W. N. Francis* for the applicant.

G

Rodger Winn for the respondents.

LORD GODDARD, C.J., said that the only question submitted to the court was whether legs were to be regarded as organs and a leg as one of two similar organs within the words in reg. 2 (5) of the National Insurance (Industrial Injuries) (Benefit) Regulations, 1948, "one of two similar organs, the functions of which would be interchangeable or complementary".

H

This case seemed to be governed entirely by *R. v. Medical Appeal Tribunal, Ex p. Burpitt* (1) ([1957] 2 All E.R. 704), in which this court held that hands were organs, and fingers of one hand which had been injured in an accident were similar organs within reg. 2 (5). The court decided that the hand or a finger was an organ, and they decided that having regard to the definitions of organs which were found in the OXFORD ENGLISH DICTIONARY. Since the court had so found, although DEVLIN, J., seemed to have had doubt whether a leg was an organ, it appeared to follow that, if a hand was an organ a foot was an organ—for if a hand was an organ an arm was an organ, and if an arm was an organ a leg was an organ and came within the words of reg. 2 (5) and what the legislative authority must have meant when they were using the words "similar organs". It also seemed that in *Re Gilmore's Application* (2) ([1957] 1 All E.R. 796), DENNING, L.J., who gave the leading judgment, quite obviously thought that a leg was an organ. He

I

said (*ibid.*, at p. 798): "Regulation 2 (5) deals with an injury to one of two 'paired organs', as they are called, such as eyes, legs, and so forth". A

For this reason *R. v. Medical Appeal Tribunal, Ex p. Burpitt* (1) applied to this case, and, therefore, the order of certiorari must go on the ground that legs were paired organs, and a separate assessment must be made in respect of the left leg as well as an assessment in respect of the right leg. B

HILBERY, J., and DONOVAN, J., agreed.

Order accordingly.

Solicitors: *Botterell & Roche*, agents for *T. S. Edwards & Son*, Newport (for the applicant); *Solicitor, Ministry of Pensions and National Insurance* (for the respondents). C

[*Reported by G. A. KIDNER, Esq., Barrister-at-Law.*] C

NOTE.

WILLIAMSON v. BRITISH BOXING BOARD OF CONTROL (1929) AND OTHERS. D

[QUEEN'S BENCH DIVISION (Devlin, J.), April 23, 1958.]

Practice—Trial—Cause list—Removal of case from cause list—Order obtained by defendants dismissing jury action against them for want of prosecution—Crown Office not notified of order so that case left in list and brought on for hearing—Duty of both parties' solicitors to notify Crown Office of order—Liability for costs thrown away—R.S.C., Ord. 36, r. 29 (6). E

DEVLIN, J.: This is the second case* in this list in which notification has not been given to the Crown Office of some order that has been made in chambers which has affected the hearing of the action. In the case which I dealt with the other day* it was an order made by the master taking the case out of the term's list. In this case† it is an order which the only remaining defendant in the action, the third-named defendant, got, viz., an order by which the action against him was to be dismissed for want of prosecution under R.S.C., Ord. 31, r. 21. The Crown Office was not given the necessary information in order to enable it to take the case out of the list, and in this case as in the last case the solicitors have blamed each other, each saying that it was the duty of the other to take the necessary steps to inform the Crown Office. F

The overriding rule in this matter is R.S.C., Ord. 36, r. 29 (6)‡, which makes it abundantly plain that it is the duty of both solicitors to take the necessary steps, and that it is not open to either of them to advance the argument that the responsibility lay wholly on the other. If solicitors want to be safe in this matter the proper course to take is for each one of them to make sure that the Crown Office is notified; and it is because of the importance of the Crown Office being G

* See *Kloss and Another v. Curtis*, "The Times", Apr. 18, 1958.

† On Apr. 15, 1958, the present case was brought on for trial before DEVLIN, J., and a jury, whereon the judge ordered that the case be listed again so that he could determine what order to make as to the costs that had been thrown away by the jury being brought to hear a case which was not effective. H

‡ R.S.C., Ord. 36, r. 29 (6) (the ANNUAL PRACTICE, 1958, p. 827), provides:—"It shall be the duty of all parties to any cause or matter entered in [the Jury List, Non-Jury List or Short Cause List of cases to be tried in the Queen's Bench Division] to furnish without delay to the officer by whom the list is kept all available information relating to any settlement, or likelihood of settlement, of the cause or matter, or affecting the estimated length of the trial." I

- A notified and of the list being kept in order that the rule, as I apprehend it, places the duty fairly and squarely on both solicitors. It is the duty, therefore, of both of them either to make the communication direct themselves or to see and satisfy themselves that the communication is made on behalf of them both by one or other of the parties. If that rule is not fulfilled solicitors lay themselves open to being made to pay personally the costs that have been thrown away as a result of the waste of public time.

- What I am doing today is to investigate where the responsibility lies. While, as I have said, it is the duty of both parties' solicitors, it may well be that the degree of responsibility and the degree of blame may fall more heavily on one rather than the other. In this case I think that it falls on the solicitors for the third-named defendant. It was they who obtained the order which dismissed the action for want of prosecution. It has been argued on their behalf that all they had to do was to send a copy of that order to the plaintiff and to leave it to the plaintiff who had had his action dismissed to take the necessary steps to bring it to the attention of the Crown Office. I do not accept that view at all. It is the duty of the solicitor who obtains the order in the first place to see that it is filed with the Crown Office so that the action can be removed from the list. It might very well be that there was a plaintiff in person, a plaintiff who had not appeared at all and was not prosecuting the action because he had disappeared from the country or something of that sort; or, again, it might very well be that time was extremely short and that the matter could not wait until the order had been drawn up and sent through the post for the plaintiff to deal with it. I think that the burden lay far more heavily on the solicitors for the third-named defendant in this instance.

While the plaintiff's solicitors cannot generally be exonerated, in this particular matter and in these circumstances, where the responsibility is finally on the third-named defendant's solicitors, I think that it is right that they should have to pay the costs thrown away.

- Accordingly I order that they should pay personally the costs thrown away in this matter. Those costs will include the costs of bringing the twelve gentlemen of the jury here, whose time was entirely wasted; they will include all the costs of this application; and they will include the costs of the proceedings before me when the case came into the list, since the plaintiff very properly, in those circumstances, thought it right to be represented by counsel so that counsel might explain to me what the position was.

[Reported by WENDY SHOCKETT, *Barrister-at-Law.*]

LONDON INVESTMENT AND MORTGAGE CO., LTD. v. INLAND REVENUE COMMISSIONERS.

LONDON INVESTMENT AND MORTGAGE CO., LTD. v. WORTHINGTON (INSPECTOR OF TAXES).

[HOUSE OF LORDS (Viscount Simonds, Lord Morton of Henryton, Lord Reid, Lord Tucker and Lord Somervell of Harrow), March 3, 4, April 24, 1958.]

Income Tax—Profits—War damage value payments—Property dealing company—Damage to properties comprising stock-in-trade—Whether value payments part of trading receipts—War Damage Act, 1943 (6 & 7 Geo. 6 c. 21), s. 66 (1)—Income Tax Act, 1918 (8 & 9 Geo. 5 c. 40), Sch. D, Case I—War Damage (Public Utility Undertakings, etc.) Act, 1949 (12, 13 & 14 Geo. 6 c. 36), s. 28.

Profits Tax—Computation of profits—War damage value payments—Whether to be included in computing profits of property dealing company.

The taxpayers, a property dealing company who had paid the compulsory war damage contributions during the war, received value payments under the War Damage Act, 1943, in respect of some of their properties which had been damaged by enemy action. They had disposed of some of the properties but retained others as part of their stock-in-trade, and were either having them rebuilt or would have them rebuilt. Under the War Damage Act, 1943, s. 66 (1), contributions made and indemnities given under Part 1 of the Act were to be treated for all purposes as outgoings of a capital nature, and by s. 113, as superseded by the War Damage (Public Utility Undertakings, etc.) Act, 1949, s. 28, expenditure on making good war damage was not deductible in computing profits for income tax purposes. On the question whether the value payments should be included in the receipts of the taxpayers' trade for the purposes of their assessments to income tax under Case I of Sch. D, and to the profits tax,

Held: the value payments were part of the taxpayers' trading receipts for taxation purposes, since they were money into which their stock-in-trade had been converted.

Decision of the COURT OF APPEAL ([1957] 1 All E.R. 277) affirmed.

[As to compensation received being a trade receipt for tax purposes, see 20 HALSBURY'S LAWS (3rd Edn.) 151-153, paras. 265, 266; and for cases on the subject, see DIGEST SUPP.]

For the Income Tax Act, 1952, s. 123, Sch. D, Case I, replacing the Income Tax Act, 1918, Sch. D, Case I, see 31 HALSBURY'S STATUTES (2nd Edn.) 116.

For the War Damage Act, 1943, s. 66, and the War Damage (Public Utility Undertakings, etc.) Act, 1949, s. 28, see 26 HALSBURY'S STATUTES (2nd Edn.) 543, 662.]

Cases referred to:

- (1) *Gliksten (J.) & Son, Ltd. v. Green*, [1929] A.C. 381; 98 L.J.K.B. 363; 140 L.T. 625; 14 Tax Cas. 364; Digest Supp.
- (2) *Newcastle Breweries, Ltd. v. Inland Revenue Comrs.*, (1927), 96 L.J.K.B. 735; 137 L.T. 426; 12 Tax Cas. 927; Digest Supp.
- (3) *Special Comrs. of Income Tax v. Linsleys (Established 1894), Ltd.*, [1958] 1 All E.R. 343.

Appeals.

Appeals by the taxpayers, London Investment and Mortgage Co., Ltd., from orders of the Court of Appeal (LORD EVERSHERD, M.R., BIRKETT and

- A ROMER, L.J.J.), dated Dec. 6, 1956, and reported [1957] 1 All E.R. 277, reversing orders of UPJOHN, J., dated May 10, 1956, and reported [1956] 2 All E.R. 613, on Cases Stated by the Special Commissioners of Income Tax. The taxpayers had appealed against assessments to income tax under Sch. D to the Income Tax Act, 1918, made on them in the sum of £30,000 for each of the years 1948-49 and 1949-50, and against assessments to the profits tax in the sum of £7,500 for each of the accounting periods ending on Mar. 31, 1948, and Mar. 31, 1949. The taxpayers were a property dealing company and had sustained war damage to certain of their properties. Under the War Damage Acts, 1941 and 1943, they had received value payments from the War Damage Commission in respect of several of these properties. They had subsequently disposed of some of the properties, freehold and leasehold, but had retained the remainder as part of their stock and were either having them rebuilt or to have them rebuilt. In their accounts, they placed any value payment received in a suspense account called the value payments account, against which they charged any money spent in making good war damage to the properties. The question for determination was whether value payments made under the War Damage Acts, 1941 and 1943, to the taxpayers, who carried on the trade of property dealing, were receipts of their trade that were required to be brought into account in computing the balance of their profits and gains for taxation purposes, and, if so, to which of their trading years the payments should be assigned.

J. Senter, Q.C., and D. C. Miller for the taxpayers.

Geoffrey Cross, Q.C., and A. S. Orr for the Crown.

- E The House took time for consideration.
Apr. 24. The following opinions were read.

- F **VISCOUNT SIMONDS:** My Lords, this appeal relates to assessments to income tax made on the taxpayers for the years 1948-49 and 1949-50 and to profits tax for the chargeable accounting periods Apr. 1, 1947, to Mar. 31, 1948, and Apr. 1, 1948, to Mar. 31, 1949. On each of the assessments the same question arises.

- G The material facts as found by the Commissioners for the Special Purposes of the Income Tax Acts are that the taxpayers were at the relevant times a property dealing company, that, during the war, certain of their properties suffered war damage and that, under the provisions of the War Damage Acts, 1941, 1943 and 1949, they received value payments from the War Damage Commission in respect of a number of these properties. The short question is whether these value payments ought to be treated as trading receipts in computing the profits or gains of the taxpayers for the purpose of the assessments in question. The Crown contends that they should, the taxpayers that they should not. The commissioners held that such payments ought *prima facie* to be brought in as receipts of the taxpayers' trade, as the properties formed part of their stock-in-trade and "on well-known principles any sum received as compensation for their loss is a trading receipt", but they further held, in view of certain provisions of the War Damage Acts, to which I shall refer, that,

- I "where a property has been, is being, or is intended to be repaired or rebuilt sums received in respect of it should not be included as receipts, but should be deducted from the amount expended on rebuilding."

This determination may well appear to produce an equitable result, but it has not been found possible to support it in any court, and there is, in fact, no *via media*. The value payments as a whole are to be treated as trading receipts or as a whole are not. UPJOHN, J., has held that they are not, the Court of Appeal that they are. I agree with the Court of Appeal.

My Lords, I have no doubt that the commissioners were right in saying that the payments were prima facie trading receipts. It was the business of the taxpayers to dispose of their stock-in-trade and to receive a cash equivalent or other compensation in return and, for the purpose of income tax law, such cases as *J. Gliksten & Son, Ltd. v. Green* (1) ((1929), 14 Tax Cas. 364) and *Newcastle Breweries, Ltd. v. Inland Revenue Comrs.* (2) ((1927), 12 Tax Cas. 927) show that it is irrelevant whether the disposition is by sale, voluntary or compulsory, or by an involuntary loss attended by subsequent compensation. The taxpayers had one asset, lost it, and acquired another. I think that it is incontrovertible that the asset they acquired was acquired in the course of their business, and not the less so because the war damage scheme was universal and compulsory and applied equally to all property owners, whether or not they carried on the business of dealers in property. I do not deal at greater length with this part of the case because I am in complete agreement with the judgment of the Court of Appeal.

But the strength of the taxpayers' case lay in the special provisions of the War Damage Acts and, in particular, s. 66 of the Act of 1943 and s. 28 of the Act of 1949. Section 66 of the Act of 1943 provided that contributions made and indemnities given under that part of the Act should be treated for all purposes as outgoings of a capital nature. The contributions here referred to are the contributions which, under the Act, property owners were required to make towards the expense of making the payments in respect of war damage as therein provided. They might be regarded as analogous to premiums paid on insurance with the state acting as insurer, but making a contribution of its own towards the necessary payments. The argument was that, since the contribution was for all purposes to be treated as an outgoing of a capital nature, including, no doubt, a computation of profits for tax purposes, it should be implied that any payment must also be regarded as of a capital nature for the same purpose. I should not be disposed to give much weight to this argument in any case but what weight it has is lost on a consideration of s. 80. That section authorised the Treasury from time to time to make estimates of the expected net receipts of the Exchequer under that part of the Act on the one hand and the expected payments on the other hand, and to increase or reduce the contributions accordingly. It would, therefore, appear reasonable that the total net contribution to the Exchequer should not be, in effect, reduced by allowing the contributor to bring it into account as an income payment for income tax purposes.

A more serious argument was founded on s. 28 of the Act of 1949 which replaced s. 113 of the Act of 1943. Section 28 was made retrospective and is applicable to the present case. It is a section which relates to income tax and profits tax and excess profits tax and nothing else, and I think that I must cite a substantial part of it. It provides, by sub-s. (1), that in computing the amount of the profits or gains, or of the income from any source, of any person for any purpose of the taxes I have mentioned, no sum shall be deducted in respect of any payment or expenditure therein mentioned. It then provides, by sub-s. (2), that no sum shall be included in respect of any payment or expenditure to which the section applies in computing (inter alia)

“(b) the cost to any person of maintenance, repairs, insurance and management in respect of which relief may be claimed under or by reference to r. 8 of No. V of Sch. A ”

and, by sub-s. (4) (so far as relevant), that the expenditure to which the section applies is any expenditure on repairing or otherwise making good war damage to land in so far as any person has received or is entitled to a payment in respect

A of the damage by virtue of any of the provisions of the principal Act (i.e., the Act of 1943). It is to be observed that the section does not purport to deal in any way with the manner in which receipts are to be treated for tax purposes. It is concerned only with deductions. "No sum shall be deducted" are the governing words. But it is said that it is a matter of necessary implication that, if expenditure on repairing or otherwise making good war damage is not allowable as a deduction so far as it may be covered by a war damage payment, then such payments must in no circumstances be treated as trading receipts for tax purposes.

My Lords, I cannot accede to this argument. I hesitate in any case to introduce by way of implication in a taxing statute a provision which cries aloud for express statement if it is intended. But I am not satisfied of any such intention. No doubt it operates hardly against the taxpayer if, having brought into account a payment as a trading receipt, he is disallowed an equivalent amount of expenditure in repair. But, equally, it is for him an uncovenanted benefit if he does not bring into account a sum which, had it been the proceeds of sale of his property instead of compensation for its loss, he must have brought into account, and which he may dispose of as he thinks fit whether in repair or rebuilding or otherwise. It might be possible, I do not say it would, to come to a different conclusion if the property owner, receiving a value payment, was bound to apply it in repair. But he is under no such obligation, and I cannot write into the Act words which are not there so as to divest of its normal fiscal consequence the receipt by him of a sum of money which he *prima facie* receives as a trading receipt. In this case we are concerned with a value payment not with a cost of works payment. The latter payment is only made after the cost has been incurred and we were told that, in practice, it was usually made direct to the building contractor. It may be that different considerations apply to it. I do not intend to say anything that would prejudice such a case, but, so far as value payments are concerned, whether deliberately or through inadvertence, the case of the property dealer being overlooked or incompletely regarded, there is, in my opinion, no provision express or implied which enables him to exclude them from his computation of profits.

In the course of the argument there was some discussion of r. 3 (k) of the Rules applicable to Sch. D, Cases I and II, to the Income Tax Act, 1918*. It was suggested that it provides a useful analogy to s. 28. Perhaps it does. But I am content to abide by what appears to me to be the plain meaning of the statute.

I would dismiss this appeal with costs.

LORD MORTON OF HENRYTON: My Lords, I agree with the speech which has just been delivered by my noble and learned friend on the Woolsack and I have nothing to add.

LORD REID: My Lords, I regard this as a difficult case. Apart from the provisions of s. 28 (4) of the War Damage (Public Utility Undertakings, etc.) Act, 1949, I should have no difficulty. It may be true that a person who does not trade in property, but carries on another trade within property owned by him, may pay or receive money in his capacity of owner and not in his capacity of trader. But when the property, in respect of the ownership of which he receives money, is part of his stock-in-trade, I find it difficult to imagine a case where that money would not be a trading receipt. In this case, the money was received because the value of the stock-in-trade had been diminished by enemy action, and it must certainly be treated as a trading receipt unless the statute requires it to be treated in some other way.

* Replaced by the Income Tax Act, 1952, s. 137 (k), for which, see 31 HALSBURY'S STATUTES (2nd Edn.) 134.

Section 28 (4) applies to all payments made in respect of war damage to land. Its provisions are intelligible and just in all cases where the owner was not trading in land and did not hold the land as part of his stock-in-trade, but they are so ill designed and lead to such unjust and anomalous results if one tries to apply them literally where the land was stock-in-trade of a trader, that it was admitted and seems clear that the draftsman did not have in mind the case of a trader who deals in land. As I recently ventured to point out in *Special Comrs. of Income Tax v. Linsleys (Established 1894), Ltd.* (3) ([1958] 1 All E.R. 343 at p. 348):

“ We are, therefore, confronted with the not unusual problem of applying statutory provisions to circumstances which they were not designed to meet. In such a case, it appears to me to be necessary to make a rather wide survey because one can easily reach a wrong conclusion if attention is concentrated only on those provisions which are immediately applicable to the particular case.”

I, therefore, think it necessary to examine the operation of s. 28 (4), not only in relation to value payments, but also in relation to cost of works payments. This matter was not fully developed in argument, and I state my views with some hesitation. But a decision of this House as to the meaning and effect of a statute is none the less final though some relevant argument was not developed in the case and I, therefore, feel bound to state my views as briefly as I can.

Under the War Damage Act, 1943, a payment made in respect of war damage may be either a cost of works payment or a value payment, the latter being made where war damage involves total loss. But total loss does not mean that the property is incapable of repair or reinstatement; it means broadly that the cost of reinstatement would be more than the amount by which the value of the property as a site and in its damaged state would be increased if reinstatement was carried out. And the Act goes on to provide that, in certain cases, value payments shall be made although the general rule would require a cost of works payment, and vice versa. Both kinds of payment are normally payable to the owner; but a cost of works payment can only be made when the sum involved has already been expended on the property, whereas a person receiving a value payment is free to do as he likes with it—he may, but need not, spend it on repairing the property. I should add that 1939 values are used in these calculations, but there is provision for increasing value payments so calculated by forty-five per cent. It appears to me that, if a value payment received by an owner who is a trader in land is a trading receipt, then a fortiori a cost of works payment received by such an owner must be a trading receipt. But I need not elaborate that because I understood that that was not disputed by counsel for the Crown.

Section 28 of the Act of 1949, which replaced an earlier provision in the Act of 1943, is designed to deal with the income tax position of owners who receive war damage payments. It applies alike to value payments and cost of works payments, and it provides that, in computing income, no sum shall be deducted in respect of any payment or expenditure to which the section applies, and that, in computing cost of repairs, etc., no such sum shall be included in any claim for relief. The expenditure to which the section applies includes (sub-s. (4) (a)):

“ any expenditure on repairing or otherwise making good war damage to land in so far as any person has received or is entitled to a payment in respect of the damage by virtue of any of the provisions of the principal

- A Act [i.e., the Act of 1943] (whether alone or as applied or modified by or under any provision of this Act) . . .”

Where damage is suffered by land which is not part of a trader's stock-in-trade, the diminution in value of the land does not enter into his account of profits for income tax purposes, and, when he receives a value payment or cost of works payment, that payment also does not enter into that account. But without s. 28 (4) he might as a result of spending the payment on repairs be able to diminish his income tax liability. That would plainly be wrong and s. 28 (4) prevents it.

- But the position is very different if the land is part of the trader's stock-in-trade. The value of the stock-in-trade (at cost or market price, whichever is the lower) at the beginning and also at the end of the year must enter the income tax account. Apart from s. 28 (4), the position as I see it would be that, if land is damaged and its value after damage is less than the value at which it stood in the valuation of stock-in-trade at the beginning of the year, only its damaged value can be included in the valuation of stock-in-trade at the end of the year. That will either diminish the profits for the year or produce a loss which it may be possible to carry forward. Then later, when the cost of works payment or value payment is received, it is a trading receipt and must enter the account as such, and the cost of works payment, being spent on repairing the property, or any part of the value payment so spent, will enter the account as an expense. And, finally, the valuation of the damaged property in the valuation of stock-in-trade will have to be written up to the value of the repaired property. I did not understand counsel for the Crown to deny that.

- Where a trader in land receives a cost of works payment, there appears to be no need for s. 28, and it would introduce confusion and injustice if it were applied literally. The Act of 1943 contemplates that he, like other owners of war damaged land, will carry out and pay for the reinstatement, and will then receive the cost of works payment. Apart from s. 28, the trader in land would, in his tax account, enter the cost of reinstatement as an outgoing and enter the cost of works payment as a receipt. That would produce a just result. But s. 28 prevents him from showing as an outgoing the cost which he has incurred and paid, but contains no express authority for excluding the cost of works payment from the other side of his account. And, being a trading receipt, it must be included unless there is authority to exclude it. If it is not excluded, then a fictitious profit will result. I understood counsel for the Crown to admit that this is an impossible result, that, in practice, the payment is always omitted and that s. 28 must be so interpreted as to authorise this omission. He pointed out that, in many cases, the owner does not, in fact, receive the payment because the payment is often made directly to the contractor who has carried out the reinstatement. In such a case, neither the cost of reinstatement nor the cost of works payment would appear in the trader's account because he did not, in fact, pay the one or receive the other, and s. 28 would have no application. But s. 28 does apply to cases where, in fact, the trader pays for the reinstatement and receives the cost of works payment, and it could not be right that its application should increase the trader's tax liability merely by reason of the fact that the cost of works payment was paid to the trader and passed on by him to the contractor instead of being paid directly to the contractor.

So this question arises. It being admitted, and I think rightly admitted, that s. 28 cannot be applied literally to traders in land, and that it must be so interpreted as to authorise the trader to omit from his tax account one kind of war damage payment, a cost of works payment, ought the section to be

interpreted so as to authorise a similar omission of the other kind of war damage payment, a value payment? There is no hard and fast line between the two. Both are payments in respect of war damage, and both appear to me to be trading receipts when received by a trader in land. The only relevant difference is that, whereas a cost of works payment must be spent on reinstatement, a value payment may, but need not, be so spent. If the value payment is so spent, then the reason for interpreting s. 28 so as to exclude it is just as strong as in the case of a cost of works payment. But it is said that, if the trader chooses not to spend his value payment on the property, he will make an untaxed gain if it is omitted from his trading account. For the moment that might be so. But, if later on he spends money on making good the damage, or if he sells the property in its damaged state and the purchaser spends money for that purpose, s. 28 still applies to prevent credit being taken for such expenditure in so far as it does not exceed the amount of the value payment.

For these reasons, I find great difficulty in reading into s. 28 an implied provision with regard to cost of works payments but refusing to read in a similar provision with regard to value payments. But, in the peculiar circumstances of this case, I do not find it necessary to dissent from the conclusion at which your Lordships have arrived.

LORD TUCKER: My Lords, for the reasons which have been stated by my noble and learned friend on the Woolsack, I agree that this appeal should be dismissed.

LORD SOMERVELL OF HARROW: My Lords, for the reasons which have been stated by my noble and learned friend on the Woolsack, I agree that this appeal should be dismissed.

Appeal dismissed.

Solicitors: *R. C. Bartlett & Co.* (for the taxpayers); *Solicitor of Inland Revenue* (for the Crown).

[Reported by G. A. KIDNER, ESQ., Barrister-at-Law.]

A GUINNESS TRUST (LONDON FUND) FOUNDED 1890
REGISTERED 1902 v. WEST HAM CORPORATION.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Hilbery and Donovan, J.J.), April 22, 1958.]

Rates—Limitation of rates chargeable—"Established or conducted for profit"—

- B** *Whether charitable organisation, though not established for profit, was conducted for profit by reason of terms of trust—Rating and Valuation (Miscellaneous Provisions) Act, 1955 (4 & 5 Eliz. 2 c. 9), s. 8 (1) (a).*

The Guinness Trust (London Fund), which was established by trust deed in 1890, claimed to be entitled to a limitation of rates for its hereditaments under s. 8 of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, as being an organisation whose main objects were charitable (as was conceded) and which was "not established or conducted for profit" within sub-s. (1) (a) of that section. Clause 1 (B) of the trust deed provided—
". . . it is the intention of the founder that the original capital of the fund should, by expenditure on objects of a permanent character returning a fair low rate of interest . . . be kept intact and go on increasing, so that . . . the purpose to be kept in view may be assistance to individuals to improve their condition, without placing them in the position of being the recipients of a bounty". On appeal from a decision of quarter sessions allowing the trust's claim,

- Held:** the trust was conducted for profit because its funds were to be expended "on objects . . . returning a fair low rate of interest", though the trust was not established for profit and the profit was used for the charitable purposes of the trust; therefore the trust was not an organisation within s. 8 (1) (a) of the Act of 1955 and was not entitled to limitation of rates for its hereditaments.

National Deposit Friendly Society (Trustees) v. Skegness U.D.C. ([1957] 3 All E.R. 199) distinguished.

- F** Appeal allowed.

[**Editorial Note.** The objects of the trust were considered also in *Guinness Trust (London Fund) v. Green* ([1955] 2 All E.R. 871) where it was held that the trust was a housing trust within the Housing Repairs and Rents Act, 1954, s. 33 (9).

- G** For the Rating and Valuation (Miscellaneous Provisions) Act, 1955, s. 8, see 35 HALSBURY'S STATUTES (2nd Edn.) 394.]

Case referred to:

(1) *National Deposit Friendly Society (Trustees) v. Skegness U.D.C.*, [1957] 3 All E.R. 199; [1957] 2 Q.B. 573; 121 J.P. 567.

Cases Stated.

- H** These were two appeals by Case Stated from decisions of the Recorder of West Ham. On Apr. 15, 1957, the Guinness Trust (London Fund) appealed to West Ham Quarter Sessions against a rate of £935 6s. 8d. made by the West Ham Corporation for the year beginning Apr. 1, 1956, in respect of the hereditament known as The Working Persons Hostel and also appealed against a rate of £18 4s. 2d. in respect of the hereditament known as Flat Ground Floor, 106, John Street, West Ham. The ground of both appeals was that the provisions of s. 8 (1) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, should be applied in respect of both hereditaments. The following facts were found.

The Guinness Trust (London Fund) was an organisation whose main objects were charitable. It was established in 1890 by a deed of trust and was incorporated by order of the Charity Commissioners in 1902. Its activities consisted mainly of providing houses for "people who are not well-to-do". Its policy had been, after allowing for all outgoings, to realise a net income of three per cent. on its capital, which was applied in acquiring additional properties and expanding

the work of the trust. The operation of the Rent Restrictions Acts had long prevented the trust from attaining this object and in 1949 and 1954 it sustained a loss of over £2,000 in each year. During the years 1946-55 its average profit was £9,150 and the trust was again on a sound financial footing. Its original capital fund was £200,000, which had been increased by the end of 1955 to about £1,500,000. The rateable values of the two hereditaments for the financial year 1955-56 were £188 and £11 respectively and the rates paid amounted to £263 4s. and £15 8s. The rateable values for the financial year 1956-57 (the first year of the new valuation list) were £976 and £19 and the rates payable would be £935 6s. 8d. and £18 4s. 2d. A
B

The sole issue before the recorder was whether or not the trust was established or conducted for profit within the meaning of s. 8 (1) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955. The trust contended that it was not established or conducted for profit in that, although its policy was to secure a surplus of receipts over expenditure in any year, this surplus was applied exclusively for the charitable purposes of the trust. For the West Ham Corporation it was contended that the terms of the deed of trust* made it clear that a profit was deliberately aimed at; that the accounts and the course of business showed that a profit was made, and that its destination was irrelevant. The corporation also contended that it was not the intention of the Act to relieve at the expense of ratepayers generally charitable organisations which were in fact conducted for profit. The recorder allowed the appeal, holding that the trust was not established for profit (and therefore the question of being conducted for profit did not arise) because profit, while contemplated by the deed of trust, was entirely incidental to the objects of the trust. The corporation appealed. C
D
E

Michael Rowe, Q.C., and *A. G. F. Rippon* for the appellants, West Ham Corporation.

J. P. Widgery, Q.C., for the respondent, Guinness Trust (London Fund).

LORD GODDARD, C.J.: This is a Case Stated by the learned Recorder of West Ham, and raises the short question whether certain buildings consisting of workmen's dwellings owned by a charitable body called the Guinness Trust are or are not entitled to the benefit of s. 8 of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, a section which has been before the courts on a great number of occasions and is in these words: F
G

"This section applies to the following hereditaments, that is to say—
(a) any hereditament occupied for the purposes of an organisation (whether corporate or unincorporate) which is not established or conducted for profit and whose main objects are charitable or are otherwise concerned with the advancement of religion, education or social welfare."

The objects of the organisation known as the Guinness Trust are admittedly charitable, so that the buildings owned by them satisfy one limb of the section, but the organisation must not only have charitable objects, it must also be one that is not established or conducted for profit. The Guinness Trust was established by a trust deed dated Feb. 4, 1890, in which the late Sir Edward Guinness, afterwards Lord Iveagh, settled the sum of £200,000 on trustees on the trusts set out in the deed. Clause 1 (B) provides: H
I

"Without restricting the interpretation in the widest sense of the objects as before defined, it is the intention of the founder that the original capital of the fund should, by expenditure on objects of a permanent character returning a fair low rate of interest, as far as possible, be kept intact and go

* See cl. 1 (B), letter I, *supra*.

- A on increasing, so that, whilst payments of money in the nature of gifts or not returnable by the recipients are not precluded, the purpose to be kept in view may be assistance to individuals to improve their condition, without placing them in the position of being the recipients of a bounty."

- B In the recitals of the trust deed the settlor showed that his main object was the provision of dwellings in which people could live in terms of self-respect and not in slum dwellings or in insanitary conditions. It is clear that what Sir Edward Guinness desired was that this sum of £200,000 should be administered by the trustees in erecting buildings and letting them to tenants at such a low rent as would enable the trust to maintain the buildings and to accumulate funds; the settlor hoped and desired that more buildings of this nature would be put up either by his trustees or other like-minded charitable people, so that the dwellings of the poor of London would be very largely increased. That was the object of the trust; and I have read the direction to the trustees. The trustees are therefore to invest their money in buildings charging rents which will yield a low rate of interest. That is a profit and the profit will be accumulated and used for the purpose of acquiring for the benefit of the trust other buildings or erecting other buildings, though not for the personal profit of any member of the trust, still less of the settlor.

- We have merely to consider the exemption which is given by Act of Parliament to an organisation which not only must be charitable but also must be neither established nor conducted for profit. Let it be assumed, as I think it may properly be assumed, that the Guinness Trust is not established for profit in the sense that that is not the object of the trust. It is, however, to be conducted for profit and exists in order that there may become an accumulation of funds which will enable the trustees to invest in other buildings and thus increase the benevolent objects which the settlor had in mind. The rating authority is not, it seems to me, concerned with more than whether the conduct of the business is for profit, and here it is for profit. It is for other objects, no doubt, but it is conducted for profit. The clause which I have read distinguishes this case, if distinction is needed, from *National Deposit Friendly Society (Trustees) v. Skegness U.D.C.* (1) ([1957] 3 All E.R. 199), to which we have been referred, which shows that if a profit is being made the rating authority is not concerned with what is done with that profit. The rating authority does not have to consider whether the profit is used for charitable purposes or whether it is used for any other purpose. In my opinion, with all respect to the learned recorder and the argument of counsel for the respondent, it is a very short point. I will assume that the organisation is not established for profit, but in my opinion it is conducted for profit, because it is making profits and its object is making profits for the purposes that I have indicated; and, in my opinion, although its main objects are charitable it is not entitled to the benefit of the section. The appeals must be allowed.

- HILBERY, J.:** I am of the same opinion. To bring these premises in question within s. 8 of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, it must be shown that the Guinness Trust is not established or conducted for profit and its main objects are charitable objects. The difficulty in the way of the Guinness Trust seems to me to be in the terms of the deed which created the trust. It is conceded that under that deed the main object for which it was established is charitable, but the question arises whether it is also conducted for profit. I find it difficult to escape from the express terms of cl. 1 (B) which has been read by my Lord because there the founder of the trust expressed himself thus:

" Without restricting the interpretation in the widest sense of the objects as before defined, it is the intention of the founder that the original capital of the fund should, by expenditure on objects of a permanent character returning a fair low rate of interest, as far as possible, be kept intact and go on increasing . . . "

In my view the fair interpretation of that is a direction to the trustees so to conduct the affairs of the trust as to produce a profit, which will if possible increase the fund available for the charitable purposes. That is conducting for profit. That distinguishes the case from the decision of the Court of Appeal on which counsel for the respondent placed great reliance, *National Deposit Friendly Society (Trustees) v. Skegness U.D.C.* (1) ([1957] 3 All E.R. 199), because the words of PARKER, L.J., on which particular stress was laid were these (*ibid.*, at p. 201):

" The organisation accordingly does earn profits from which the members benefit, but that as it seems to us is a very different thing from being established or conducted for profit. In our judgment the earning of profits is purely incidental, and it cannot be said that the organisation is established or conducted for profit."

In my view, if the facts were that in this case the trustees had, merely incidental to the discharge of the trust, so to invest money as to increase the amount available for charitable purposes the case would come immediately within the reasoning of that judgment, but that is not the case here. It is not that incidentally or fortuitously these profits have been made by the trustees. They have been made pursuant to the direction given to them about the affairs of the trust under the trust deed in cl. 1 (B) which I have read. In my view, therefore, the contention of the Guinness trustees here fails.

DONOVAN, J.: I agree. It seems to me that all that the learned recorder thought he had to decide here was whether the trust was established for profit, and if he decided it was not then he had automatically to decide that the trust was not conducted for profit. I think that is clearly wrong. There are two separate conditions in the section both of which must be satisfied before there is a claim for relief. I merely venture to repeat what I said in argument to counsel for the respondent in connexion with the judgment of PARKER, L.J., about the concern being conducted for profit. Where a concern simply invests its reserves in order to get a return until the reserves are required for the business, it is natural to say that in so investing its reserves the concern is not merely on that account conducting its affairs for profit. It is otherwise where the whole business is to make investments and so earn a profit, whether the investments be in stocks and shares or in dwelling-houses.

Appeals allowed.

Solicitors: *Town clerk*, West Ham Corporation (for the appellants); *Travers Smith, Braithwaite & Co.* (for the respondent).

[*Reported by E. COCKBURN MILLAR, Barrister-at-Law.*]

A KITCHEN v. ROYAL AIR FORCES ASSOCIATION AND
OTHERS.

[COURT OF APPEAL (Lord Evershed, M.R., Parker and Sellers, L.JJ.), March 18, 19, 20, 21, 24, 25, 26, 27, 28, 31, April 1, 1958.]

B *Limitation of Action—Postponement of limitation period—Negligence—Right of action concealed by fraud—Failure by solicitor to commence an action on behalf of client within statutory period—Ex gratia payment subsequently made by intended defendant for client's benefit—Concealment of source of gift—Limitation Act, 1939 (2 & 3 Geo. 6 c. 21), s. 26 (b).*

Solicitor—Negligence—Damages—Action under Fatal Accidents Acts, 1846 to 1908, not brought within limitation period.

C On May 22, 1945, the plaintiff's husband, who was serving in the Royal Air Force and was then on leave, was electrocuted, when using domestic electrical equipment in the kitchen of his home, and died. The plaintiff believed that his death was caused by some negligence on the part of the electricity company in relation to the wiring of the installation. Through a voluntary organisation information concerning her case was forwarded D in November, 1945, to the second defendants, a firm of solicitors who had offered to help members of the Royal Air Force and their dependants. The second defendants became solicitors for the plaintiff. They were, as the court found, negligent in their conduct of the matter on the plaintiff's behalf, failing to pursue proper inquiries how it had been possible for the accident E to have happened, allowing the twelve months' limitation period for bringing proceedings under the Fatal Accidents Acts, 1846 to 1908, to expire without beginning an action and failing to distinguish between a claim under those Acts and a claim under the Law Reform (Miscellaneous Provisions) Act, 1934. The maximum amount which the plaintiff could have recovered in an action under the Fatal Accidents Acts, 1846 to 1908, was £3,000, though F her chances of success were uncertain. On June 3, 1946, the second defendants attempted to persuade the electricity company to make an ex gratia payment, but were unsuccessful. In October, 1946, the plaintiff herself wrote to the company, and, as a result of her letter, the company approached G the defendants and offered to make a donation of £100 to be used for the benefit of the plaintiff and her family, it being agreed that the plaintiff should not be informed who the donor was. The second defendants deducted five guineas from the donation for their charges, and the remainder was applied in assisting the plaintiff without disclosing the source of the money. At this time the relationship of solicitor and client still subsisted, so the Court of Appeal found, between the second defendants and the plaintiff. On Sept. 30, 1955, the plaintiff brought an action against the second defendants for damages for negligence in the formulation and H prosecution of her claim against the electricity company. In reply to a plea that the action was barred by lapse of time the plaintiff alleged that her right of action had been concealed by fraud within s. 26 (b)* of the Limitation Act, 1939. The plaintiff having been awarded £2,000 damages, the second defendants appealed on the ground (a) that the cause of action was statute-barred and (b) that, if the action lay, only nominal damages were recoverable.

I **Held:** (i) the word fraud in s. 26 (b) of the Limitation Act, 1939, was not confined to deceit or dishonesty, and the conduct of the second defendants in concealing that payment was made by the electricity company in the autumn of 1946 for the plaintiff's benefit amounted, for the purposes of s. 26 (b), to concealment by fraud of her right of action against them at that time; therefore, the plaintiff's right of action for negligence was not barred by s. 2 of the Act of 1939.

* The terms of s. 26 (b) are printed at p. 246, letter B, post.

Beaman v. A.R.T.S., Ltd. ([1949] 1 All E.R. 465) applied. A

(ii) the right of action under the Fatal Accidents Acts, 1846 to 1908, which the plaintiff lost was a right of substance and the award of damages for the second defendants' negligence should not be nominal; there being no appeal against the award of damages in so far as it exceeded nominal damages, the award, though generous, would stand.

Appeal dismissed. B

[For the Limitation Act, 1939, s. 26, see 13 HALSBURY'S STATUTES (2nd Edn.) 1188.]

Cases referred to:

- (1) *Bulli Coal Mining Co. v. Osborne*, [1899] A.C. 351; 68 L.J.P.C. 49; 80 L.T. 430; 32 Digest 524, 1798. C
- (2) *Wood v. Jones*, (1889), 61 L.T. 551; 32 Digest 343, 255.
- (3) *Beaman v. A.R.T.S., Ltd.*, [1949] 1 All E.R. 465; [1949] 1 K.B. 550; 2nd Digest Supp.

Appeal.

The second defendants, a firm of solicitors, appealed from that part of the judgment of LLOYD-JACOB, J., dated May 28, 1957, whereby it was adjudged that the plaintiff, Hilda Kitchen, should recover the sum of £2,000 damages and the costs of her action against the second defendants. The plaintiff's action against the other defendants, who were the Royal Air Forces Association (herein called "the association") and persons representing the association, failed, and from that decision there was no appeal. D

In May, 1945, the plaintiff's husband, then a leading aircraftman in the Royal Air Force, was home on leave, living with his wife and their two daughters in their flat. The plaintiff was then expecting the birth of a third child who was born later in that year. At about 8 a.m. on May 22 the plaintiff's husband went to the kitchen and turned on the main switch at the control box for the purpose of preparing tea. He was electrocuted and died. At that time the electrical energy, supplied by an electrical company, was introduced by two cables, which were encased in a lead covering and entered the control box. From this box wires, encased in rubber, emerged and these passed the energy to the cooker which was very close to the sink over which were two waterpipes. There was a socket in the control box where flex leading to an electric kettle could be plugged. The cover of the control box on May 22, 1945, had become charged with electricity. When the plaintiff's husband touched the control box cover with one hand, and, as it appeared, with the other seized one of the taps and turned it, the charge passed through his body. How the control box became charged had never been discovered. The view put forward on behalf of the electricity company had been to the effect that earthing was achieved by a wire from an earthed terminal in the control box to a clip, which was clipped to the lead cover of the wire leading to the meter; this lead cover had become fractured, the cover of the insulated cables within had become worn, so that the wires themselves were exposed; further, the clip had been moved from its proper place on the lead cover and placed over the fracture, so that, in the presence of moisture, current could pass in a reverse direction. This account, if correct, would raise the question by whom the connexion was made. The plaintiff's account was different. It was that the charging of the control box came along wires leading from the control box to the cooker, which she said were badly worn; and she maintained that when in 1940 she went to the flat the cables leading to the control box and the wires leading from it had been wholly disconnected and bent back against the wall and that they were then re-connected by the electricity company. For that re-connexion the electricity company was, in the plaintiff's view, responsible. E F G H I

After the accident the plaintiff was helped by the local secretary of the Soldiers' Sailors' and Airmen's Families Association, and the information concerning her

- A case was forwarded by the association (the first defendant) to the second defendants, who were one of the firms of solicitors who had offered to assist the association or its members and their dependants. With the association's letter, dated Nov. 21, 1945, were enclosed notes of evidence at an inquest on the husband's death, which notes had been prepared by a solicitor then acting for the plaintiff. The second defendants thus became the solicitors of the plaintiff as from the end of November, 1945, and continued in that relationship to her, as conceded, until June or July, 1946*. The notes of proceedings at the inquest showed the case which was advanced for the electricity company, but did not show what the plaintiff's case was. The second defendants thereon made out a back-sheet and sent the matter in that condition to junior counsel for advice. Counsel advised that some expert opinion should be obtained which would help to show how the accident occurred and that further information might be got from the plaintiff herself. The second defendants sent that opinion to the association and, some ten weeks later, an expert was instructed; but by that time the installation had been changed, the arrangement of the cooker in the kitchen had been altered and the expert was unable to give a useful opinion as to the cause of the accident. At that time a Mr. Arditti, who was experienced in legal work but was not an admitted solicitor, joined the second defendants as an articulated clerk and the plaintiff's case was deputed to him. He had an interview with the plaintiff on May 7, 1946, his note of which included the following:

E "On the day of the accident a neighbour (Mr. Fronda) was in the kitchen when the [electricity company's] officials, who were summoned by the coroner's officer . . . arrived. According to Mr. Fronda, the [electricity company's] officials opened the control box, drew in their breath, looked at each other, and then decided to take away the kettle with the frayed flex even though this had not been in use . . . [then under the marginal heading "Note" there followed:] The installation of the cooker after the accident was effected free of charge by the electricity company.

F "Conclusions. [The plaintiff] feels very strongly that the blame for the accident lies with the [electricity company] . . . The [electricity company's] official's (Penfold's) evidence would not seem to conflict with the above. On the other hand, he stated that the [electricity company's] 'job' normally ended at the meter. What is meant by 'normally' and should the current have been connected up in October, 1944, if the wiring was faulty? . . . [Finally, the note says:] This one point would seem to be [the plaintiff's] sole remaining hope as there certainly does not seem to be any possible case against the landlord."

G At this time only a fortnight remained before the period of time in which proceedings under the Fatal Accidents Act, 1846, must be begun. On May 9 there was a conference with counsel who, no expert evidence having been obtained in answer to his previous request, was not in a position to add to what he had said before and expressed in discussion a discouraging answer. On May 10 the second defendants wrote to the association as follows:

I "The possibility of an action against the [electricity company] was discussed with counsel, who advised that the chances of success are extremely remote and that our only hope would be to try to obtain some form of ex gratia payment from them. We accordingly approached the [electricity company], but, in view of the fact that a writ must be issued before the end of next week and this case does not warrant such expenditure, we are not very hopeful that our approach will meet with any appreciable success."

On June 3 the second defendants wrote to the electricity company a letter that

* The relationship of solicitor and client was held on appeal to have continued until a date in October, 1946 (see p. 248, letters E and F, and p. 250, letter B, post).

feebly presented the plaintiff's case and contained no reference to the distinction between a claim under the Fatal Accidents Acts, 1846 to 1908, and a claim under the Law Reform (Miscellaneous Provisions) Act, 1934. The letter, while requesting an ex gratia payment, and notwithstanding the absence of instructions from the plaintiff, contained the following:

"Needless to say, any such grant by your company will be reciprocated by an undertaking on the part of [the plaintiff] that anything she accepts is in full and final settlement of any claim she may have as a result of the accident aforesaid."

On July 8 the electricity company refused this request. On July 9 the second defendants wrote to the association in these terms:

"Further to our letter of May 10, we are now informed by the solicitor to the [electricity company] that after careful consideration of this matter his board have decided that they cannot recommend any form of ex gratia payment to [the plaintiff]. In view of the unfortunate outcome of this case we do not propose making any charge to [the plaintiff] for our services."

On Oct. 8, 1946, the plaintiff herself wrote to the electricity company, and as a result of that a sum of £100 was paid by the electricity company to the association through the second defendants, less five guineas deducted therefrom by the second defendants for their costs. In 1950 the plaintiff with the assistance of the Poor Persons' Committee and later of the legal aid organisation brought an action, through another firm of solicitors (Messrs. William Easton & Sons), against the electricity company founded on the Law Reform (Miscellaneous Provisions) Act, 1934. In 1954 this action was compromised by the payment by the South Eastern Electricity Board (the successor of the electricity company) of the sum of £250. This sum, added to that which the electricity company had previously paid, was little short of the full amount that the plaintiff could have expected to recover by virtue of a claim under the Act of 1934.

The plaintiff's present action was commenced on Sept. 30, 1955, and her claim, so far as material, was for damages for negligence in and about the formulation and prosecution of a claim, arising out of her husband's death, against the electricity company or its successor, the South Eastern Electricity Board. The second defendants denied the plaintiff's allegations against them and pleaded that the action was statute-barred under s. 2 of the Limitation Act, 1939, the writ not having been issued within six years of the time when the alleged cause of action accrued. By her reply the plaintiff relied on s. 26 of the Limitation Act, 1939, and said that her right of action against the second defendants was concealed by the fraud of those defendants and that she neither did discover nor by the exercise of reasonable diligence could have discovered the matters on which she relied earlier than six years before the date of the issue of the writ in her present action. After a trial lasting thirteen days LLOYD-JACOB, J., held that the second defendants were negligent and failed in their duty as solicitors to the plaintiff, and that they were not protected by the Limitation Act, 1939, s. 2, because the plaintiff's right of action against them had been concealed by their fraud within the meaning of s. 26 (b) of the Act of 1939. His LORDSHIP acquitted the second defendants and Mr. Arditti from any dishonesty or bad motive, in the ordinary meaning of those words, and the Court of Appeal accepted the judge's finding in this respect.

P. M. O'Connor and J. G. H. Gasson for the second defendants.

Neil Lawson, Q.C., and J. G. Wilmers for the plaintiff.

LORD EVERSHERD, M.R.: This long and difficult case has raised three distinct points for our determination: (i) Did the second defendants, who are the appellants in this appeal, act as solicitors for the plaintiff during some, and if so, what period in the years 1945 and 1946, and, if they did so act, did they

- A fail to devote the standard of care which was due from them as solicitors to their client: in other words, were they guilty of negligence towards the plaintiff? (ii) If so, then, since admittedly the Limitation Act, 1939, applies to a cause of action founded on such negligence, and since admittedly the statutory period of six years elapsed since any alleged act of negligence and before the commencement of proceedings against the second defendants, can they rely on the Limitation Act, 1939? More precisely, can the plaintiff escape the effect of the statute by showing concealment by fraud of her right of action within the terms of s. 26 (b) of the Act of 1939? (iii) Assuming that both the first and second questions are answered in the plaintiff's favour, what was the loss or damage, if any, which flowed from the negligence? I have stated the three questions in the order in which they were argued before us and in the order in which they were decided by the learned judge below. I have also stated them in what may be an ascending order of difficulty. If the plaintiff fails on any one of the three points, she fails altogether. The onus is squarely on her as regards the first and second points. To some and to a substantial extent it is also on her as regards the third point.

- D An action against a firm of solicitors for alleged negligence by one who says that she was their client is always a matter of special anxiety to the court; for to some extent, inevitably, our system and profession of the law is impugned and its adequacy and competence challenged. Especially is this so in the present case.

- [HIS LORDSHIP stated the facts (summarised at p. 242, letter E, to p. 244, letter F, ante), referred to the long period of time which had elapsed since the accident, to the evidence concerning and the question how the accident happened, and concluded that by May 10, 1946, the second defendants had formed the view that the thing to do was to allow time to expire, so barring the plaintiff's claim, and that they had drawn no distinction between the claim under the Fatal Accidents Acts, 1846 to 1908, and the claim under the Law Reform (Miscellaneous Provisions) Act, 1934. HIS LORDSHIP continued:] In my judgment the second defendants proceeded to adopt the line of least possible effort. It is not merely that they never applied their minds at all to what their duties were and what the possible rights of the plaintiff might be, but they never applied their minds, as their senior partner himself stated, to the question who their client was. They did not even think fit in the circumstances to ask for the depositions before the coroner. It is not merely that they put the case so feebly to the electricity company and included, without any authority whatever, the suggestion that anything which the company paid would be accepted in full settlement, but the real gravamen of the case, as it seems to me, is that they deliberately allowed the time to run out without getting any instructions at all and knowing that no expert evidence had been obtained. I cannot, for my part, understand how, in the circumstances, a responsible firm of solicitors failed to make any attempt at least to keep the case alive, while they made some effort to get the essential expert evidence which counsel had advised them to do months before. I will only add that, in my judgment, it is no answer to what I have said to say that the second defendants, by writing and giving the information which they did to the association, were thereby to be taken to be giving information to the plaintiff on the ground that the association were, in some sense, the agents of the plaintiff to accept and receive such information as the second defendants chose to give. I, therefore, agree with the learned judge that the case of negligence by the second defendants is made out.

The second defendants have pleaded the Limitation Act, 1939, as they are entitled to do. In an action by a client against his or her solicitors for proved negligence, the court will not be astute to find that the solicitors can escape the consequences of their default by relying on the statute. The second defendants are, however, entitled, if the case is made out, to set up the statute. Moreover, in the present case, the statutory period of six years since the breach of duty had

occurred had elapsed long before the action was brought, and, therefore, the onus lies on the plaintiff to show, if she can, that the second defendants are not entitled to rely on the Limitation Act, 1939. This she has sought to do, so far as this court is concerned, by relying on s. 26 (b) of the Act of 1939. Section 26 reads:

"Where, in the case of any action for which a period of limitation is prescribed by this Act . . . (b) the right of action is concealed by the fraud of [the defendant or his agent] . . . the period of limitation shall not begin to run until the plaintiff has discovered the fraud . . . or could with reasonable diligence have discovered it . . ."

As counsel for the second defendants pointed out, the plaintiff has to show, first, that the right of action raised in this case was concealed by the second defendants, and, further, that it was so concealed by their fraud. The learned judge decided the point in the plaintiff's favour. The first ground of his decision was, as I understand it, that the original failure by the second defendants to inform the plaintiff in regard to the limitation of time in regard to her possible claim under the Fatal Accidents Acts was itself not merely an act of negligence but also constituted concealment by fraud. In this matter, however "fraud" in the section is to be defined, I am unable to agree with the learned judge's conclusion. No doubt, in some cases the facts may be such that the circumstances of the wrongful acts may also constitute concealment by fraud: e.g., where the wrongful acts are continuous and are also surreptitious. Such was the case, for example, in *Bulli Coal Mining Co. v. Osborne* (1) ([1899] A.C. 351). I will cite part of a sentence from the headnote to show what the position in that case was:

"Where the appellants had furtively for a series of years taken the respondents' coal by means of a wilful and secret underground trespass . . ."

That, however, is not, in my judgment, this case. Indeed, a decision to the effect that the failure to inform the plaintiff, while being an act of negligence, also constituted the requisite concealment by fraud, would be contrary to the decision in *Wood v. Jones* (2) ((1889), 61 L.T. 551), where it had been suggested that the failure of solicitors to give the client proper information as to a valuation also constituted the necessary concealment. That suggestion was rejected, and, in my judgment, rightly so, by KEKEWICH, J. I do not think that the present case can be distinguished in this respect by the mere circumstance that the second defendants continued to act as the plaintiff's solicitors after the particular act of negligence to which I have referred.

LLOYD-JACOB, J., also based himself, however, on the events which occurred in October and November, 1946, and which I must now shortly relate. In the letter dated June 3, 1946*, which the second defendants had written to the electricity company's solicitor, they had suggested that any grant made by the company would be reciprocated by an undertaking on the part of the plaintiff to accept it in full and final settlement of her claim. On Oct. 8 the plaintiff wrote a letter to the company. As a consequence, two telephone conversations were recorded by the second defendants. The first is the record made by Mr. Arditti, on Oct. 25, of a telephone call made by Mr. Stubbins, the solicitor of the electricity company:

"Attending solicitor of [the electricity company] on 'phone when he informed us that his company was unable to make any ex gratia payment to [the plaintiff] because she may consider this as an admission of liability on the part of his company. However, the board might consider making a donation to [the association] but they would want to know how the money would be used. We undertook to make inquiry . . . and report back."

The record of the second conversation, on the same date, was as follows:

* See p. 244, letters A and B, ante.

- A "Attending Squadron Leader O'Donnell of [the association] and informing [him] that [the electricity company] had approached us. He advised that the full amount of any donation that the company care to make to [the association] will be used for the benefit of [the plaintiff's] family . . . We undertook to inform this to the company and keep Squadron Leader O'Donnell informed. We also advised him that we would have to make a
- B small deduction in respect of our charges."

The note which Squadron Leader O'Donnell made of that conversation was made on Oct. 30:

- C "Mr. Arditti spoke to me re this case on Oct. 25, 1946, to the effect that he had received a communication from the solicitors of [the electricity company], stating that there might be the possibility of a donation from a certain quarter to the [association's] funds and that it might be appropriate if such donation were distributed to [the plaintiff] tactfully, by such means as [the association] should decide . . ."

At the end of his note Squadron Leader O'Donnell recorded:

- D "Confidentially, it appears to me that [the electricity company] may be thinking of helping [the plaintiff] in this indirect way, without making any factual ex gratia payment, which would probably in law be rather awkward."

- E Finally—and this is underlined: "Mrs. Kitchen must not know, of course, the originator of the donation, when it is received and distributed". The reference to secrecy is to be observed, and that, in fact, was how the matter was carried out. The electricity company sent £100, and that sum, diminished by an amount of five guineas for the second defendants' charges, was entrusted to the association, who applied it in assisting the plaintiff and her family; but there was never any disclosure—in fact, there was careful nondisclosure—to the plaintiff or to Mrs. Griffiths* of the source of the money.

- F In a case fruitful of mysteries this is, indeed, one. From the point of view of the electricity company, if the plaintiff was a person who might be inclined (in the phrase used by counsel for the second defendants) to misconstrue any grant, why did the company not accept the suggestion in the second defendants' letter, that if the company made a payment it would be taken in full settlement of all claims which the plaintiff had? Vis-à-vis the plaintiff, the company, by doing as it did, was no better off. The company remained liable to the plaintiff's importunities. What is said is, not that it was necessary for the electricity company to do as it did, but that it eased the company's conscience, and, indeed, that may be the simple answer. It may be that, though the electricity company had avoided, for its own purposes, making officially any payment at all, for some reason or another the company felt under an obligation to help the plaintiff. That, of course, would be wholly creditable. However, any further light on
- G what the electricity company was thinking is not available to us. Mr. Stubbins, the company's solicitor, appears to have been in court during the trial, but he was not called to give evidence. Another possible solution is that this idea of secrecy was something which was thought of and suggested by Mr. Arditti, and done (for example) for the reason that he knew that he could not, in fact, implement the suggestion which he had made at the end of his letter to the company.

- H On this matter the learned judge reached a clear finding. He treated Mr. Arditti's evidence as requiring caution and he concluded that the secrecy suggestion was an idea of Mr. Arditti, put forward by him in order that he or the second defendants could avoid entering into the relationship with the plaintiff of solicitor and client. I must, however, add that the learned judge expressly acquitted Mr. Arditti of any deliberate motive, for example, of protecting the second defendants or himself from possible consequences. The learned judge said that
- I

* Mrs. Griffiths was the local secretary of the Soldiers' Sailors' and Airmen's Families Association originally consulted by the plaintiff.

it was a snap decision to avoid the consequences of the solicitor and client relationship. I think, in fairness to Mr. Arditti, I should read this passage of the judgment: A

"I hope I made it perfectly plain that in finding, as I do, that the initiation of secrecy must plainly be accepted by Mr. Arditti as his responsibility, I do not wish it to be thought that in so determining and introducing it into the telephone conversation he had in mind any particular consequences to himself or to his firm which might have saved them from criticism or difficulty thereafter. It was plain that it was a telephone conversation at which a decision was made, so to speak, on the spur of the moment." B

The finding has been strongly challenged by counsel for the second defendants. Assuming, says he, that the idea was to make the payment to the association, then the secrecy provision is really a matter of very little significance and this suggestion which Mr. Arditti was supposed to be putting forward was his elaboration. I have found this point, as I earlier indicated, one of great difficulty, but, on the whole, I am not prepared to differ in this respect from the conclusion of the learned judge, to the extent that I think that Mr. Arditti ought to be taken as having been at heart a willing and ready party to this secrecy scheme even if he was not its author, although I am not thereby qualifying the learned judge's acquittal of deliberate motive on Mr. Arditti's part, as suggested in the judgment. C

If that is right, what is the result? The learned judge said that the suggestion was made on the spur of the moment in order that Mr. Arditti, and his firm, the second defendants, might not reconstitute or constitute the solicitor and client relationship; and that he was successful in his object. On this last matter I find myself in disagreement with the learned judge. I am satisfied that at this period, and for the purposes in hand, the second defendants were, and remained, the plaintiff's solicitors. I cannot accept the contention of counsel for the second defendants that there was some clear determination of the relation which followed on the express refusal in July of the electricity company to make an *ex gratia* payment. Such determination would, perhaps, be somewhat more easy to establish if the second defendants had ever clearly thought out and assumed the duties and responsibilities of acting (as they did, in fact, act) as the plaintiff's solicitors. As I have indicated—and this goes to the root of their conduct—they were always, to say the least of it, hazy in the extreme in thinking out what their relationships were with those with whom they were in communication. D

I base my conclusion that the solicitor and client relationship existed in this vital period, first, on the terms of the second defendants' letter dated June 3, 1946, to the electricity company*. Mr. Arditti and the second defendants knew nothing whatever of the plaintiff's letter of Oct. 8. Any approach from the electricity company, so far as Mr. Arditti was concerned, must have been related to his last communication to the company. Indeed, in a letter dated Dec. 13, 1950, to Messrs. William Easton & Sons, the senior partner of the second defendants went so far as to say: "Subsequently, we were able to induce the [electricity company] to pay a sum of £100 . . ." Further, in a letter dated July 12, 1946, the second defendants wrote to the association: ". . . if we can be of any further assistance in this unfortunate matter please do not hesitate to let us know". Elsewhere they refer to their having failed "so far" to obtain anything for the plaintiff. The conclusive matter, however, I take to be the matter of the second defendants' charges. It will be recalled† that in a letter dated July 9, 1946, they had written to the association saying: ". . . we do not propose making any charge to [the plaintiff] . . ." But in reporting the telephone conversation with Mr. Stubbins on Oct. 25, Mr. Arditti had said to Squadron Leader O'Donnell: ". . . we would have to make a small deduction in respect E F G H I

* See p. 244, letters A and B, ante.

† See p. 244, letter C, ante.

A of our charges", that is to say, a deduction from the sum which otherwise would be wholly applied for the benefit of the plaintiff.

If then the second defendants were acting, as I think that they were, as solicitors for the plaintiff, what was the effect of the concealment from her of this payment? It is all very well now to justify their having done so on the ground that otherwise she possibly, or probably, would have got nothing from the electricity company, but I cannot accept that as a satisfactory answer.

B If the second defendants were, as I hold that they were, acting as solicitors for the plaintiff, they clearly should have informed her of what the electricity company was proposing and, indeed, the senior partner of the second defendants himself so stated. A necessary consequence of the concealment (as the second

C defendants must have realised, if they had given any thought to the matter at all) was a concealment also from the plaintiff of the real effect of their having thrown away—and I use that word deliberately—any case which she might have possessed under the Fatal Accidents Acts in May, 1946. Does, however, that concealment amount to fraud? There is no finding, and no justification for any finding, of dishonesty as that word is ordinarily understood. It is now clear, however, that the word "fraud" in s. 26 (b) of the Limitation Act, 1939, is by

D no means limited to common law fraud or deceit. Equally, it is clear, having regard to the decision in *Beaman v. A.R.T.S., Ltd.* (3) ([1949] 1 All E.R. 465), that no degree of moral turpitude is necessary to establish fraud within the section. What is covered by equitable fraud is a matter which LORD HARDWICKE did not attempt to define two hundred years ago, and I certainly shall not attempt to do so now, but it is, I think, clear that the phrase covers conduct which,

E having regard to some special relationship between the two parties concerned, is an unconscionable thing for the one to do towards the other.

In *Beaman v. A.R.T.S., Ltd.* (3), the relationship between the parties was that of bailor and bailee. The complaint was that the bailees, in breach of their duty and contrary to what the bailor relied on them to do, took steps to get rid of certain goods belonging to the bailor, not for any malevolent motive, or any

F motive which in the ordinary way would be called dishonest, but because it suited their own business to do so and since they thought the goods were of no use to the bailor. The bailor was abroad during the war and the bailees thought that by disposing of the goods they would assist the bailor by saving her charges. LORD GREENE, M.R., said ([1949] 1 All E.R. at p. 469):

G "The defendants' principal purpose, if not their sole real purpose, in getting rid of the plaintiff's goods was to obtain for themselves the commercial advantage of being able to close down their business. In breach of

H their duty as bailees to communicate with the plaintiff before converting her goods, they recklessly and without making the slightest effort to ascertain the true position assumed that communication was impossible, and it is noticeable that, even after the Mediterranean was opened in 1943 on the

I surrender of Italy, they made no attempt to let the plaintiff know what they had done. They recklessly and without taking the least trouble to verify the facts assumed (what was false and on a simple examination of the records would have been shown to be false) that the plaintiff had not troubled about her goods, and that large storage charges had mounted up and would continue to mount up which the plaintiff would be unable to pay. They recklessly formed the opinion that the goods were valueless without having any independent valuation and in disregard of the fact (which, as bailees carrying on business as such, they must have known) that the absence of pecuniary value could afford no justification for disregarding their obligations . . . I am of opinion that the conduct of the defendants, by the very manner in which they converted the plaintiff's chattels in breach of the confidence reposed in them and in circumstances calculated to keep her in

ignorance of the wrong that they had committed, amounted to a fraudulent concealment of the cause of action."

In my judgment, similar reasoning applies in this case. The nature and consequences of the relationship between solicitor and client is to my mind more powerful in favour of the plaintiff in the present case than was the relationship of bailee and bailor. I think that in this case the conduct of the second defendants was reckless, in the sense in which LORD GREENE, M.R., used the word, in at least to the same degree as it was in *Beaman v. A.R.T.S., Ltd.* (3).

Assuming, as I do, that the plaintiff was the second defendants' client, she was entitled to rely on them to look after her interests, and it was in breach of that confidence, as I think, that they did what they did in October and November, 1946, and concealed from her facts which would undoubtedly, if disclosed, have brought to light what her true rights against the second defendants were. Therefore, although I have felt considerable difficulty about this part of the case, on the whole I have come to the conclusion that there is here just enough established by the plaintiff to enable her to say that there was concealment by fraud by the second defendants, and so to deprive them of the right to set up against her the Limitation Act, 1939. Counsel for the second defendants, in opening the case, put the argument that, even though the position was as I have stated, still the plaintiff had not acted with reasonable diligence, within the meaning of s. 26 of the Act of 1939, and should have found out earlier than she did what her rights were against the second defendants. But I do not think that she could or should. She says that she did not find out what her rights were until 1954, and she was believed by the learned judge. I cannot think that it would be reasonable to expect a woman in her position to have found out by reasonable diligence what the situation was, at least until about the time of the action brought for her by Messrs. William Easton & Sons in 1950.

I come last to what may be the most difficult point of all, namely, assuming that the plaintiff has established negligence, has she proved anything other than nominal damages? It is necessary to say something of the nature of the problem which (as I understand the law) the court has to solve in determining the measure of damages in such a case as this. The point taken by counsel for the second defendants is that we have now to consider the question of liability as between the plaintiff and the electricity company (or their successors) as though it were a distinct proceeding within the present action, and that, if we find on balance against the plaintiff, that is to say, that she fails in her claim against the electricity company (that claim being considered as if it were a separate and existing proceeding), then it follows that her damage is no more than nominal. If that is the right approach, it must follow that in any case such as the present the result, expressed in terms of money, is always all for the plaintiff or nothing. I cannot, for my part, accept that as the right formulation of the problem. If, in this kind of case, it is plain that an action could have been brought, and, that if it had been brought, it must have succeeded, the answer is easy. The damaged plaintiff then would recover the full amount of the damages lost by the failure to bring the action originally. On the other hand, if it be made clear that the plaintiff never had a cause of action, that there was no case which the plaintiff could reasonably ever have formulated, then it is equally plain that she can get nothing save nominal damages for the solicitors' negligence. I would add, as was conceded by counsel for the plaintiff, that in such a case it is not enough for the plaintiff to say: "Though I had no claim in law, still, I had a nuisance value which I could have so utilised as to extract something from the other side, and they would have had to pay something to me in order to persuade me to go away".

The present case, however, falls into neither one nor the other of the categories which I have mentioned. There may be cases where it would be quite impossible to try "the action within the action", as counsel for the second defendants asks.

A It may be that for one reason or another the action for negligence is not brought until, say, twenty years after the event, and in the process of time the material witnesses, or many of them, may have died or become quite out of reach for the purpose of being called to give evidence. In my judgment, assuming that the plaintiff has established negligence, what the court has to do in such a case as the present is to determine what the plaintiff has lost by that negligence. The question is: Has the plaintiff lost some right of value, some chose in action of reality and substance? In such a case it may be that its value is not easy to determine, but it is the duty of the court to determine that value as best it can. In the present case, I start with this. The learned judge here found all these points in the end for the plaintiff. Moreover, he, having seen the plaintiff in the witness-box, found expressly that she was a truthful and candid witness. He, therefore, concluded that she should be entitled to recover £2,000, which was a figure he arrived at as being equivalent to two-thirds arithmetically of the full amount which (admittedly) was the maximum recoverable under the Fatal Accidents Acts. The relevant passage in the judgment is:

"I am not prepared myself to say that there was no hope for this action. I think there were certain difficulties in the way, and I think, having regard to the fact that [the plaintiff] had three children to look after, it was a very heavy responsibility on those advising her, if an offer of compromise had been made, to reject it out of hand. The more I think about it the more I think that, weighing up these possibilities and considering that even successful actions may involve a party in some part of the costs, the fair figure at which to estimate the damage which was suffered by the failure to bring this matter to trial or to issue proceedings is the sum of £2,000."

The learned judge does not say in terms whether the action, if brought, would have been well-founded. The first sentence is: "I am not prepared myself to say that there was no hope for this action", which, at first sight, would suggest that he thought it a somewhat speculative matter. But since the admitted maximum was £3,000, the final award of £2,000 must, in my view, mean that, in the opinion of the learned judge, this cause of action was one which, on merits, was more likely to succeed than not.

[His LORDSHIP considered the criticism of counsel for the second defendants regarding the finding of the judge that the plaintiff lost a valuable cause of action, and continued:] After giving my best consideration to the matter and directing myself, I hope, properly to the problems which are to be solved in this case, I find it impossible to say that there was here no valuable right, no cause of action, which was lost by the negligence. I agree with the judge that there were difficulties. The whole case is fraught with mystery and one is almost at a loss to conceive how such a state of things ever should have arisen. The fact is that it did arise because, unfortunately, the plaintiff's husband was killed. The plaintiff has suffered many buffetings in the course of the last thirteen years but in this one respect Fortune, it may be, has smiled on her; for I think, for my part, that she has been generously treated in being awarded £2,000. The second defendants, however, are not quarrelling with the matter of quantum. There is, therefore, nothing that I need say on that matter. I think that the plaintiff established that there was a cause of action and that she had lost something of value. Therefore, I think on this matter, too, that we should not disturb the judge's finding. In the end, therefore, I would say that this appeal should be dismissed.

PARKER, L.J.: I have come to the same conclusion. That the second defendants were negligent towards the plaintiff in May, 1946, I have no doubt and for the reasons given by my Lord. Whether, however, by fraud they concealed the cause of action from the plaintiff is a matter on which I have had considerable doubt. If there was such a concealment, it is to be found and to be found only, in my view, in the events of October, 1946. On the whole,

though with considerable hesitation, I have come to the same conclusion as my Lord, and I would accept his judgment on this point. A

The only matter on which I would desire to add something is on the difficult question of damages. On this point, the first question to consider is how the plaintiff's husband met his death by electrocution. That his left hand was on the tap over the sink is, I think, clear. The tap and pipe were torn away from their proper position in his convulsions. That his right hand must, at the same time, have come in touch with the control unit is also, I think, clear. It could not have been the cooker itself, because this was found to be adequately earthed. Moreover, the plaintiff herself, immediately after the accident, in putting on the kettle, got a slight shock from the control unit. According to the plaintiff, the switch on the control unit was turned off at nights, and, since it was found on, I think that it seems probable that the plaintiff's husband was pulling down the switch on the control unit with his right hand at the same time as his left hand was on the tap. Thus he was making himself into a conductor from the control unit to earth. [HIS LORDSHIP considered the question how the plaintiff's husband was electrocuted, and continued:] The matter remains a mystery, and, were it necessary for this court to decide whether the plaintiff would have succeeded, I, for my part, would have found great difficulty in coming to that conclusion; but, as I understand it, that is not our task. If the plaintiff can satisfy the court that she would have had some prospect of success, then it would be for the court to evaluate those prospects, taking into consideration the difficulties that remained to be surmounted. In other words, unless the court is satisfied that her claim was bound to fail, something more than nominal damages fall to be awarded. B C D E

Bearing that in mind, what is the position? The plaintiff is clearly a person whose evidence was likely to be believed. The learned judge was clearly impressed by her. Counsel for the second defendants has raised forcible criticisms of her evidence, but it is to be observed that all those criticisms were made, and, no doubt, made with equal force, before the learned judge, and he, despite that, was prepared to accept the plaintiff's evidence. No doubt, the plaintiff would, in the action, have maintained that the electricity company reconnected the lead wires in 1940. As my Lord has said, that is not a last minute assertion on the part of the plaintiff. In January, 1946, that was her case. Furthermore, whoever connected those wires connected them wrongly, and, if capable of doing that, he might equally be capable of breaking the lead sheath and trying to hide his fault by fixing the clip over or in the gap so caused. If, in the year 1946, in an action against the electricity company, the plaintiff had given this evidence, it would clearly have called for an answer by the company, and nobody knows what would have happened then. Mr. Edwards* might or might not have been called. If the company were not in a position to call him, they might have sought to compromise the action, as, indeed, they did the claim under the Law Reform (Miscellaneous Provisions) Act, 1934. If Mr. Edwards had been called, he might or might not have been believed. True, he was an experienced meter fixer, but he was not a wireman, and, for all one knows, he might have left the work of reconnexion to a mate or underling. There remains, above all, the fact that there is really no alternative suggestion as to how the lead sheath was broken. In these circumstances, I cannot say that the claim was bound to fail, and, accordingly, the plaintiff is entitled to something more than nominal damages. The learned judge assessed the damages at £2,000 as against £3,000, the amount agreed to be the maximum recoverable if she had succeeded in the action. I confess that, in the light of my analysis of the position, I should have valued the plaintiff's potential claim at very much less, but there is no appeal against this award in so far as it exceeds nominal damages, and, accordingly, F G H I

* Mr. Edwards was a servant of the electricity company who visited the plaintiff's premises in 1940.

A the award must stand. In these circumstances, I would, like my Lord, dismiss the appeal.

SELLERS, L.J.: I agree with the judgments of my Lords, and I will add only a few observations of my own on some of the issues.

B With regard to the second defendants' reliance on the Limitation Act, 1939, and the plaintiff's endeavour to overcome it, there was, in my view, no active concealment by the second defendants in June or July, 1946. There was a negligent decision by Mr. Arditti* on the plaintiff's proposed claim, because inadequate efforts had been made to obtain the evidence on which an opinion could properly be expressed. The evidence of the plaintiff and others, available at the time, required careful investigation and assessment by an experienced expert in electrical matters and this was not obtained. There were further acts of negligent omission by Mr. Arditti. He failed to serve a writ within the statutory period of one year to keep the claim under the Fatal Accidents Acts, 1846 to 1908, open and so, at least, to enable an expert to be consulted and his report to be considered. He failed to inform the plaintiff of the time limit for the writ and the consequences of not issuing the writ and to obtain her instructions one way or the other. It has been accepted by the second defendants, and, indeed, it is quite obvious, that the plaintiff would have insisted on a writ being issued and would have rejected advice to let the matter drop. Those are the acts of omission which gave rise to the claim against the second defendants for negligence or breach of duty, but I do not find in them or in the circumstances surrounding them any evidence of fraudulent concealment. In October and November, 1946, however, there was an active concealment, a deliberate and intentional failure for some reason to disclose the offer of £100 made by the electricity company. What was the reason? If it had been solely to benefit the plaintiff and ensure that she received safely, from an undisclosed source, financial benefit which she would not otherwise have received, then, although there was concealment, I would not have thought that fraud, even in its widest sense, or on general equitable grounds, had been established. If, however, the evidence establishes that the non-disclosure to the plaintiff of the electricity company's renewed approach to the second defendants in October, 1946, and the company's offer of some payment for the benefit of the plaintiff amounted to a further breach of duty to the plaintiff by the second defendants, or if that disclosure was withheld in order to benefit the second defendants themselves, then I think that circumstances arise which would establish fraudulent concealment under s. 26 (b) of the Limitation Act, 1939, as it has been interpreted in the authorities to which LORD EVERSHEDE, M.R., has referred.

The learned judge rejected the second defendants' contention that their motive and interest was solely to obtain a benefit for the plaintiff and that the electricity company enforced secrecy as a basis of their financial assistance. I see no reason to reject the judge's view. The approach to the electricity company had been brought about by the plaintiff's letter of Oct. 8, 1946, direct to the company, requesting a reconsideration of her claim. Although the evidence did not touch on it, I find it hard to believe that no reference was made to that letter by the electricity company's solicitor, Mr. Stubbins, to Mr. Arditti during the vital telephone conversation. For all the electricity company knew, it might have been followed up by many more such letters or by direct personal approach or both, and it would hardly seem to have been serving the electricity company's interest to require secrecy and to dispense with a receipt in final settlement of all claims, which the second defendants earlier and without any authority had been rash enough to offer.

I think that there was abundant justification for the judge's finding that the suggestion of secrecy emanated from Mr. Arditti. The judgment holds, if I

* Mr. Arditti was an articled clerk of legal experience to whom the conduct of the plaintiff's matter was delegated by the second defendants.

understand it aright, that Mr. Arditti, not wishing to make a full disclosure of what had taken place, sought to evade that responsibility by acting in a manner which would not involve him in a solicitor and client relationship with the plaintiff. I agree with my Lords that the second defendants were solicitors and were acting as solicitors for the plaintiff in October and November, 1946, and that their decision not to disclose the approach to the electricity company was a breach of their duty in that capacity. The plaintiff had written the letter and if she had heard that in response the electricity company was making some offer, call it *ex gratia* or a donation, after an earlier complete refusal to do anything, she would, no doubt, have been prompted to press further. The offer of £100, generous as it was, if there was no legal liability, was modest, indeed, in comparison with the needs of the plaintiff and her children. If she had known what was taking place and had demanded more and had insisted, as it seems that she would have done, that action should be taken, the second defendants would have been in a difficulty and their failure to inform her of the omission to have issued a writ would have been revealed.

Whatever may have been in the mind of Mr. Arditti at the time of the telephone conversation, his failure of duty concealed from the plaintiff facts which would, in all probability, have revealed the second defendants' earlier breach of duty. The concealment was intentional and did, in fact, benefit and save the interests of the second defendants. If the "device", as it has been called in argument, was Mr. Arditti's, as I would hold it to have been, it cannot be regarded in all the circumstances merely as a high-minded endeavour to benefit the plaintiff, and, in my view, it is sufficient to prevent the second defendants from relying on the defence of the Limitation Act, 1939. Whatever is to be said for it, the result was that the plaintiff was put in a false position. She received a curt and rather callous letter from the electricity company on Oct. 28, 1946, saying that they felt "that no useful purpose would be served by granting the interview for which you have asked".

The only other matter on which I would wish to touch is in regard to the damages. Cases concerning electricity are often difficult and may develop surprisingly in the course of a trial when all the factors are judicially investigated by examination, cross-examination and argument, and, therefore, until judgment, may leave a position of uncertainty in the minds of the contesting parties. The plaintiff was not an expert electrician but she did know something, perhaps more than anyone else who gave evidence, about the electrical arrangements in her kitchen. The judge believed her as a witness, and, notwithstanding the powerful criticisms of her evidence and its inconsistencies by counsel for the second defendants, I would not feel justified in saying that the judge was wrong. It became apparent that a vital factor in the case was the finding after the accident of a fracture in the lead covering of the lead running from the control box to the meter. The question arises how this fracture could have occurred. [His LORDSHIP referred briefly to possible causes and continued:] In my view, it is quite untenable to regard the claim against the electricity company as one without any foundation and as one which was bound to fail. On behalf of the plaintiff, it has not been sought to establish that she was certain of victory and should have recovered £3,000, which was agreed as the appropriate sum in a successful claim under the Fatal Accidents Acts, 1846 to 1908. There was room for compromise on both sides, and, as I view it, every probability of a compromise if the plaintiff's action had been pressed, and I would not disturb the judge's assessment of £2,000, high though I regard it.

Appeal dismissed. Leave to appeal to the House of Lords refused.

Solicitors: *Hewitt, Woollacott & Chown* (acting on behalf of the second defendants); *H. C. L. Hanne & Co.* (for the plaintiff).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

A

BEER v. DAVIES.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Hilbery and Donovan, J.J.), April 28, 1958.]

B

Road Traffic—Notice of intended prosecution—Notice sent to defendant's residence by registered post—Defendant away on holiday unknown to police—Notice returned to police undelivered—Defendant, bus driver employed by London Transport Executive—Not warned of prosecution at the time offence committed—No notice served on London Transport Executive as registered owners of vehicle—Whether notice served on defendant—Whether case within exemption from requirement of service—Road Traffic Act, 1930 (20 & 21 Geo. 5 c. 43), s. 21 (c), proviso (i)—Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 26.

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The respondent, when driving a London Transport omnibus, was involved in a collision. Soon afterwards a policeman, who was on point duty nearby, took particulars. The respondent gave his correct home address and was not warned that he might be prosecuted nor was any summons for a driving offence served on him within the fourteen days after the collision allowed by s. 21 of the Road Traffic Act, 1930*. Notice of intended prosecution was sent by the police to the respondent at his home address by registered post within the fourteen days, but it was not delivered as the respondent was away on holiday and there was no one in his home. The notice was returned to the police through the post more than fourteen days after the collision. No notice was served on the London Transport Executive, who were the registered owners of the omnibus. An information against the respondent for driving without due care and attention was dismissed pursuant to s. 21 of the Road Traffic Act, 1930, which forbade the respondent's being convicted unless within fourteen days of the commission of the offence "a notice of the intended prosecution . . . was served on or sent by registered post to him or the person registered as the owner of the vehicle". By proviso (i) to s. 21 this requirement was not a bar to conviction if the name and address of the registered owner of the vehicle could not with reasonable diligence have been ascertained in time for him to be served or if the respondent by his own conduct contributed to the failure to serve him.

Held: the information had been rightly dismissed under s. 21 of the Road Traffic Act, 1930, because—

(i) the notice of intended prosecution had not been served within the time allowed as it had not been delivered (*R. v. London Quarter Sessions, Ex p. Rossi*, [1956] 1 All E.R. 670, followed), and

(ii) the case was not within proviso (i) to s. 21 as the respondent had not contributed by his conduct to the failure to serve him and the owners of the omnibus could have been served with the notice within the fourteen days allowed by s. 21.

Appeal dismissed.

[As to notice of prosecution, see 31 HALSBURY'S LAWS (2nd Edn.) 680, para. 1008.

For the Road Traffic Act, 1930, s. 21, see 24 HALSBURY'S STATUTES (2nd Edn.) 594; for the Interpretation Act, 1889, s. 26, see *ibid.*, 224.]

Case referred to:

(1) *R. v. London Quarter Sessions, Ex p. Rossi*, [1956] 1 All E.R. 670; [1956] 1 Q.B. 682; 120 J.P. 239; 3rd Digest Supp.

Case Stated.

This was a Case Stated by a metropolitan magistrate in respect of his adjudication as a magistrates' court sitting at Bow Street. On July 29, 1957, an

* The relevant terms of s. 21 are printed at pp. 256, 257, and p. 258, letter E, post.

information was preferred by James Beer, the appellant, against George Robert Davies, the respondent, that on June 10, 1957, the respondent drove a motor vehicle without due care and attention contrary to s. 12 (1) of the Road Traffic Act, 1930. When the information was heard before the metropolitan magistrate, the respondent raised the question whether s. 21 of the Act of 1930 had been complied with. The following facts were found. A

The respondent, when driving a London Transport omnibus, was involved in a collision with a motor car. A police officer who was near to the scene of the collision took the appropriate particulars from the respondent including his name and address which the respondent correctly gave as 153, Tunnel Avenue, Greenwich, London, S.E.10, without adding any qualification. The respondent was not warned at the time of the collision that he might be prosecuted under the Road Traffic Act, 1930. No summons for an alleged offence under the Act of 1930 was served on the respondent within fourteen days of the collision but on June 20, 1957, viz., ten days after the commission of the alleged offence, a notice of intended prosecution, within the terms of s. 21 of the Act of 1930, was sent by registered post to the respondent to the address which he had given to the police officer at the time of the collision. On June 27, 1957, the notice and its envelope were returned to the appellant by the Post Office, the envelope being marked "Undelivered for reason stated. No response to 739 [the postman's number]". In fact, the respondent was away from his home on holiday from June 15 to June 22 and, between these dates, there was no one at his home to take in registered post which was delivered there. The appellant made no inquiries as to where the respondent was nor did he consult London Transport Executive, whom he knew to be the respondent's employers. No notice of intended prosecution was served by the appellant on London Transport Executive, who were the registered owners of the omnibus. When it was discovered, after June 27, that the respondent had been away on holiday, a police officer went to the respondent's home, on July 2, viz., more than fourteen days after the commission of the alleged offence, and personally served on him a second notice, explaining to the respondent what had happened to the original notice. London Transport Executive, the respondent's employers, knew that he was away on holiday and would not be returning to work until June 30, but they did not know where he had gone. B
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It was contended for the respondent that s. 21* of the Road Traffic Act, 1930, had not been complied with in that the second notice was out of time and the first notice was not received by the respondent; accordingly, the respondent should be acquitted of the alleged offence. For the appellant, it was contended that as the first notice was properly sent by registered post within the time specified in s. 21, to the address which the respondent gave, and since the police were unaware that the respondent was going away on holiday, s. 21 had been complied with. The metropolitan magistrate was of opinion that the respondent's contentions were correct and that the failure to comply with s. 21 was not due to any of the matters stated in the proviso† to that section; accordingly, he dismissed the information against the respondent. G
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The question for the opinion of the court was whether, on these facts, the metropolitan magistrate came to a correct decision in law.

Paul Wrightson for the appellant.

H. F. Newman for the respondent. I

LORD GODDARD, C.J., having stated the facts and referred to the Case Stated, continued: Section 21 of the Road Traffic Act, 1930, provides that a person prosecuted for a driving offence under the Act shall not be convicted

"unless either—(a) he was warned at the time the offence was committed that the question of prosecuting him for an offence under some one or other

* For the terms of s. 21, see letter I, *supra*, to p. 257, letter A, post.

† For the terms of the proviso to s. 21, see p. 258, letter E, post.

- A of the provisions aforesaid would be taken into consideration; or (b) within fourteen days of the commission of the offence a summons for the offence was served on him; or (c) within the said fourteen days a notice of the intended prosecution specifying the nature of the alleged offence and the time and place where it is alleged to have been committed was served on or sent by registered post to him or the person registered as the owner of the vehicle at the time of the commission of the offence."

Before I read the proviso to s. 21 of the Act of 1930, I will say this: The question is whether this notice has been served on the respondent, and it can be served either by serving it on him—that is personal service—or serving it by registered post. Various other cases have been decided in this court*, which I need not consider, since the Court of Appeal have subsequently dealt with the question of service—it is true that this was with regard to service of a notice under another Act than the Road Traffic Act, 1930. Service by post is the subject of s. 26 of the Interpretation Act, 1889, which provides:

- D "Where an Act passed after the commencement of this Act authorises or requires any document to be served by post, whether the expression 'serve', or the expression 'give' or 'send', or any other expression is used, then, unless the contrary intention appears, the service shall be deemed to be effected by properly addressing, prepaying, and posting a letter containing the document, and unless the contrary is proved to have been effected at the time at which the letter would be delivered in the ordinary course of post."

- E The Court of Appeal in *R. v. London Quarter Sessions, Ex p. Rossi* (1) ([1956] 1 All E.R. 670), have decided that where a notice is to be served by registered post, though it is prima facie enough to prove that it was correctly directed, stamped and posted, yet if it can be shown that the notice was never delivered, there has not been service and s. 26 of the Interpretation Act, 1889, does not assist. In *R. v. London Quarter Sessions, Ex p. Rossi* (1) the Court of Appeal were not concerned with the Road Traffic Act, 1930. The question was one of an appeal to quarter sessions in a bastardy matter, but the substance of the decision applies equally here because the Court of Appeal were considering s. 3 of the Summary Jurisdiction (Appeals) Act, 1933, which provides for the giving of various notices, and says:

- G "A notice required by this sub-section to be given to any person may be sent by post in a registered letter addressed to him at his last or usual place of abode."

- H What happened in that case was that the alleged putative father, the man who had been adjudged by the magistrate not to be the putative father, who was the respondent to the mother's appeal, had left the house where he had been living, and a notice was sent to him at the house, which was his last known place of abode, by registered post. He had gone away, and the letter was not taken in. The Court of Appeal held that no notice had been given to him and reversed the decision of this court who held that there had been a notice. I am bound to say that one of the things that caused this court to decide that there had been notice was that we thought that the man was deliberately evading notice, and had taken himself off so that the unfortunate woman could not know where he was. She knew where he ordinarily lived, and she sent the notice there, but it was proved that he had gone away. We thought that he was evading notice, and we thought the section had been complied with, but the Court of Appeal said that that was wrong. It is true that DENNING, L.J., in the course of his judgment said ([1956] 1 All E.R. at p. 675):

* See, e.g., *Holt v. Dyson*, [1950] 2 All E.R. 840; *Sandland v. Neale*, [1955] 3 All E.R. 571.

"Evading service would be a ground for ordering personal service or substituted service, but not for dispensing with service altogether."

With great respect to the learned lord justice, while I know that there are many rules of the Supreme Court which deal with substituted service of writs or other proceedings, I do not know of any rule in the Magistrates' Courts Act, 1952, or anywhere else which allows for substituted service of notices which have to be given under the Acts which apply in those courts. It may be, in view of the expression of opinion of DENNING, L.J., that one may go to a court and ask for leave to serve a notice by substituted service. How that can be done in the case of an appeal to quarter sessions I have no knowledge. Is one to apply to the magistrates for leave to serve by substituted service, or is one to apply to quarter sessions, which is the court which has to try the case, because quarter sessions probably will not be able to sit in time for one to apply as they only sit so many times a year? I confess that I do not understand how substituted service can be effected, but at any rate there is the decision of the Court of Appeal that a notice sent by registered post but not delivered is not good service. I do not see, therefore, that we can possibly hold otherwise in this case without disregarding that decision, though, technically, it may not be binding because it is a criminal cause or matter.

After full argument, it seems to me that we are bound to decide that there has not been service in this case. Then comes the question whether the proviso to s. 21 of the Road Traffic Act, 1930, is brought into play. The proviso says:

"Provided that—(i) Failure to comply with [the requirement in s. 21 that there shall be no conviction unless inter alia within fourteen days of the commission of the offence a notice of intended prosecution has been served either on the accused or the registered owner of the vehicle] shall not be a bar to the conviction of the accused in any case where the court is satisfied that—(1) neither the name and address of the accused nor the name and address of the registered owner of the vehicle, could with reasonable diligence have been ascertained in time for a summons to be served or for a notice to be served or sent as aforesaid; or (2) the accused by his own conduct contributed to the failure."

Therefore, before the failure to serve can be excused the court has to be satisfied that neither the name nor the address of the accused or his employer could be ascertained because s. 21 of the Act of 1930 provided that the notice could be sent by registered post to the person registered as the owner of the vehicle as well as to the actual driver at the time of the commission of the offence; so it seems to me that it is impossible to bring that part of the proviso into play because the police certainly knew the registered owner of the vehicle, that is to say, the London Transport Executive*. Of course, I quite understand their position. Their position was that naturally they served the notice on the respondent whose name and address they had got. It was because the Post Office took some time to return the notice to the police that they had not time then to serve the registered owner, but that is a matter of which the respondent can take advantage. We cannot rewrite the section. The whole point is this, that it is said that the accused by his own conduct contributed to the failure because he had given an address and had not said to the police "I am going to be away on a certain day". Even if he knew that he was going to be away on the day, he at any rate would not know that he was going to be prosecuted. The very object of this notice is to tell him that he is going to be prosecuted. Still less would he know when the notice was going to be served on him. I

* The London Transport Executive was established under s. 5 of the Transport Act, 1947; activities formerly carried on by the London Passenger Transport Board were delegated to the executive by a Scheme dated Dec. 5, 1947, which operated from the beginning of 1948. This executive was not abolished by the British Transport Commission (Executives) Order, 1953 (S.I. 1953 No. 1291) which abolished the others.

A think that the words "the accused by his own conduct contributed to the failure" mean that the accused had done something which prevented the police from serving him, such as giving a false address.

For these reasons I think that the magistrate came to a correct decision and the appeal fails.

B **HILBERY, J.:** I am of the same opinion. Section 21 of the Road Traffic Act, 1930, is a section which provides certain restrictions on prosecutions under the preceding section, and under the preceding section it is the duty of the driver to give his name and address. [His LORDSHIP then read s. 21*, and continued:] The accident in this case which led to an attempt to serve a notice of an intended prosecution occurred on June 10, 1957. On June 20 a notice
C purporting to be a notice pursuant to s. 21 of the Act of 1930 was sent to the address of the respondent, an address which was his address and which he had given to the police at the time particulars were taken about the accident. He happened to be away on his holiday, and there was nobody to take in the registered letter, and the postman returned it. Unfortunately the Post Office delayed in sending it back to the police as a letter which they had been unable
D to deliver until June 27, and of course it was then too late†, for the police to send the notice to the owner of the respondent's vehicle, because fourteen days had gone by. The vehicle being driven was a London passenger omnibus, and the London Transport Executive was the owner.

For the reasons given by my Lord, I am of opinion that we cannot hold that in this case there was a sufficient giving of the notice merely by sending the notice by registered post to the defendant at the address which was his address.
E We are clearly precluded, it seems to me, by the decision of the Court of Appeal in *R. v. London Quarter Sessions, Ex p. Rossi* (1) ([1956] 1 All E.R. 670). I refer particularly to the judgment of MORRIS, L.J., where I think the matter as to which we are precluded is made perfectly clear. After quoting the whole of s. 26 of the Interpretation Act, 1889, which I need not read, he refers to the Summary Jurisdiction (Appeals) Act, 1933, and says (*ibid.*, at p. 678):

F "The Act of 1933 clearly permits or authorises the giving of a notice as to a hearing by sending a document by registered post. But if the primary obligation of giving notice means in this context the giving of some form of notice which reaches the party interested so that he may be present or represented at a hearing, then the permissive user of the post denotes a
G user so that notice may reach the party interested so that he may be present or represented at the hearing. It was, therefore, entirely proper to send a notice to Mr. Rossi by registered post. Applying the provisions of the Interpretation Act, 1889, s. 26, since no contrary intention appears from the Act of 1933, the sending of the notice to Mr. Rossi was deemed to be effected by properly addressing, prepaying and posting the letter which contained
H the document. Then by the concluding words of s. 26, the sending of the notice was deemed, unless the contrary was proved, to have been effected at the time at which the letter would have been delivered in the ordinary course of post. Here, however, the contrary was proved. It was proved not merely that the letter was not delivered in the ordinary course of post but that the letter was not delivered at all."

I For that reason the learned lord justice is saying that there was no compliance with the requirements of the Summary Jurisdiction (Appeals) Act, 1933, that a notice required to be given by s. 3 (1) of the Act might be sent by post in a registered letter addressed to him at his last or usual place of abode. In those circumstances, it seems to me quite plain that we, too, are bound now to give that interpretation to these words in s. 21 of the Act of 1930.

* For the terms of s. 21, see pp. 256, 257, to p. 258, letter E, ante.

† Section 21 provides that a notice of intended prosecution must be served within fourteen days of the commission of the offence.

Counsel for the appellant then falls back on the proviso to s. 21, but the proviso in my view on its plain language is a proviso which can only be used where there has been a failure to comply with the requirements of s. 21 because

“neither the name and address of the accused nor the name and address of the registered owner of the vehicle, could with reasonable diligence have been ascertained in time for a summons to be served or for a notice to be served or sent . . .”

Those words relate to the provision in s. 21 that such a notice may be given to the person who has been driving the car or to the owner of the car and, those alternatives being open, in order to obtain the benefit of the proviso the police must show that neither of those alternatives was open to them by the exercise of reasonable diligence. Here that cannot be shown because there was no difficulty about serving the notice on the owner by the exercise of less than diligence, since the vehicle was a public omnibus owned by the London Transport Executive.

Finally, counsel for the appellant says that he relies on the second part of the proviso, namely, that the accused by his own conduct contributed to the failure to serve the notice, but here all that is shown is that the driver of the omnibus, the respondent, having given his correct address in the ordinary course of his employment apparently went away on his annual holiday. He was not to know that the police would be serving any such notice as is required by s. 21, because no warning had been given to him that there might be a prosecution. He was not in any sense taking any action to avoid service, and, without stating anything which would be regarded hereafter as binding on the construction of those words in the second part of the proviso, it is enough to say that in my view at any rate what he did here did not amount to conduct which contributed to the failure of the police to serve on him the notice under s. 21 which they wished to serve.

For these reasons I agree with the judgment of my Lord.

DONOVAN, J.: I agree with both judgments which have been delivered, and have nothing to add.

Appeal dismissed.

Solicitors: *Solicitor, Metropolitan Police* (for the appellant); *Geoffrey B. Gush & Co.* (for the respondent).

[*Reported by WENDY SHOCKETT, Barrister-at-Law.*]

A

HILLIER v. HILLIER AND LATHAM.

[COURT OF APPEAL (Hodson, Romer and Sellers, L.JJ.), April 24, 1958.]

Divorce—Petition—Petition within three years of marriage—Exceptional hardship suffered by petitioner—Adultery of wife leading to pregnancy—Domestic situation causing nervous distress to husband—Matrimonial Causes Act, 1950 (14 Geo. 6 c. 25), s. 2 (1), proviso, (2).

B

The parties were married in March, 1956. The wife left the husband in November of that year; she vacillated in her intent to return, and thereby caused the husband distress leading to a breakdown in health. In 1957 the wife met L. with whom she committed adultery and became pregnant. The birth of the child of the wife and L. was expected to take place at the beginning of May, 1958. There was no probability of a reconciliation of the spouses, because the wife was living with L. and wanted to marry him. An application by the husband for leave to present a petition of divorce within three years of the marriage on the ground of exceptional hardship having been refused, fresh evidence was admitted in the Court of Appeal, showing that the husband suffered to an unusual extent from nervous anxiety about this domestic situation which, if continued, would lead to serious injury to health.

C

Held: the approach to a determination of such an application should be subjective and, as the fresh evidence showed that the particular individual who was the husband in this case would suffer in health if he had to wait the full period of three years before being able to present a petition for divorce, a case of exceptional hardship was made out and leave to present the petition should be granted.

E

Bowman v. Bowman ([1949] 2 All E.R. 127) discussed.

Per CURIAM: the mere fact that conception follows on an act of adultery in the first three years of marriage does not constitute in itself exceptional hardship within the meaning of the proviso to s. 2 (1) of the Matrimonial Causes Act, 1950.

F

Appeal allowed.

[As to granting leave to present petition within three years of marriage on the ground of exceptional hardship suffered by the petitioner, see 12 HALSBURY'S LAWS (3rd Edn.) 235, para. 442, note (c); and for cases on the subject, see 27 DIGEST (Repl.) 373, 3077-3081.

G

For the Matrimonial Causes Act, 1950, s. 2, see 29 HALSBURY'S STATUTES (2nd Edn.) 393.]

Case referred to:

(1) *Bowman v. Bowman*, [1949] 2 All E.R. 127; [1949] P. 353; [1949] L.J.R. 1416; 27 Digest (Repl.) 373, 3081.

H

Interlocutory Appeal.

This was an appeal with leave from an order of WRANGHAM, J., on Apr. 18, 1958, dismissing the application of the husband for leave to present a petition for divorce. The learned judge held that adultery plus pregnancy did not constitute exceptional hardship in this particular case; that the wife committed adultery followed by what was a reasonably normal result of such adultery, namely, the conception of a child, and that the conception of a child as a result of adulterous intercourse was not so far removed from the ordinary that it ipso facto converted the hardship of having an adulterous wife into an exceptional hardship.

I

J. Sofer for the appellant husband.

W. Kee for the respondent wife.

HODSON, L.J.: This is an appeal by leave from an order of WRANGHAM, J., dated Apr. 18, 1958. The reason for the acceleration of the appeal, which was

set down on Apr. 2, is that it is desired (and that is one of the objects of this application) to enable the respondent to a proposed divorce petition to marry the man with whom she has committed adultery before May 5, that being the date when she expects to be confined as a result, as it seems and the man says, of that adultery. The actual matter before the court was and is an application for leave to present a petition for divorce within three years of the marriage, the marriage having taken place on Mar. 24, 1956. Section 2 (1) of the Matrimonial Causes Act, 1950, provides that no petition for divorce shall be presented within three years of the marriage, but there is a proviso that a judge may on application allow a petition to be presented before three years have passed

“on the ground that the case is one of exceptional hardship suffered by the petitioner or of exceptional depravity on the part of the respondent.”

Sub-section (2) of the Act provides:

“In determining any application under this section for leave to present a petition before the expiration of three years from the date of the marriage, the judge shall have regard to the interests of any children of the marriage and to the question whether there is reasonable probability of a reconciliation between the parties before the expiration of the said three years.”

The learned judge dismissed this application which was brought on the ground of exceptional hardship suffered by the petitioner in the circumstances of this case which were that in November, 1956, within a comparatively few months of the marriage, his wife left him. She never returned to him although she vacillated in her intention to return, and caused him great distress, leading up to something in the nature of a nervous breakdown on his part which caused him to be absent from his work for some time. In February, 1957, the wife was admitted as an inmate of Roffey Park Rehabilitation Centre at Horsham in Sussex for treatment. At that time the relationship between the parties was not unfriendly; affectionate letters were exchanged, and the husband hoped that his wife would return to him. In this centre she met the man concerned in this case with whom she has committed adultery, and expressed herself to be in love with him. Since that time she has been adamant in her refusal to return to her husband, who subsequently learned that she was pregnant by this man. A medical certificate was obtained which shows when the child is likely to be born. The fact that this adultery has resulted in pregnancy is an element which, no doubt, did satisfy the learned judge that the prospects of reconciliation were indeed remote, because it would make it more unlikely that the husband would take his wife back if she had a child by another man.

It is on the question of exceptional hardship that this appeal turns. I would say at once that for my part I agree with what the learned judge said in regard to the fact of the pregnancy. I do not think that it makes any difference whether the child is expected to be born, or whether the child has been born. In either case I would not think it right to lay down that that must necessarily be regarded as exceptional hardship to the husband, although no doubt it would be an element in the case (as it has been in this case) which would cause the husband to be distressed and afflicted by the injury which has been put on him. The reference in the sub-section to the interests of children of the marriage does not seem to me to assist, because, looking at the realities of this matter, this child is agreed to be not a child of the marriage, and it is on both sides agreed that the child is in reality the child of the wife by the man with whom she has committed adultery. It is pointed out that if the child is born before that man marries the wife, as he says that he intends to do, the child cannot be legitimated by subsequent marriage. If, however, the child is born when the man and the wife are free to marry and if they do marry, the child will be regarded *prima facie* as the child of that marriage.

- A There is an element in this case which I think the court is entitled to look at as showing that the husband has suffered exceptional hardship. The learned judge did pay some regard to the breakdown in health which the husband suffered after his wife left him in November, 1956, and before she had actually met this other man. He disregarded it, or paid little attention to that breakdown in health, because he thought that it was scarcely relevant having regard to the fact that the man who has caused the trouble in this case did not come on the scene until afterwards. In this court we have allowed further evidence to be given as to the suffering which the husband has had following on not only his wife leaving him, but her throwing in her lot with this other man; and from that further evidence it appears that he has suffered to a perhaps unusual extent from the nervous anxiety which this domestic situation has caused him. He has been unable to concentrate on his work—which is that of a supervising clerk—and he failed in his attempt to be accepted as a candidate for a departmental training scheme at a time when he was quite unable to concentrate on or do justice to his work. He has suffered, and is still suffering, from sleeplessness and anxiety caused by the domestic situation in which he finds himself, and he has consulted a medical man who has prescribed sedatives and advised him that, if he continues to worry, his health must inevitably suffer.
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- I think that the court is entitled to look at the effect on this particular husband of the situation which has developed in considering the question of exceptional hardship, and not merely to confine itself to an objective view as to how the ordinary man might be expected to react in given circumstances. I have said that I do not base my judgment on any question of the interests of the child, although reference was made to a passage in the judgment of DENNING, L.J., in *Bowman v. Bowman* (1) ([1949] 2 All E.R. 127 at p. 128), where in giving instances in which he had himself exercised his discretion at first instance DENNING, L.J., refers to the case of a wife as the result of adultery having a child by another man so that the husband, if he took her back, would have to maintain another man's child. That situation, of course, is not contemplated in the present case.
- E
- F Here, so far as the evidence goes, there is no likelihood of the husband, if this application is rejected, being expected to take his wife back and legitimate the child. The facts of the case are that the other man and the woman are living together, and that it is not contemplated that the woman should return to her husband bringing the child with her. So that the only real ground on which I can see my way to saying that this is a case of exceptional hardship is the case which has been put forward in this court, and indeed supported by quite different evidence from that given in the court below, namely, a case in which exceptional hardship has been caused to the husband by reason of the suffering in his health which he has endured, and it is for those reasons that I would allow this appeal.
- G

- ROMER, L.J.: I agree, and I agree for the same reasons which my Lord has mentioned. My reasons for the view that this appeal should be allowed are founded principally on evidence which was not before the learned judge consisting of a further affidavit of the husband. He relies on the exceptional hardship provision in s. 2 (1) of the Matrimonial Causes Act, 1950—"that the case is one of exceptional hardship suffered by the petitioner". Those words presumably include hardship suffered in the past by the would-be petitioner, but I think myself that they are directed to a considerable extent, if not primarily, to the possibility or probability of exceptional hardship being suffered in the future by the petitioner if he has to wait the full period of three years before he can present his petition, which in this case would be nearly one more year, the marriage having taken place in March, 1956.
- H
- I

The husband, as the evidence quite obviously shows, experienced in the past worry and strain to a degree which may fairly be described as exceptional, resulting as it did at the end of 1956, I think, in a nervous breakdown. That trouble was quite plainly brought about by his wife's treatment of him, her

desertion and vacillation whether to return to him or not, her confession that she had a lover, and her later confession as to her pregnancy. All those elements, lasting as they did over quite a period of time, built up a position which did result in this man being subjected to and experiencing a very considerable degree of nervous tension. That being the position in the past, we have now before us an affidavit which has been sworn since the matter was before the learned judge in which the husband says that he has consulted his doctor, who advised him that if he continues to worry in the way he has been worrying in the past his health must inevitably suffer further; and that, of course, is highly relevant to what, as I have already said, I think perhaps is the primary purpose of, or the position which was primarily envisaged by, the section, namely, the effect that having to wait for the full three years would have on the would-be petitioner; and in this case the position is that it would inevitably result in a further deterioration in his nervous condition.

I agree with my Lord that one should approach each case subjectively, and whatever the position might be in relation to what one might perhaps describe in other connexions as the ordinary reasonable man, if you find a man who is of a particularly nervous or highly strung disposition, and further delay may have a serious effect on him, then it may fairly be said of him that it would be exceptional hardship in his case to compel him to delay and hold up his petition for the full three years, especially if one couples it, as one does in this case, with his experiences in the past. On top of all that, it is perfectly plain here that there is no prospect of reconciliation between these two parties, a matter to which DENNING, L.J., adverted in his judgment in *Bowman v. Bowman* (1) ([1949] 2 All E.R. 127) to which my Lord has referred. For those reasons, based as they are on this man's health, and on nothing else as far as I am concerned, I think he has made out a case. In conclusion I would associate myself with what my Lord has said; and I agree with the learned judge in this: I cannot think that the mere fact that conception follows on an act of adultery in the first three years of the marriage constitutes in itself exceptional hardship for the purpose of s. 2 of the Matrimonial Causes Act, 1950. I would allow the appeal.

SELLERS, L.J.: I agree; and I so entirely agree with the reasons given by both my Lords that I desire to add none of my own.

Appeal allowed. Leave to serve petition within three years granted.

Solicitors: *H. E. Thomas & Co.* (for the husband); *Webster, Butcher & Johnson* (for the wife).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

A WILSON v. TYNESIDE WINDOW CLEANING CO.

[COURT OF APPEAL (Jenkins, Parker and Pearce, L.JJ.), April 23, 24, 1958.]

Master and Servant—Duty of master—Reasonable care not to expose servant to unnecessary risk—Extent of duty with regard to work places not under master's control—Servant sent to clean third party's windows—Injury due to handle coming away from window—Liability of master.

A master's duty to his servant to take reasonable care so to carry out his operations as not to subject his servant to unnecessary risk (see *Smith v. Baker & Sons*, [1891] A.C. at p. 362) is one single duty applicable in all circumstances, though it may be convenient to divide it into categories (as was done by LORD WRIGHT in *Wilsons & Clyde Coal Co., Ltd. v. English*, [1937] 3 All E.R. at p. 640) when dealing with a particular case. So viewed, the question whether the master was in control of the premises, or whether the premises were those of a stranger, becomes merely one of the ingredients, albeit an important one, in considering the question of fact whether, in all the circumstances, the master took reasonable care. See p. 271, letter D, p. 272, letter I, to p. 273, letter A, and p. 271, letter H, post.

Observations of DENNING, L.J., in *Christmas v. General Cleaning Contractors, Ltd.* ([1952] 1 All E.R. at p. 41) on an employer's duty of care as to the safety of the place of work where the premises are not under his control, criticised (see p. 273, letter E, post).

A skilled and experienced window cleaner, who knew that he should not trust the handles on windows without first testing them, was frequently sent by his employers to clean the windows of a particular customer. The employers did not inspect the customer's premises each time when they sent window cleaners there, nor did they specifically warn the window cleaner of particular dangers; but they did instruct him to leave uncleaned any window which presented unusual difficulty and which he was in doubt whether he could clean safely, to report the fact to them and to ask for further instructions. There was no evidence of any practice in the trade either of inspecting premises for safety before work or of repeatedly warning workmen of the dangers. While cleaning the outside of a kitchen window, the woodwork of which appeared to the window cleaner to be rotten, of which he knew the sash to be stiff and of which one of the two handles was missing, the window cleaner attempted to pull the window down by the remaining handle. The handle came away in his hand, causing him to lose his balance, fall and sustain severe injuries. In an action by the window cleaner against the employers for alleged negligence exposing him to unnecessary risk,

Held: the employers had taken reasonable care not to subject the plaintiff to unnecessary risk, because the danger was an apparent danger, the plaintiff was very experienced at the work, and they had instructed him not to clean windows which it might not be safe to clean; the employers, therefore, were not liable.

Hodgson v. British Arc Welding Co., Ltd., and B. & N. Green & Silley Weir, Ltd. ([1946] 1 All E.R. 95) considered.

Per CURIAM: the reasoning in *Cilia v. H. M. James & Sons* ([1954] 2 All E.R. 9) and *Taylor v. Sims & Sims* ([1942] 2 All E.R. 375) that there is no duty of care in respect of premises over which the master has no control is inconsistent with *Biddle v. Hart* ([1907] 1 K.B. 649), and with the speech of LORD WRIGHT in *Thomson v. Cremin* ([1953] 2 All E.R. at p. 1192); see p. 272, letter D, and p. 273, letter D, post.

Appeal dismissed.

[As to the extent of a master's duty at common law, see 22 HALSBURY'S LAWS (2nd Edn.) 187, para. 314; and for cases on the subject, see 34 DIGEST 194-199, 1580-1626.]

Cases referred to:

- (1) *Wilsons & Clyde Coal Co., Ltd. v. English*, [1937] 3 All E.R. 628; [1938] A.C. 57; 106 L.J.P.C. 117; 157 L.T. 406; Digest Supp.
- (2) *Biddle v. Hart*, [1907] 1 K.B. 649; 76 L.J.K.B. 418; 97 L.T. 66; 36 Digest (Repl.) 63, 342.
- (3) *Christmas v. General Cleaning Contractors, Ltd.*, [1952] 1 All E.R. 39; [1952] 1 K.B. 141; *affd.* H.L., sub nom. *General Cleaning Contractors, Ltd. v. Christmas*, [1952] 2 All E.R. 1110; [1953] A.C. 180; 3rd Digest Supp.
- (4) *Taylor v. Sims & Sims*, [1942] 2 All E.R. 375; 167 L.T. 414; 36 Digest (Repl.) 153, 806.
- (5) *Cilia v. James (H. M.) & Sons*, [1954] 2 All E.R. 9; 3rd Digest Supp.
- (6) *Smith v. Baker & Sons*, [1891] A.C. 325; 60 L.J.Q.B. 683; 65 L.T. 467; 55 J.P. 660; 36 Digest (Repl.) 154, 812.
- (7) *London Graving Dock Co., Ltd. v. Horton*, [1951] 2 All E.R. 1; [1951] A.C. 737; 36 Digest (Repl.) 54, 296.
- (8) *Hodgson v. British Arc Welding Co., Ltd., and B. & N. Green & Silley Weir, Ltd.*, [1946] 1 All E.R. 95; [1946] K.B. 302; 115 L.J.K.B. 400; 174 L.T. 379; 24 Digest (Repl.) 1089, 403.
- (9) *Thomson v. Cremin*, [1953] 2 All E.R. 1185; 3rd Digest Supp.
- (10) *Davie v. New Merton Board Mills, Ltd.*, [1958] 1 All E.R. 67.

Appeal.

The plaintiff, a window cleaner, appealed from the decision of DONOVAN, J., in a reserved judgment dated June 14, 1957, and given at York Assizes, dismissing his claim for damages for personal injuries against his employers. The facts, which are summarised in the headnote, are fully stated in the judgment of PEARCE, L.J.

G. S. Waller, Q.C., and *R. P. Smith* for the plaintiff, the workman.

Marven Everett, Q.C., and *R. C. H. Briggs* for the defendants, the employers.

JENKINS, L.J.: I will ask PEARCE, L.J., to deliver the first judgment.

PEARCE, L.J.: The plaintiff appeals from a judgment of DONOVAN, J., given at York Assizes on June 14, 1957, dismissing the plaintiff's claim for damages for personal injury suffered in an accident sustained by him when he was working for the defendants as a window cleaner. The plaintiff alleged negligence against the defendants. The defendants denied negligence but made no allegation of contributory negligence. The learned judge assessed the damages, in case of appeal, at £4,320.

The plaintiff was a man aged fifty-six at the time of the accident. He had been a window cleaner all his working life, and was a trained and very experienced man in that occupation. He had worked for the defendants for thirteen or fourteen years. He had been a charge-hand with his previous employers, and acted in that capacity with the defendants when he was needed to do so. He had taught many hundreds of persons how to carry on their trade.

The defendant firm had been in existence for sixty years, employing at times up to fifty men, and so far as accidents were concerned had apparently a good record. The defendants had a contract to clean the windows of the Newcastle Breweries once a quarter, a task which took two men three or four days. The plaintiff had done work on the breweries frequently in the last ten years before the accident. There was no inspection of the premises before the starting of the work. On Sept. 3, 1954, the plaintiff and another man went to perform the quarterly cleaning. In due course the plaintiff cleaned the window with

- A which this case is concerned. It is twelve feet from the ground; it overlooks a street with a rather steep incline. He had cleaned that same window three months before and on other previous occasions. There had originally been handles on each side of the underneath of the upper sash, but for some two or three years there had been only one handle remaining, namely, that on the right-hand side. The room to which the window belonged was a kitchen.
- B The steam condensed and ran down, causing the woodwork to rot. To the plaintiff it appeared "all rotten", to use his own words; and he said that the sash was always a bit stiff. The plaintiff first cleaned the window from the inside. Then he put up his twenty-eight foot extending ladder and wedged it firmly on the ground. Standing on the ladder, he cleaned the bottom half first. Then he took hold of the handle with his right hand and put the fingers of his left hand over the putty on the bottom bar of the top sash, in order to pull the sash down. He had so used that handle three months before and on previous occasions. He gave a pull on the handle. It came away in his hand, so that he lost balance and fell off the ladder, suffering severe injuries. The learned judge found that he gave a pull of sufficient strength to bring the top half of the window down had the handle remained firm. The plaintiff complains of that finding as putting the strength of the pull too high, but the learned judge took into account the fact that the pull was enough to throw the plaintiff off balance; and it seems to me that it was a reasonable finding, on the evidence.
- C
- D

- E When the plaintiff went to work for the defendants he knew that he should not trust handles on windows, but he had never himself experienced the coming off of a handle. The defendants had never given him general safety instructions, or said anything to him specifically about handles, but, in answer to the question "When you first went to this company if someone had said to you 'Never trust handles on windows' would that have been something you knew already?" the plaintiff said "Something I knew already". The learned judge describes the extent of the plaintiff's knowledge and information in these words:
- F

- G "If in the course of his work the plaintiff came across a window the cleaning of which presented some unusual difficulty, and the plaintiff was in doubt whether he could clean it safely, then the system was that he should leave the window uncleaned, report the fact to the defendants, and ask for further instructions. He was told to do this when he first joined the defendant firm in 1942."

Counsel for the plaintiff says that to call that a system was putting the matter higher than the evidence justified; but I do not think that that criticism is made out. Then the learned judge continued:

- H "The plaintiff had cleaned this particular window many times previously himself, the last occasion being the June before the September when he met with his accident. In that June, he had pulled the top half of this window down all right despite the missing handle, though the window was always a bit stiff to move. He knew that the window had had only one handle for years, and, as already mentioned, he saw that the state of the woodwork of the window was rotten. He knew from experience that one should not trust to handles on windows, that is, that he should not pull on them in any circumstances in which, if the handle gave way, he would run the risk of injury. He knew that he should test the handle first. No general instructions were given to him when he joined the defendants as to how he should clean windows. He already knew. No warning against using window handles as handholds lest they should give way was given to him, but he was already aware of this danger. He had cleaned very many
- I

windows having handles similar to the one in the present case: such handles were common in the Newcastle district, and, while one had never come off before while he was holding it, he was aware of the possibility that one might—'I knew all along' he said 'that one should not trust to handles'."

There was evidence that handles coming off are frequent causes of accidents. Mr. Davis, a surveyor called for the plaintiff, made four criticisms of the defendants' behaviour. First, he said that there ought to be printed rules; and he produced a booklet which set out clearly what are the perils and what matters should be avoided. He said that that booklet ought to be given to the employees and that they should be made to sign a document to say that they had read it, because although they might be aware of the warnings contained in it it was necessary to drive those warnings home. Secondly, he said that the men should be told that where there was only one handle remaining on an upper sash, the sash should be opened from the inside. Thirdly, he recommended regular visits, say once or twice a year, by someone in authority, to see that the employees were doing their work properly and that all was going well—that being chiefly designed to impress on them the importance of obeying safety rules. He admitted that there was a field where it had to be left to the men to find defects and report. He had no knowledge of what the practice was in the window-cleaning trade; and he had no knowledge of preliminary inspections being made before the men worked on a particular job; but he had heard of people coming round as overseers to see that the work was being properly done.

The learned judge's findings of fact are not seriously challenged. There are four minor criticisms, two of which I have mentioned, where counsel for the plaintiff says that the learned judge gave a wrong emphasis to the evidence. I do not think that any valid criticisms of the learned judge's findings of fact have been made out. In a long and careful judgment, he dealt with all the relevant facts and all the contentions put forward by the plaintiff. Mr. Waller, in his very fair and careful argument for the plaintiff, bases his contentions on two main grounds: first, that it is the duty of the defendants to provide a place of work as safe as reasonable care and skill can make it. The accident (he says) shows that this place of work was not safe. That duty is always on the defendants, whether delegated or not, as is shown by (in particular) *Wilsons & Clyde Coal Co., Ltd. v. English* (1) ([1937] 3 All E.R. 628). He relies on *Biddle v. Hart* (2) ([1907] 1 K.B. 649) and on a dictum of DENNING, L.J., in *Christmas v. General Cleaning Contractors, Ltd.* (3) ([1952] 1 All E.R. 39), as showing that the employer's duty of care as to the safety of the place of work extends even to premises over which he has no control; and he argues that the decisions in *Taylor v. Sims & Sims* (4) ([1942] 2 All E.R. 375) and *Cilia v. H. M. James & Sons* (5) ([1954] 2 All E.R. 9) are wrong in so far as a contrary view was taken. On the basis that the responsibility for providing a safe place of work remains on the master even though he has no control of the premises, counsel for the plaintiff contends that at the least a preliminary inspection to ascertain the dangers is available to the master, and that in this case the defendants were negligent in not so inspecting and in not providing a safe place of work for the plaintiff. Further, in respect of premises out of the master's control counsel for the plaintiff argues that the duty of providing safe premises is, as it were, delegated by the master to the occupier. The master is thus vicariously liable for the occupier's failure to provide safe premises. It is true that, if one can import such a notional delegation, that further argument would stand. Such a delegation, however, necessitates a fiction which seems to me to have no justification in fact. The tradesman comes to the premises to do something to them. He does not thereby delegate to the owner something which he himself has no right to do and with which he has never been concerned.

A Counsel for the plaintiff's second point, as additional or alternative, is that the defendants failed in their duty to take steps to provide a system which would protect the plaintiff from the danger which caused his accident. A proper system (in his contention) would necessitate first an instruction to the plaintiff that a window with only one handle must be opened from inside: secondly, a regular inspection by an overseer to see how the work was going and to emphasise the necessity for safety precautions: thirdly, a specific warning of the danger of trusting to handles on windows, a warning which should be repeated say twice a year, even though the danger was known to the plaintiff—counsel instanced certain railway regulations that, though known to the men, have to be read to them twice a year as a reminder of things which, though well-known, are apt to escape their attention or to be treated lightly—and fourthly, that the master should have told the occupier to put the premises in order.

The learned judge dealt with the first contention (as to the duty to provide a safe place of work) as follows. First he reminded himself of the well-known dictum of LORD HERSCHELL in *Smith v. Baker & Sons* (6) ([1891] A.C. 325 at p. 362) that the duty of the employer is to take reasonable care to provide proper appliances and to maintain them in proper condition and so to carry out his operations as not to subject those employed by him to unnecessary risk. He dealt with the passage in the judgment of DENNING, L.J., in the window-cleaning case *Christmas v. General Cleaning Contractors, Ltd.* (3) ([1952] 1 All E.R. 39) to which I have referred. That passage reads as follows (*ibid.*, at p. 41):

E “The next question is whether the contractors are liable to their workman, the plaintiff. Counsel for the contractors argued that employers who send their men out to work on the premises of other people, have no responsibility for the safety of those premises. He cited *Taylor v. Sims & Sims* (4) in support of that proposition. He said that it was for the occupier to see that the premises were safe for the workman and not for the employer to do so. I cannot agree with that proposition. Until recently many people thought that an occupier was bound to use reasonable care to see that his premises were safe for workmen he invited on them, but that is no longer true. The decision of the House of Lords in *London Graving Dock Co., Ltd. v. Horton* (7) ([1951] 2 All E.R. 1) shows that an occupier can allow his premises to remain defective and dangerous with impunity so long as he gives the men warning of the risk or the danger is so obvious that they must be aware of it. If this is so, I think it must follow that it is for the employer, who sends his men to the premises, to take reasonable care to see that the premises are safe for the men or else take proper steps to protect the men from the dangers to which he sends them.”

H The learned lord justice was saying, in effect, that *Horton's* case (7) had left a gap which must be filled by imposing on the employer a liability for dangers for which the invitor might no longer be liable. The learned judge observed that the other members of the Court of Appeal had based their judgments on somewhat different grounds and that in the House of Lords the decision in the plaintiff's favour was based on a shortcoming in the system employed to clean the windows rather than a failure to inspect the windows before each periodical cleaning. He then referred to *Cilia v. H. M. James & Sons* (5) and *Taylor v. Sims & Sims* (4), in each of which cases the learned judges held that where an employer sent out his men to work on the premises of others there was no duty of care on him in respect of those premises and that, if there were, the duty had, on the particular facts of each case, been discharged. He also referred to *Hodgson v. British Arc Welding Co., Ltd.*, and *B. & N. Green & Silley Weir, Ltd.* (8)

([1946] 1 All E.R. 95), in which HILBERY, J., dealt with a similar point in a somewhat different and, as it seems to me, a preferable way. The implications of his judgment are not that the employers had no duty at all in respect of things over which they had no control but that the discharge of that duty was of a wholly different kind from that where the master was in control. A

The learned judge then continued as follows:

“There is no evidence before me of any practice of window cleaning employers to inspect premises in detail before each periodical cleaning of the windows. Nor would Mr. Davis—a surveyor called for the plaintiff—go further than to say that employers should go around while the work was on ‘to keep an eye on the men and see how the job was shaping’. I think it would be placing too heavy a burden on employers to say that they must inspect in detail all the premises where their men clean windows every time the men do so and before they do so. Some premises contain so many windows that before the last window was inspected some new defect might have developed in the first; for example, a broken sash-cord, and the work of inspection might be endless. Without in any way minimising the risks of the job, I think that they can be met in other ways. If men are properly taught their job; are provided with proper equipment; are adequately warned of the dangers, and are instructed that they should not clean any windows which appear to them to be too dangerous to clean, but should report the matter back to the employer, then it seems to me to be unnecessary to lay down that the employer must in addition inspect every window beforehand.” B C D E

The learned judge then went on to deal with *Thomson v. Cremin* (9) ([1953] 2 All E.R. 1185) on which the plaintiff relied before him and relies before us. In that case a stevedore succeeded against a shipowner, as invitor, in respect of a faulty shoring that injured the plaintiff. The shoring had been installed by competent shipwrights in Australia, who were independent contractors, and a government certificate had been issued to the effect that the regulations had been duly complied with. The shipowner, on the same reasoning as that in *Wilsons & Clyde Coal Co., Ltd. v. English* (1), was held vicariously liable to an invitee for the default of the independent contractors. The plaintiff in this case sought to say that since a master owes an even higher duty to a servant than an invitor owes to an invitee, then a master must a fortiori owe a duty to a servant to see that the premises are safe before sending his workman to work on someone else's premises. However, as the learned judge pointed out, this very argument had failed in that case, since the plaintiff had sued his master as well as the shipowner but had failed against his master. The learned judge referred to the words of VISCOUNT SIMON, L.C., and LORD WRIGHT (*ibid.*, at pp. 1192, 1193) in that case. VISCOUNT SIMON, L.C., said (*ibid.*, at p. 1189): F G H

“Here, again, I agree with the view of the Scottish courts that it was not proved to be part of the regular practice or course of duty of stevedoring firms to make such inspection.”

The learned judge then dealt with the duty to make this particular handle safe, and concluded that, since it was not within the power of the defendants to do so and since they had not the necessary control over the premises, it could hardly be unreasonable not to do so. He concluded, on this point, I

“The defendants in fact met the situation in this case by telling the plaintiff, a very experienced man, that he need clean no window which he considered unsafe. I hold that there was no obligation on the defendants to

- A go further and make good the defective handle. The duty of an employer to take reasonable care to provide a safe place of work relates, in my view, only to that place of work which is in the employer's occupation or over which he is shown to have the necessary degree of control. This is not true of the premises in the present case."
- B The learned judge then dealt with the defendants' alleged failure to warn the plaintiff of that which he already knew, namely, the danger of pulling on handles, and with the failure to give periodically repeated warnings in order to keep his caution vigilant, and decided that there was no negligent failure in that respect. He commented on the fact that there was no evidence of any practice in the trade with regard to repeated warnings. He differentiated between this
- C case and cases where risks are "insidious and unseen", such as dermatitis cases, where, for instance, it might be that reminders as to the use of barrier cream and such like precautions were necessary; and he pointed out that in any event it was pure guesswork whether, if there had been periodic warnings, this accident would have been avoided. He found, therefore, that the defendants had not been negligent.
- D Now it is true that in *Wilsons & Clyde Coal Co., Ltd. v. English* (1), LORD WRIGHT divided up the duty of a master into three main headings for convenience of definition or argument; but all three are ultimately only manifestations of the same duty of the master to take reasonable care so to carry out his operations as not to subject those employed by him to unnecessary risk. Whether the servant
- E is working on the premises of the master or on those of a stranger, that duty is still the same; but as a matter of common sense its performance and discharge will probably be vastly different in the two cases. The master's own premises are under his control: if they are dangerously in need of repair he can and must rectify the fault at once if he is to escape the censure of negligence. If, however,
- F a master sends his plumber to mend a leak in a respectable private house, no one could hold him negligent for not visiting the house himself to see if the carpet in the hall creates a trap. Between those extremes are countless possible examples in which the court may have to decide the question of fact: did the master take reasonable care so to carry out his operations as not to subject those employed by him to unnecessary risk? Precautions dictated by reasonable care when the servant works on the master's premises may be wholly pre-
- G vented or greatly circumscribed when the place of work is under the control of a stranger. Additional safeguards intended to reinforce the man's own knowledge and skill in surmounting difficulties or dangers may be reasonable in the former case but impracticable and unreasonable in the latter. So viewed, the question whether the master was in control of the premises ceases to be a matter of technicality and becomes merely one of the ingredients, albeit a very
- H important one, in a consideration of the question of fact whether, in all the circumstances, the master took reasonable steps.
- I That is the reasoning of this court in *Biddle v. Hart* (2) ([1907] 1 K.B. 649). In that case a stevedore's workman, whilst engaged in unloading a ship, was injured owing to a defect in the tackle, and he was suing his master. The learned judge withdrew the case from the jury, on the ground that the stevedore was not responsible for a defect in the ship's tackle because the tackle did not belong to him. SIR GORELL BARNES, P., said (*ibid.*, at p. 653):

"In my opinion, if the employer uses plant which is not his own for the purpose of doing something which he has engaged to do, it cannot possibly be said that he has no duty whatever in relation to that plant. Otherwise he would be able to take anything that came from anybody and to use anything in the work he was engaged upon without making any inquiry

at all, and then say, in the event of an injury arising from a defect in the plant, that he had nothing to do with it, and so escape liability. That, to my mind, is unreasonable, and is not consistent with the second section*. What I take to be the meaning of that is that if the employer uses plant which does not belong to him, he may have a duty in regard to the persons employed to take reasonable care to see that it is proper for the purpose for which it is used. It may be that in a case of this character, although he had that duty, yet, if he had dealt with these shipowners before and had never had any cause for complaint, the jury might think that he had reasonably discharged that duty. On the other hand, when you have evidence that the plant was old and had been in use for a long time, the jury might say they were not satisfied that reasonable care had been taken to see that it was in a proper condition. Once establish the duty the question is, What would the jury consider a discharge of that duty ? ”

As PARKER, L.J., pointed out in *Davie v. New Merton Board Mills, Ltd.* (10) ([1958] 1 All E.R. 67), that reasoning seems inconsistent with the two decisions, to which I have referred, which say that there is no duty of care in respect of premises over which the master has no control, but it is consistent with the alternative ratio decidendi in each case that the duty had been discharged. It is consistent, I think, with the implications of the judgment of HILBERY, J., in *Hodgson v. British Arc Welding Co., Ltd.* (8). Applying that reasoning to this case, I think that the plaintiff has not shown that the defendants failed to take reasonable steps for the safety of the plaintiff.

The learned judge's reasoning seems to me to be sound. It was a question of fact whether the defendants were negligent; and I see no ground for differing from the conclusions of fact which the learned judge reached. I would dismiss the appeal.

PARKER, L.J.: I agree. I have no doubt that this appeal fails. It is only out of respect for Mr. Waller's persuasive argument for the plaintiff that I add anything. The first way in which he puts his case is this. It is, he says, the master's duty to provide a place of employment as safe as the exercise of reasonable skill and care will permit. Quite clearly, the premises in this case where the plaintiff was to work were not as safe as the exercise of reasonable skill and care would permit: therefore, as the duty is personal, the defendants are liable; and that is so whether the premises are in the occupation of the defendants or (as here) of people who are neither servants nor agents of, nor independent contractors employed by, the defendants.

This case is a very good example of the difficulties that one gets into in treating the duty owed at common law by a master to his servant as a number of separate duties. Thus, it is often said (as it is said in this case) that the master owes a duty to make the place of employment as safe as reasonable skill and care will permit. Again, it is said that it is the master's duty to make the plant and tools as safe as reasonable skill and care will permit; and again it is said that it is the master's duty to devise and lay down a safe system of working. Approached in that way, questions at once arise whether, and if so to what extent, any of those duties extend (in the case of premises) to premises not occupied or controlled by the master, or (in the case of plant and tools) to plant and tools bought from responsible and reputable suppliers or manufacturers—bearing in mind, as has been laid down so often, that in each case the duty is a duty personal to the employer, in the sense used in *Wilsons & Clyde Coal Co., Ltd. v. English* (1) ([1937] 3 All E.R. 628). It is no doubt convenient, when one is dealing with

* I.e., s. 2 of the Employers' Liability Act, 1880, repealed by s. 1 (2) of the Law Reform (Personal Injuries) Act, 1948 (25 HALSBURY'S STATUTES (2nd Edn.) 364).

A any particular case, to divide that duty into a number of categories; but I prefer to consider the master's duty as one applicable in all circumstances, namely, to take reasonable care for the safety of his men, or, as LORD HERSCHELL said in the well-known passage in *Smith v. Baker & Sons* (6) ([1891] A.C. 325 at p. 362), to take reasonable care so to carry out his operations as not to subject those employed by him to unnecessary risk.

B That general duty applies in the circumstances of every case; but the governing words "reasonable care" limit the extent of the duty in the circumstances of each case. Accordingly the duty is there, whether the premises on which the workman is employed are in the occupation of the master or of a third party, or whether the tool* has been made to the order of the master or his manager, C servant or agent, or is a standard tool supplied and manufactured by reputable third parties; but what reasonable care demands in each case will no doubt vary.

That is the true principle, and is consistent with the decision of this court in *Biddle v. Hart* (2) ([1907] 1 K.B. 649). As I said in *Davie v. New Merton Board Mills, Ltd.* (10) ([1958] 1 All E.R. 67), I very much doubt whether the decisions in *Taylor v. Sims & Sims* (4) ([1942] 2 All E.R. 375) and *Cilia v. H. M. James & Sons* (5) ([1954] 2 All E.R. 9) are correct decisions in so far as they said that in circumstances such as these there is no duty in respect of the safety of the premises. It seems to me also that those statements are inconsistent with a passage in the speech of LORD WRIGHT in *Thomson v. Cremin* (9) ([1953] 2 All E.R. at p. 1192). D Counsel for the plaintiff relied strongly on the dicta of DENNING, L.J., in *Christmas v. General Cleaning Contractors, Ltd.* (3) ([1952] 1 All E.R. 39); but those were dicta, and, in so far as counsel for the plaintiff said that those remarks implied that there was a duty to make premises in the occupation of a third party safe, I do not think that they can stand with the decisions to which I have referred. E Bearing that in mind, there is nothing in this case on which one can say that the general duty, so far as it relates to premises, has been F broken.

One can conceive cases of a very old, dilapidated building, or a building which is known to have suffered war damage or is dilapidated in some other respect, where one could say that it was the duty of an employer to see that it was made safe or, if it could not be made safe, if necessary to forbid his workmen to go G there and work. However, there is no suggestion of that in the present case.

So much for counsel for the plaintiff's first contention. His second contention is based on an allegation that in various respects there has been a breach of the sub-division of the duty which relates to an unsafe system of working. This must be right: that in so far as what one may call the first division, the making the premises safe, cannot be fully performed, as when they are in the possession of a H third party it behoves the master to exercise all the more care in regard to his system of working.

In regard to the system of working, various points are taken. It is said first that it was the duty of the master, albeit he could not make the premises safe, to inspect them, either each time the workmen went on the job or at any rate I twice a year in the course of a contract such as this. That, of course, overlaps to some extent what I have already said in regard to the first contention; but in so far as it is based on an unsafe system of working it seems to me that the answer here is that there is no suggestion that there is any practice in the trade in that regard. No doubt a master will inspect the premises generally with a view to estimating for the job in the first instance; but there is no practice in the trade whereby he must make a periodic inspection.

* Cf. *Davie v. New Merton Board Mills, Ltd.* (10).

Secondly, it is said that reasonable care demanded in this case that there should be repeated warnings given to the plaintiff of the danger of windows sticking and of handles coming off. In fact in the present case there not only has been no repeated warning, but no initial warning. But the circumstances here are these: this is a man who was fifty-six years of age at the time, and who has been all his life a window cleaner: he is a very experienced man, usually acting as a charge-hand, and he frankly said that he knew of the dangers involved, of handles coming off. It is said that he should have been told again and again—one witness suggested that it should be impressed on him twice a year. For my part, I would like to adopt entirely what DONOVAN, J., said on that point. It seems to me that the disadvantage of doing that in the case of skilled men of this sort may well outweigh the advantages; and I cannot think that “reasonable care” demands a repeated warning to skilled men in a case at any rate such as this, where the dangers involved are patent. It is not a case, like that which one sometimes meets, of the danger of silicosis from particles of dust which are quite invisible and cannot be seen. I do not know, but it may well be that in such cases “reasonable care” would demand that the employer should warn and exhort the men constantly to wear masks. However, there, as I have said, the danger is not patent.

Lastly, it is said (and for my part I think that this is the strongest way that counsel for the plaintiff can put his case) that there ought to have been general instructions that men should clean all sash windows from the inside first and, while inside, should see that the top sash would come down—in other words that it was not stuck; and that in the case of a window the handles of which were suspect it be actually opened while the men are inside. That, however, was a suggestion made by only one witness, who I do not think had any experience of window cleaning whatsoever. There is no suggestion that there is any settled practice in the trade for the giving of such instructions. Accordingly, one would have to say (adopting the words so often used) that it would have been folly on the part of a prudent employer not to give such instructions. For my part, I am quite unable to say that in that regard the plaintiff has made out his case.

For these reasons, as well as the reasons given by my Lord, I would dismiss this appeal.

JENKINS, L.J.: I entirely agree, and find nothing I can usefully add.

Appeal dismissed.

Solicitors: *Gregory, Rowcliffe & Co.*, agents for *Hadaway & Hadaway*, Newcastle-upon-Tyne (for the plaintiff); *Barlow, Lyde & Gilbert* (for the defendants).

[*Reported by* HENRY SUMMERFIELD, Esq., *Barrister-at-Law.*]

NOTE.Re HASLIP (*deceased*).

B [PROBATE, DIVORCE AND ADMIRALTY DIVISION (Karminski, J.), April 2, 1958.]

Intestacy—Grant of administration—Administration pendente lite—Number of administrators—Supreme Court of Judicature (Consolidation) Act, 1925 (15 & 16 Geo. 5 c. 49), s. 163 (1).

C [As to the appointment of one administrator pendente lite where life or minority interest arises, see 16 HALSBURY'S LAWS (3rd Edn.) 218, para. 395, note (s), 245, para. 456, note (q); and for a case on the subject, see 23 DIGEST (Repl.) 211, 2504.

For the Supreme Court of Judicature (Consolidation) Act, 1925, s. 163 (1), see 9 HALSBURY'S STATUTES (2nd Edn.) 779.]

D Cases referred to:

(1) *In the Estate of Lindley, Lindley v. Lindley*, [1953] 2 All E.R. 319; [1953] P. 203; 23 Digest (Repl.) 211, 2504.

(2) *Re White*, [1928] P. 75; 96 L.J.P. 157; 138 L.T. 68; 23 Digest (Repl.) 144, 1508.

E **Motion.**

This was an application for the appointment of an administrator pendente lite.

The plaintiffs in the action, S.M.H. and H.M.N., claimed to be the executors of the last will and codicil dated respectively Aug. 9, 1944, and June 11, 1956, of Louisa Mary Haslip, spinster, deceased, and they claimed to have the will and codicil pronounced for in solemn form with the exception of certain alterations and additions alleged to have been made after the execution of the will. If the will were admitted to probate a life interest would arise in favour of the deceased's sister E.M.H. In the event of an intestacy E.M.H. would be entitled to one half share in the deceased's estate, and the remaining half share would be divided between the plaintiff S.M.H. and the defendant V.L.M.S., who was the deceased's niece and the sister of the plaintiff S.M.H.

D. G. A. Lowe for the plaintiffs.

J. P. Comyn for the defendant.

H *D. G. A. Lowe* for the plaintiffs. This is a friendly action, although the defendant, who would have an interest on an intestacy, is independently advised and represented. There is some uncertainty whether there is power to appoint only one administrator. *In the Estate of Lindley, Lindley v. Lindley* (1) ([1953] 2 All E.R. 319) shows that one administrator alone can be appointed as a sole administrator pendente lite. In TRISTRAM AND COOTE'S PROBATE PRACTICE (20th Edn.) 515, 516, it is stated that *In the Estate of Lindley* (1) is in conflict with the practice following a decision of the Court of Appeal in *Re White* (2) ([1928] P. 75).

J. P. Comyn, for the defendant, consented to the motion.

KARMINSKI, J.: In *Re White* (2) there was an application for a grant to a sole administratrix. That was refused. In the present case the application is under s. 163 of the Supreme Court of Judicature (Consolidation) Act,

1925, which speaks of a grant of administration "to an administrator". I A have no hesitation in following the decision *In the Estate of Lindley* (1)*.

I grant the order as prayed.

Order accordingly.

Solicitors: *Wilkinsons* (for the plaintiffs); *Kimbers* (for the defendant).

[Reported by A. T. HOOLAHAN, ESQ., Barrister-at-Law.] B

EASTBOURNE CORPORATION v. FORTES ICE CREAM PARLOUR (1955), LTD.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Hilbery and Donovan, JJ.),
April 16, 17, 30, 1958.]

*Town and Country Planning—Enforcement notice—Appeal against notice—
Jurisdiction of justices to determine whether or not matters referred to in notice
constituted development—Town and Country Planning Act, 1947 (10 & 11
Geo. 6 c. 51), s. 17 (2), proviso, s. 23 (4).* D

On an appeal under s. 23 (4) of the Town and Country Planning Act, 1947, to a magistrates' court by a person served with an enforcement notice the court has no jurisdiction to determine whether the matters referred to in the enforcement notice as being development did or did not constitute develop- E
ment within s. 12 (2) of the Act (so held by HILBERY and DONOVAN, JJ.; LORD GODDARD, C.J., dissenting).

Keats v. London County Council ([1954] 3 All E.R. 303) approved; *East Riding County Council v. Park Estate (Bridlington), Ltd.* ([1956] 2 All E.R. 669) considered. F

Per DONOVAN and HILBERY, JJ.: (i) *Norris v. Edmonton Corpn.* ([1957] 2 All E.R. 801) followed *Perrins v. Perrins* ([1951] 1 All E.R. 1075) which was specifically overruled in *Francis v. Yiewsley & West Drayton U.D.C.* ([1957] 3 All E.R. 529), and *Norris v. Edmonton Corpn.*, therefore, must also be regarded as no longer law (see p. 285, letter E, post). G

(ii) in so far as the proviso to s. 17 (2) of the Town and Country Planning Act, 1947, contemplates an appeal on the question of development or no development, it is repugnant to s. 23 (4) and the latter enactment prevails (see p. 282, letters C and F, post).

Appeal allowed.

[**Editorial Note.** The decision in the present case should be considered H with that in *Fyson v. Buckinghamshire County Council*, p. 286, post.

For the Town and Country Planning Act, 1947, s. 17 and s. 23, see 25 HALSBURY'S STATUTES (2nd Edn.) 515, 524.]

* *Re White* ([1928] P. 75), where there were infant beneficiaries and application was made under s. 162 (1) of the Act of 1925 for the appointment of a sole administrator was also considered in *Re Hall* ([1950] 1 All E.R. 718) on the question whether the amendment effected by s. 9 of the Administration of Justice Act, 1928, to s. 162 (1) of the Supreme Court of Judicature (Consolidation) Act, 1925, rendered that decision no longer binding. In *Re Hall* it was decided that the position was not affected by the amendment and that two administrators must be appointed under s. 162 (1) since the legislature had not made it clear, in enacting the amendment, that there was no intention to dispose with the requirements of s. 160 (1). A distinction is thus to be drawn between the number of administrators to be appointed under s. 162 (1) on the one hand and s. 163 (1), which is concerned with the grant pendente lite, on the other hand. I

A Cases referred to:

(1) *East Riding County Council v. Park Estate (Bridlington), Ltd.*, [1956] 2 All E.R. 669; [1957] A.C. 223; 3rd Digest Supp.

(2) *Keats v. London County Council*, [1954] 3 All E.R. 303; 118 J.P. 548; 3rd Digest Supp.

B (3) *Norris v. Edmonton Corpn.*, [1957] 2 All E.R. 801; [1957] 2 Q.B. 564; 121 J.P. 513.

(4) *Francis v. Yiewsley & West Drayton U.D.C.*, [1957] 3 All E.R. 529; 122 J.P. 31.

(5) *Wood v. Riley*, (1867), as reported in L.R. 3 C.P. 26; 42 Digest 658, 666.

(6) *Arnold v. Gravesend Corpn.*, (1856), 2 K. & J. 574; 25 L.J.Ch. 530; 27 L.T.O.S. 97; 20 J.P. 358; 69 E.R. 911; 42 Digest 659, 677.

C (7) *Perrins v. Perrins*, [1951] 1 All E.R. 1075; [1951] 2 K.B. 414; 115 J.P. 346; 2nd Digest Supp.

Case Stated.

D This was a Case Stated by justices for the County Borough of Eastbourne in respect of their adjudication as a magistrates' court sitting at Eastbourne on July 12, 1957. On June 13, 1957, the respondents, Fortes Ice Cream Parlour (1955), Ltd., preferred a complaint for an order to quash or vary a notice dated May 16, 1957, of the appellants, Eastbourne County Borough, relating to premises at 247, Terminus Road, Eastbourne, and expressed to be an enforcement notice served pursuant to the Town and Country Planning Act, 1947, E s. 23, requiring the respondents to remove an automatic ice cream sales machine which had been affixed to and installed on the forecourt of 247, Terminus Road, together with an electric cable attached thereto, and further to remove the bolts and other fittings securing the machine to the forecourt within twenty-one days after the date on which the notice became effective, which was on the expiration of twenty-eight days from the service of the notice. The notice stated that the F installation of the machine constituted development within the meaning of the Act of 1947 and that it had been carried out without the grant of planning permission under Part 3 of the Act. The following facts were found. The premises at 247, Terminus Road were a shop on the ground floor and basement of a building at the corner of Terminus Road and Burlington Road. The shop G was occupied by the respondents as an ice cream parlour and restaurant under a lease held in trust for the respondents by one Forte, as director thereof. The external appearance of the premises was that of an ice cream parlour and restaurant on the ground floor having a paved forecourt adjoining the public footway of the two roads. The shop front facing these roads had a black base, large glass windows displaying food menus and advertisements, and a fascia H board at a height of from twelve to fourteen feet above the forecourt and bearing the words "Fortes Ice Cream Parlour". In or about June, 1956, the respondents purchased an automatic coin-operated ice cream sales machine from the manufacturers thereof who then delivered it to the premises and placed it on the forecourt in the corner thereof nearest to the adjoining premises at 245, Terminus Road. The machine was blue and white in colour, six feet two inches I high, approximately thirty inches square and weighed approximately five and a half hundredweight. There were holes in the base of the machine whereby it could be bolted to a packing case when in transit or bolted to the ground when in use. The machine in question was not attached to the forecourt by bolts or otherwise. Other holes allowed axles and wheels to be attached to the base of the machine but these were not normally attached to the machine in question. The refrigeration plant in the machine was operated by electricity supplied through a cable (housed in a five-eighths inch conduit) which was connected to

the mains supply in the premises. The conduit came from a grille in the base of the shop front and was fitted by an electrician from a nearby shop. The conduit was black. It was the manufacturers' practice to advise purchasers on the siting, operation and maintenance of their machines, and a representative of the manufacturers had called to see the respondents' machine from time to time since June, 1956. No planning permission under the Town and Country Planning Act, 1947, was sought or granted on any application relating to the machine. On June 24, 1957, the respondents' machine was removed from the forecourt. It took about five minutes to disconnect the electricity cable and remove the machine. By fitting a "Nipham" switch, the time taken to disconnect the cable could be considerably shortened. The machine was removed on June 24, 1957, in order to take photographs of the premises without it, and it was thereafter immediately replaced. Otherwise it had not been removed from the premises since its arrival, and had been moved only slightly from time to time.

It was contended by the respondents:—(a) the magistrates were not bound to assume that the matters alleged in the enforcement notice had occurred or, in so far as they had occurred, that they constituted development, but could determine whether or not any operations amounting to development had occurred; (b) neither what was alleged in the enforcement notice nor what had, in fact, occurred amounted to the carrying out of development within the meaning of s. 12 of the Act of 1947, and, accordingly, the magistrates might be satisfied that no permission was required in respect thereof; (c) alternatively, any operations carried out did not involve development by reason of proviso (a) to s. 12 (2) of the Act; (d) further, or alternatively, the requirements of the enforcement notice (except in so far as they were incapable of performance) had been satisfied (before the beginning of the period allowed for the purpose) on June 24, 1957, and the form of enforcement notice used was inappropriate; (e) it was conceded by the respondents that placing a machine on land might, in some cases, involve a material change of use, but not in this case. It was contended by the appellants that the installation of the machine constituted development within the meaning of s. 12 (2) of the Act of 1947, and, as such, required planning permission under s. 12 (1).

The magistrates were of opinion that (a) it was open to them to determine whether the matters alleged as constituting development had, in fact, occurred and whether, if so, they constituted development within s. 12 (2), and (b) in this case there had been no such development. They accordingly quashed the enforcement notice and the appellants now appealed.

P. T. S. Boydell for the appellants.

J. D. James and *H. H. Sebag-Montefiore* for the respondents.

Our. adv. vult.

Apr. 30. The following judgments were read.

LORD GODDARD, C.J.: This is a Special Case stated by justices for the County Borough of Eastbourne to whom a complaint was preferred under s. 23 of the Town and Country Planning Act, 1947, asking for an order to quash or vary an enforcement notice relating to premises at 247, Terminus Road in the borough. The notice required the removal of an automatic ice cream sales machine and its attachments from the forecourt of the premises within twenty-one days after the date on which the notice became effective, which was on the expiration of twenty-eight days from service. The justices held that they had jurisdiction to determine whether or not the matters referred to in the notice constituted development within the meaning of s. 12 (2) of the Act, and determined that they did not.

A The only question raised by the Case and argued before this court was whether they had this jurisdiction or not. Section 23 and s. 24 of this Act have been considered by the courts in a number of cases, all of which have raised questions of difficulty; indeed, in *East Riding County Council v. Park Estate (Bridlington)*, Ltd. (1) ([1956] 2 All E.R. 669), VISCOUNT SIMONDS referred (*ibid.*, at p. 670) to the question there in debate as one of exceptional difficulty, and it is probable
 B that the last word has not yet been spoken on these sections.

The court is indebted to both counsel for their careful arguments in which all the cases bearing on the point have been examined. Section 23 provides for the enforcement of planning control and (by sub-s. (1)) enables the authority, if it appears that any development of land has been carried out after the appointed day without permission, to serve on the owner or occupier a notice called an
 C enforcement notice. Sub-section (2) provides that the notice shall specify the development which is alleged to have been carried out without permission, or, as the case may be, the matters in respect of which it is alleged that any conditions subject to which permission had been granted have not been complied with. Sub-section (4) gives an appeal to a magistrates' court to a person
 D aggrieved by the notice, and provides that, on any such appeal, that court

"(a) if satisfied that permission was granted under this Part of this Act for the development to which the notice relates, or that no such permission was required in respect thereof, or, as the case may be, that the conditions subject to which such permission was granted have been complied with, shall quash the notice to which the appeal relates."

E The question which we have to determine depends, in my opinion, on the construction of the words

"if satisfied that permission was granted under this Part of this Act for the development to which the notice relates, or that no such permission was required in respect thereof."

F Are the court to assume that there has been development and must they confine themselves to considering whether it is development permitted by the Act without permission, or can they go further and decide that there has not, in fact, been any development? I propose in the first place to treat this as a matter of
 G construction, and then to consider what effect, if any, the cases which have been decided on the section have on the conclusion to which I have come.

Reading sub-s. (2) and sub-s. (4) together, para. (a) of sub-s. (4) provides that the court, if satisfied that no permission was required for the development which is alleged to have been carried out without the grant of permission, shall quash the notice to which the appeal relates. Now, although the powers of the court are limited, as has been pointed out in more than one judgment on this paragraph,
 H in my opinion, the court must be entitled to inquire into what the notice describes as development, because, if it is not development within the Act, it follows that no permission was required. Permission to carry out work is not required if it is one of the operations or uses dealt with in the proviso to s. 12 (2). Permission is not required if no material change is made in the use to which buildings or land is being put. If, then, the planning authority alleged that there had been a
 I material change so that permission was required, the court would, as it seems to me, be bound to consider what the use had been and whether the change alleged by the authority constituted a material change.

In this respect, it is important to have regard to s. 17 of the Act. This section (by sub-s. (1)) enables a person who proposes to carry out any operations or make any change in the use of the land to apply to the local planning authority to determine whether what he proposes would constitute or involve development of the land and, if so, whether an application for permission is required. The

effect of sub-s. (2) is to enable the landowner to appeal to the Minister against the determination of the planning authority, and the proviso to that sub-section enacts that where it is decided by the Minister that any operations or use would constitute or involve development his decision shall not be final for the purposes of any appeal to the court under the provisions relating to the enforcement of planning control. A

Now s. 23 (4) does give an appeal against an enforcement order, and seems to me to envisage the case where, notwithstanding the decision of the Minister, the landowner carries out that which he proposed and then receives an enforcement order. Notwithstanding the Minister's decision, he is given an appeal to the court and, in that case, it appears to me that the first question the court would have to decide would be whether the proposed operations or use would constitute or involve development. It may be also they could decide that, although it was development, no permission would be required because the work would come within the proviso to s. 12 (2). It follows that, in my opinion, where the court is hearing an appeal under s. 23 (4), it has jurisdiction to consider whether the operations or change of use is development or not. B C

The opinion that I have formed does conflict with the decision of this court in *Keats v. London County Council* (2) ([1954] 3 All E.R. 303). In that case it was held that the justices had no power to determine whether development had taken place but only whether permission for the works or use to which the notice referred had been given or was not required, and, for the reasons which I have just given, I think that, in considering whether permission was not required, the justices must be able to determine that it was not required because the works did not constitute development. It will be observed that s. 17 was not called to the attention of the court in *Keats'* case (2), and that section seems to me to have a most important bearing on the question we now have to consider. Moreover, when *Keats'* case (2) was cited to this court in *Norris v. Edmonton Corpn.* (3) ([1957] 2 All E.R. 801), the opinion was expressed that the reasoning on which it was based appeared to conflict with that of the House of Lords in *East Riding County Council v. Park Estate (Bridlington), Ltd.* (1). It appeared to the court that their Lordships had decided that justices have jurisdiction to inquire into the facts in order to see whether development had taken place, and, in this respect, I would call particular attention to the speech of LORD EVERSHED ([1956] 2 All E.R. at p. 681). Accordingly, I think that I am justified in regarding *Keats'* case (2) as one that ought not to be followed, and that I am at liberty to hold that the justices did have jurisdiction to consider whether the matter complained of constituted development. D E F G

Reluctant as I am to differ from my brethren who take a contrary view, I feel constrained to maintain my opinion first because I think that the construction which I have placed on these difficult sections avoids the repugnancy to which DONOVAN, J., has referred, and secondly because it enables the owner or occupier to challenge the planning authority's opinion otherwise than by inviting them to prosecute him or waiting for them to do so. The decision of the Court of Appeal in *Francis v. Yiewsley & West Drayton U.D.C.* (4) ([1957] 3 All E.R. 529) shows that, on a prosecution, the challenge can be made and must be decided by the justices. The object of s. 17 seems to me to enable the owner to obtain a decision without committing what may prove to be a criminal offence. H

The result, therefore, is that the appeal will be allowed. I

HILBERY, J.: I have the misfortune to differ from my Lord, and need hardly say that I do so with diffidence; but I have finally arrived at the same opinion as DONOVAN, J., and for the same reasons. As I have had the advantage of reading the judgment that he is about to deliver, it is sufficient if I say that I am in complete agreement with it. I would, therefore, allow the appeal.

DONOVAN, J.: I much regret to find myself differing from the Lord Chief Justice, and I need hardly say that, in consequence, I regard my own conclusions

A with misgiving. But, though I have searched for the flaw, it still eludes me, and I had better, therefore, state my view at no more length than the subject and the circumstances require.

The Town and Country Planning Act, 1947, defines development, in s. 12 (2), as

B "the carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of any material change in the use of any buildings or other land."

C The Act then proceeds to deal with two kinds of such "development": (i) that for which permission is to be required; (ii) that for which permission is not to be required. It also deals with certain operations on, or change of use of, land which are not to be regarded as involving development at all, and are, therefore, outside the Act altogether. These are set out in the proviso to s. 12 (2) and include, for example, works which affect only the interior of a building, or do not materially affect the external appearance. It also follows from the words of the definition that any change in the user of buildings or land which is not a material change is not "development".

D In relation to these matters which the Act says are not "development", no question of permission under the Act arises. They are simply not within it. When, therefore, s. 23 (4) comes to pose the question—Was permission under this Act required or not?—it cannot be referring to these operations, as regards which no question of permission or veto under the Act can arise. The inquiry has reference instead to those operations or change of use which, while still constituting "development" under s. 12, may nevertheless be carried out without permission. These include all developments before the appointed day (s. 12 (1)), all the changes of use specified in s. 12 (5), and the operations described in the proviso to s. 12 (3) (b). In these circumstances, I think that it is inaccurate to speak of permission not being required under the Act on the ground that the particular operation or change of use is not "development". For then, as I say, the question does not arise at all. The phrase is apt only to refer to that which is development but which the Act exempts from the necessity for permission.

E Coming now to s. 23 (4), it is clear that, under its terms, justices can do one of four things alone: (a) quash the notice if satisfied that permission was granted under Part 3 of the Act for the development in question; (b) quash the notice if satisfied that no such permission was required or that the conditions attached to any such permission have been complied with; (c) vary the conditions of the notice if satisfied they are to any extent unnecessary; (d) in any other case dismiss the appeal. There is quite clearly within the four corners of s. 23 (4) itself no jurisdiction to inquire whether the alleged development has occurred.

F The respondents' argument to the contrary, based on the words of s. 23 (4) (a), is this: The justices are to quash the notice inter alia "if satisfied . . . that no such permission was required in respect thereof". The words "in respect thereof" relate back to the expression "development to which the notice relates", and this, in turn, means "development which is alleged to have been carried out without the grant of the permission" required under the Act (see sub-s. (1) and sub-s. (2) of s. 23). So, it is argued, one is dealing under s. 23 (4) simply with "alleged development", and it must be open to the subject to show that the allegation is unfounded and that, therefore, no permission is required. But the real allegation is not "development" but "development without the necessary permission", and, since some development can be carried out without such permission, full effect can be given to the words in s. 23 (4) (a), "if satisfied . . . that no such permission was required" without having to construe them as opening up the whole question whether there was any "development" at all. And, as I have said, where there is no "development", no question of permission or embargo arises. I, therefore, reject the argument.

Stress, however, is laid on the language of the proviso to s. 17 (2), already referred to by the Lord Chief Justice, and I agree that this raises a real difficulty. The only appeal to the court referred to in that proviso is the appeal under s. 23 (4), first to petty sessions and then to quarter sessions. If the proviso had been limited to a determination by the Minister that permission was required, there would be no conflict with the terms of s. 23 (4) at all because that question is expressly within the jurisdiction of the justices, and they are being told by the proviso not to treat the Minister's decision on that point as final. But they are told the same thing by the proviso in a case where the Minister decides that the prospective operations or use will constitute development of the land. Yet, looked at alone, s. 23 (4) confers on the justices no jurisdiction to determine this question at all. The problem, therefore, is how to resolve this repugnancy, and there are only two ways of doing it: (i) to construe s. 23 (4) as though it conferred the jurisdiction in question because of the language of the proviso to s. 17 (2); or (ii) to treat the language of s. 23 (4) as paramount; and the proviso to s. 17 (2) as being, in so far as it contemplates an appeal on the question of development or no development, simply as careless language which is inoperative having regard to the clear terms of s. 23 (4) itself (see hereon MAXWELL ON INTERPRETATION OF STATUTES (10th Edn.), p. 229).

I prefer the latter alternative. My reasons are that it is in s. 23 (4) that jurisdiction is conferred and delimited; so that, to find out the limits of that jurisdiction, it is to s. 23 (4) that one would naturally turn. It is not to be expected that Parliament would deliberately confer a very wide jurisdiction by a mere proviso in a section dealing with a different matter, and then go on in the section actually conferring jurisdiction carefully to confine it within narrower limits. Moreover, if s. 23 (4) is regarded as paramount in this particular respect, the proviso to s. 17 (2) does not thereby become empty of content, as I have shown. I think, therefore, that the position must be faced and accepted that, in the one respect now under consideration, the proviso to s. 17 (2) and s. 23 (4) are repugnant provisions; but I think it would do too much violence to the clear language of s. 23 (4) to attempt a reconciliation by enlarging the jurisdiction to accord fully with the proviso. If two sections of an Act are repugnant, the general rule is that the last must prevail; and an enacting power cannot, as a rule, be implied from the language of a proviso (see on these matters *Wood v. Riley* (5) (1867), as reported in L.R. 3 C.P. 26, and *Arnold v. Gravesend Corpn.* (6) (1856), 2 K. & J. 574 at p. 591).

A further consideration is this: The Act makes certain elected local authorities the persons who are to plan and control development. By s. 5 of the Act, these authorities must carry out surveys of their areas and submit to the Minister development plans which may allocate certain areas for agricultural, residential or other purposes. The development plans may be approved by the Minister with or without modifications. Provision is made for the hearing of objections, and local inquiries may be ordered. Unless it is contended by somebody that the plan is invalid under the terms of the Act, it is not open to question in any legal proceedings (s. 11 (3)). If local benches of justices, on whom none of these duties is placed, can override the planning authority on the question whether something is "development" or not, it is obvious that they can interfere with all development plans, and that a large measure of planning control (as distinct from enforcement) has been placed in their hands. Had this been Parliament's intention, I cannot believe that it would have been effected by a mere proviso in a section dealing with a different subject-matter. I should have expected provisions as clear and explicit as those by which the justices' jurisdiction as to enforcement is expressed and limited in s. 23 (4). In my respectful opinion, therefore, the decision in *Keats v. London County Council* (2) ([1954] 3 All E.R. 303) is correct, although no argument on the proviso to s. 17 (2) was presented to the court.

In *Norris v. Edmonton Corpn.* (3) ([1957] 2 All E.R. 801), however, this court said that the decision in *Keats'* case (2) must be regarded as overruled as being

A inconsistent with the reasoning of the subsequent decision of the House of Lords in *East Riding County Council v. Park Estate (Bridlington), Ltd.* (1) ([1956] 2 All E.R. 669). Counsel for the present appellants, however, contended before us that there was no such inconsistency. It is common ground that in this latter case there was no express disapproval of the decision in *Keats'* case (2), which was cited to their Lordships in argument; but the contention of inconsistency is supported by the present respondents in this way: To arrive at its decision the House of Lords in the *East Riding* case (1) had to regard justices as free to go behind the enforcement notice to ascertain whether there had been development within the meaning of the Act of 1947. The justices would then find that there was not, because it had all taken place before the appointed day. But this cannot be reconciled with the decision in *Keats'* case (2) that justices may not go behind the notice to inquire whether there has been "development". If, therefore, they may do this, then they were entitled to do so in the present case, and, as a result, they found that no development had occurred.

In the circumstances, it is necessary to examine the matter in some detail. The short facts of the *East Riding* case (1) were these: There had, admittedly, been development of the land in question, but it had all been carried out, again admittedly, before the appointed day, namely, July 1, 1948. That being so, while it did not cease to be "development", it was development for which permission was not required under Part 3 of the Act (see s. 12). Nevertheless, the East Riding County Council served an enforcement notice on the occupier stating that this development was "in contravention of planning control" and requiring that it should be discontinued. The occupier made two answers: (i) that the development having been carried out before the appointed day the justices, on appeal to them under s. 23 (4), should have quashed the notice in exercise of their express jurisdiction to do so under the sub-section in the case of development for which, under Part 3 of the Act, no permission was required; (ii) that the notice was so defective in form that it was a nullity. The East Riding County Council contended that, although the development had taken place before the appointed day, they were, nevertheless, entitled on the facts to invoke s. 75 of the Act of 1947, and, therefore, to treat the development as contravening the Act of 1947. As to this, it was held that, not having mentioned s. 75 in the notice, they were not entitled to take the point. For the purposes of the present case, that is all that needs to be said about s. 75. The county council then disputed, for various reasons, that the notice was a nullity, and into these it is unnecessary for present purposes to go.

On the case made for the occupier VISCOUNT SIMONDS, LORD COHEN and LORD EVERSLED agreed that the justices should have quashed the notice on the ground that the development, by reason of its date, required no permission under Part 3 of the Act. In this respect, s. 23 (4) confers express jurisdiction on the justices. VISCOUNT SIMONDS also thought that the notice was in any event not a notice on which the county council could rely because of its defects. LORD MORTON OF HENRYTON thought that the notice was a nullity. He doubted whether the justices had power to quash it, but, as the practical effect was the same, concurred in the motion to dismiss the council's appeal. LORD RADCLIFFE took the same view.

In considering whether the reasoning of their Lordships is inconsistent with the Divisional Court's decision in *Keats'* case (2), it may be observed first of all that the question for decision in each case was different. In *Keats'* case (2), the question was: Can the justices, under the terms of s. 23 (4), inquire into the question whether there has been development at all? In the *East Riding* case (1), the question was: Did the development, which had admittedly taken place, require any permission under Part 3 of the Act? Prima facie, therefore, one

could answer this second question either way without disturbing the decision in *Keats'* case (2). A

Next, as to the actual reasoning in the *East Riding* case (1), VISCOUNT SIMONDS said ([1956] 2 All E.R. at p. 674), adopting what the Lord Chief Justice had said in an earlier case*, and applying it to the case under consideration:

"The justices had power to quash in the present case because no such permission was required in respect of work which was done before July 1, 1948." B

LORD COHEN said (*ibid.*, at p. 681):

". . . the respondents proved that no such permission was required in respect thereof, i.e., in respect of 'the development to which the notice relates'. The magistrates, therefore, had jurisdiction to quash the enforcement order, and, in my opinion, they should have done so." C

LORD EVERSHERD said (*ibid.*, at p. 684):

"The words in s. 23 (4), 'no such permission was required in respect thereof', are clearly capable of application to any case in which permission was not, in truth, required under the Act of 1947, whether because the development was of a kind which, by the terms of the Act, called for no permission, or because the development, by reason of the date when it was carried out, was outside the scope of the Act altogether . . . I think the Court of Appeal and the Divisional Court were right in holding that, in the circumstances and on its true construction, the enforcement notice . . . ought to have been quashed by the justices." D E

So far, I have not been able myself to find in the reasoning of their Lordships anything inconsistent with the decision in *Keats'* case (2). It is true that in his speech LORD EVERSHERD also said this (*ibid.*): F

"But other cases may well arise in which serious questions of fact might be involved, questions whether, in truth, the development had been carried out before the appointed day, or whether the land had, in fact, ever been used as alleged. If in such cases it were beyond the jurisdiction of the justices on an appeal to determine such questions of fact, then the only course open to the owner would be to await the taking of further steps by the authority under s. 24 of the Act, and then to challenge the validity of the notice; a course which might well involve him in a long period of uncertainty, and would certainly be likely to expose him to serious expense. Equally might such a course of proceedings be an embarrassment to the authority who might find, when the facts had turned out ultimately against them, that it was then too late to exercise their statutory powers and duties at all." G H

When LORD EVERSHERD uses the words "or whether the land had, in fact, ever been used as alleged" he does, indeed, pose the same kind of question that was answered in *Keats'* case (2). But he does not go on to answer it in a sense inconsistent with that decision, or, indeed, at all. And, when reading this passage, it is useful to recall his earlier remarks (*ibid.*, at p. 683): I

"It cannot, I think, be doubted that the terms of s. 23 (4) (a) and the formulation of the three grounds on which a notice under the section may be quashed, assume the premise on which the notice proceeds—viz., that the matters complained of have been done, or undertaken, since July 1, 1948.

* *Lincoln County Council (Parts of Lindsey) v. Henshall*, [1953] 1 All E.R. 1143 at p. 1145.

A The relevant words 'that no such permission was required in respect thereof,' according to their more natural meaning, refer to those cases in which, by virtue of s. 12 (5), the development is of the limited character for which permission is excused. On the face of it, the sub-section makes no provision for the case where the development alleged has not occurred in fact at all."

B With diffidence, therefore, I think the reasoning of the speeches in the *East Riding* case (1) is not inconsistent with the decision in *Keats'* case (2); indeed, that it harmonises with it. It is not the case, as counsel for the present respondents suggests, that the House of Lords regarded justices as free to go behind the enforcement notice in order to decide whether there had been development or not. But where the question is whether the development took place before the appointed day, justices must necessarily inquire into the facts in this respect, for the date of the development will determine whether permission was, or was not, required under the Act, and this matter is within the jurisdiction expressly conferred on justices under s. 23 (4) (a). The decision in the *East Riding* case (1), in my view, involves no more in this particular direction. At the same time, it is noteworthy that all their Lordships emphasised the strictly confined nature of the jurisdiction conferred on justices by s. 23 (4).

The question then arises whether the contrary view expressed by this court in *Norris v. Edmonton Corpn.* (3) still binds us. The decision followed that of this court in *Perrins v. Perrins* (7) ([1951] 1 All E.R. 1075), and that decision was specifically overruled by the Court of Appeal in *Francis v. Yiewsley & West Drayton U.D.C.* (4) ([1957] 3 All E.R. 529). *Norris v. Edmonton Corpn.* (3), therefore, must also be regarded as no longer law. But the Court of Appeal reached its decision on a different ground, involving no necessary conflict with the reason which led the Divisional Court to its decision in the *Norris* case (3). Nevertheless, now that the decision itself has gone, no useful purpose would, it seems to me, be served by regarding its reasoning as still binding. I agree that it is a peculiar position if the occupier has to wait to be prosecuted before he can challenge the planning authority's view that development has occurred, and that, as the law stands at present, the justices will then do under s. 24 (3) what they cannot do under s. 23 (4), namely, inquire whether development has occurred. But at least that is better for the occupier than nothing at all; and, in some cases, he may also be able to proceed for a declaratory judgment. However that may be, I think the words of s. 23 (4) strictly confine the justices' jurisdiction under that sub-section to the issues there specified.

The ultimate result I reach is, therefore, this: (i) The decision in *Keats'* case (2) still binds this court. (ii) Accordingly, in the present case, the justices had no jurisdiction under s. 23 (4) to consider whether the alleged development had, in fact, occurred, and to decide that it had not. (iii) That the appeal must, accordingly, be allowed, there being no other question before us.

Appeal allowed.

Solicitors: *Sharpe, Pritchard & Co.*, agents for *Town clerk*, Eastbourne (for the appellants); *Clifford-Turner & Co.* (for the respondents).

[Reported by G. A. KIDNER, ESQ., Barrister-at-Law.]

NOTE.FYSON v. BUCKINGHAMSHIRE COUNTY COUNCIL.
METAL RECOVERY AND STORAGE CO., LTD. v. SAME.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Hilbery and Donovan, JJ.),
Apr. 17, 21, 22, 1958.]

Town and Country Planning—Enforcement notice—Appeal against notice—Renewal of previous use of land after July 1, 1948—Whether appeal should be allowed on the ground that there was no development of land—Town and Country Planning Act, 1947 (10 & 11 Geo. 5 c. 51), s. 23 (4).

[**Editorial Note.** This decision should be considered with *Eastbourne Corpn. v. Fortes Ice Cream Parlour (1955), Ltd.*, p. 276, ante, as regards any jurisdiction of a magistrates' court on an appeal under s. 23 (4) of the Town and Country Planning Act, 1947, to determine whether there has been development of the land in relation to which an enforcement notice is served.

For s. 23 (4) of the Town and Country Planning Act, 1947, see 25 HALSBURY'S STATUTES (2nd Edn.) 525.]

Case referred to:

- (1) *Postill v. East Riding County Council*, [1956] 2 All E.R. 685; [1956] 2 Q.B. 386; 120 J.P. 376; 3rd Digest Supp.

Cases Stated.

These were two Cases Stated by justices for the County of Buckingham in respect of their adjudication as a magistrates' court sitting at Amersham on July 26, 1957. On June 18, 1957, the appellant, John Russell Fyson (hereinafter called "the appellant Fyson"), appealed pursuant to the Town and Country Planning Act, 1947, s. 23 (4), by complaint for an order to quash, or alternatively vary, an enforcement notice dated May 27, 1957, and issued by the Amersham Rural District Council (hereinafter called "the Amersham Council") on behalf of the respondents, the Buckinghamshire County Council. On the same day a similar complaint against the same form of notice was made on behalf of the appellants, the Metal Recovery and Storage Co., Ltd. (hereinafter called "the appellant company") by one Gray, a director thereof. The enforcement notice required the discontinuance of the use of certain land at Copperkins Lane, Amersham, and of the buildings erected thereon for industrial purposes, viz., metal recovery storage and trading, and was served on the appellant Fyson as owner and on the appellant company as occupiers thereof. The following facts were found. The land to which the enforcement notice related (hereinafter called "the appeal site") comprised about two and a half acres on the north side of Copperkins Lane opposite a brickworks. In or about June, 1943, the appeal site was requisitioned by the Ministry of Works on behalf of the Ministry of Supply and remained requisitioned until Dec. 1, 1950. During the requisition, from about July, 1943, to April, 1949, the appeal site (including buildings which were erected on it) was used by and on behalf of the Ministry of Supply for various purposes, and no application was made under the planning legislation then in force in respect thereof. In 1950 the appellant Fyson entered into negotiation with the agents for the then owner for the purchase of the appeal site, including the buildings thereon. The appellant Fyson agreed with the Ministry of Works to accept the de-requisition of the appeal site and buildings in their existing state at Dec. 1, 1950, in lieu of compensation under the Compensation (Defence) Act, 1938, s. 2 (1) (b), and the appeal site was conveyed to the appellant Fyson on May 9, 1951. From May, 1949, to June, 1956, the appeal site was unoccupied save that a few items of equipment and stores were left on it and that from the end of 1953, the appellant Fyson stored chemicals on it and from December, 1953, to March, 1954, used it for the reception, grading and repacking and despatch of starch. Since about July, 1956, the appeal site had been occupied

- A by the appellant company who had used it in the course of their business for the receipt and storage of materials such as grease and paper, for the storage and recovery of metals, timber and machinery, and for similar purposes. None of these purposes was different from the user during requisition. In so far as it was a finding of fact, there had been no material change in the use of the appeal site (or the buildings thereon) since July 1, 1948, the appointed day
- B under the Town and Country Planning Act, 1947. The appellant *Fyson* and the appellant company admitted that, during the period of requisition, the appeal site was subject to such a right of possession by or on behalf of the Crown as to render planning control unenforceable as mentioned in the Building Restrictions (War-Time Contraventions) Act, 1946, s. 7 (6), and that no express planning permission had been granted under the Town and Country Planning
- C Act, 1947, or under previous planning legislation.

It was contended by the appellants that (i) the enforcement notice must be read as alleging development of the appeal site by making a material change of use since July 1, 1948, and was not based on an allegation of a contravention of previous planning control or of failure to comply with conditions; (ii) the uses complained of were metal recovery storage and trading also described as

D industrial and all were, in fact, within the existing use at the appointed day; (iii) any development had taken place before the appointed day under previous control of the Town and Country Planning Act, 1932, and there had been none since the appointed day under Part 3 of the Town and Country Planning Act, 1947, and, therefore, no permission was required in respect thereof under the latter Act; (iv) accordingly, the enforcement notice should be quashed under

E s. 23 (4) (a) of the Act of 1947; (v) if, in respect of any part of the appeal site, the justices were not satisfied within the meaning of s. 23 (4) (a), they should vary the notice so as to refer only to that part, as mentioned in s. 23 (4) (b) of the Act of 1947; (vi) the justices were not bound to assume that the development alleged in the enforcement notice had taken place. It was contended by the respondents that the use of the premises for purposes of the recovery,

F storage and trading of and in metal and other materials having ceased in May, 1949, it was not open to the respondents to serve an enforcement notice thereafter under s. 23 of the Act of 1947, or under that section as applied by s. 75 of that Act, as such notice would have had to require the discontinuance of a use which had already ceased. If and so far as mere cesser might not immediately amount to discontinuance, the continued cesser of the user from May,

G 1949, amounted to a discontinuance. Once the use, for which it was admitted no permission existed under any of the Town and Country Planning Acts, was discontinued, it ceased to have any effect for the purposes of these Acts, in the same way as would have been the case had it been discontinued pursuant to a notice, and the use of the premises for the storing of starch and chemicals from December, 1953, to March, 1954, constituted development for which planning

H permission was necessary. Similarly, on the cesser and discontinuance of this use in March, 1954, it was not open to the respondents to serve any enforcement notice, and this unauthorised use ceased to be of any effect, in the same way as would have been the case had it been discontinued pursuant to a notice. The use commenced by the appellant company in August, 1956, accordingly constituted development under the Town and Country Planning Act, 1947, for

I which planning permission was required but had not been obtained. A mere transitory unauthorised use of a few months discontinued before service of an enforcement notice could not preclude a local planning authority from ever thereafter serving an enforcement notice if the premises were again used after a lapse of four or more years for the same or similar purposes. The justices were of opinion that, as there had been no material change of use since the appointed day, no permission was required under Part 3 of the Act of 1947 for the present user of the appeal site, and would have quashed the enforcement

notice*, but they dismissed the appeals on another ground, viz., that there had been a determination under the Building Restrictions (War-Time Contraventions) Act, 1946, and that the appellant Fyson should have pursued his remedy by appeal to the Minister under that Act but, instead, allowed his appeal to lapse. This ground was abandoned on appeal to the Divisional Court, it being conceded that the decision of the justices could not be supported on this ground.

J. D. James and H. H. Sebag-Montefiore for the appellants.

J. S. Daniel for the respondents, Buckinghamshire County Council.

DONOVAN, J., delivered the judgment of the court: The respondents argue that the previous use was discontinued and that a new use was begun in 1956, when the land was used once more for storing purposes. The justices, however, found expressly against this contention and, their finding being one of fact, it is conceded that it must prevail unless it is one to which the justices could not reasonably have come. I think that it is impossible to say that. Reliance was placed on the decision in *Postill v. East Riding County Council* (1) ([1956] 2 All E.R. 685), where this court held that the use of land for an itinerant circus was discontinued when the circus departed at the end of the season, and that, therefore, there had been compliance with a condition for discontinuance subject to which the planning permission had been given, albeit the circus came back in the next year. The difference in the facts is obvious. In the present case, the land has been in the ownership of the appellant Fyson since 1951, and there has never been any use of the land since 1943 by anyone except for the purpose of the storage of materials. All that has happened is that there has been a rather long interruption of that use, but without any change of use. Indeed, the question here is not, as it was in the *Postill* case (1), whether a particular use has been discontinued, but is, to use the language of s. 12 (2) of the Town and Country Planning Act, 1947, whether, since July 1, 1948, there has been any material change in the use of the land. To my mind there clearly has not been such a change, even though for some years the land was put to no use. I think that the justices were fully entitled to come to the decision which they did reach. It is said that certain provisions of the Act of 1947, notably s. 12 (5) (c), will not make sense unless the decision of the justices in this respect is reversed. If that be so, it is a matter for Parliament. Problems under this Act will become even more difficult than they are already, and perhaps even insoluble, if each time a construction has to be sought which will resolve every discord into song. Here we have simply a question of fact whether the justices were entitled to decide as they did. Both appeals should be allowed.

Appeals allowed.

Solicitors: *Mills, Lockyer & Co.*, agents for *Blaser, Mills & Lewis*, Chesham, Buckinghamshire (for the appellants); *Clerk to the Buckinghamshire County Council* (for the respondents).

[Reported by G. A. KIDNER, Esq., Barrister-at-Law.]

* The two appeals to the Divisional Court here reported were heard and decided after the arguments in *Eastbourne Corpn. v. Fortes Ice Cream Parlour (1955), Ltd.* (p. 276, letter E, ante), had been heard, but before judgment in that case had been delivered.

A R. v. ST. MARGARET'S TRUST, LTD. AND OTHERS.

[COURT OF CRIMINAL APPEAL (Lord Goddard, C.J., Donovan and Havers, JJ.), March 31, April 1, 21, 1958.]

Hire-Purchase—Control—Contravention of statutory requirement that percentage of cash price must be paid before agreement is signed—Finance company ignorant of contravention—Whether finance company guilty of offence—Hire-Purchase and Credit Sale Agreements (Control) Order, 1956 (S.I. 1956 No. 180), art. 1.

Criminal Law—Mens rea—Statutory offence—Prohibition of disposal of goods by hire-purchase—Whether prohibition absolute—Hire-Purchase and Credit Sale Agreements (Control) Order, 1956 (S.I. 1956 No. 180), art. 1.

A hire-purchase finance company entered into a hire-purchase transaction by which it in fact contravened art. 1 of the Hire-Purchase and Credit Sale Agreements (Control) Order, 1956, which provided that "a person shall not dispose of any goods ... in pursuance of a hire-purchase ... agreement ... unless the requirements specified in Sch. 2 hereto are or have been satisfied ...". A requirement of the schedule, viz., that fifty per cent. of the cash price must be paid before signing the agreement, was not satisfied. The company, however, acted innocently, having been misled as to the true cash price and having been informed that the requisite fifty per cent. had been paid. Contravention of the order was punishable by imprisonment or fine.

Held: having regard to the object of the financial control of which the Order of 1956 was part and to the terms of art. 1, contravention of art. 1 was an offence although the act was innocently done.

Per CURIAM: modern statutes create offences where knowledge on the part of an offender is not essential, and there is no universal prior presumption of mens rea. Each statute must be construed according to its terms and its object. If, so construed, mens rea is not expressly or by necessary implication excluded, it is then that it will be regarded as essential (see p. 293, letter B, post).

Dictum of KENNEDY, L.J., in *Hobbs v. Winchester Corpn.* ([1910] 2 K.B. at p. 483) approved.

Appeal dismissed.

[Editorial Note. The decision in the present case is limited to the offence created by art. 1 of the Order of 1956 and the court expressly refrained from deciding that mens rea is not an ingredient of any offence against art. 3, having regard to the words "cause or permit" in that article (see p. 294, letter D, post).

The Order of 1956 has been superseded by the Hire-Purchase and Credit Sale Agreements (Control) Order, 1957 (S.I. 1957 No. 430), in relation to transactions after Apr. 3, 1957.

As to mens rea in statutory offences, see 10 HALSBURY'S LAWS (3rd Edn.) 273-275, paras. 508, 509; and for cases on the subject, see 14 DIGEST (Repl.) 31-39, 33-95.]

Cases referred to:

(1) *Sherras v. De Rutzen*, [1895] 1 Q.B. 918; 64 L.J.M.C. 218; 72 L.T. 839; 59 J.P. 440; 14 Digest (Repl.) 39, 90.

(2) *Hobbs v. Winchester Corpn.*, [1910] 2 K.B. 471; 79 L.J.K.B. 1123; 102 L.T. 841; 74 J.P. 413; 14 Digest (Repl.) 37, 71.

(3) *Cundy v. Le Cocq*, (1884), 13 Q.B.D. 207; 53 L.J.M.C. 125; 51 L.T. 265; 48 J.P. 599; 14 Digest (Repl.) 38, 88.

(4) *R. v. Prince*, (1875), L.R. 2 C.C.R. 154; 44 L.J.M.C. 122; 32 L.T. 700; 39 J.P. 676; 14 Digest (Repl.) 52, 181.

(5) *R. v. Bishop*, (1880), 5 Q.B.D. 259; 49 L.J.M.C. 45; 42 L.T. 240; 44 J.P. 330; 14 Digest (Repl.) 37, 77.

- (6) *Nichols v. Hall*, (1873), L.R. 8 C.P. 322; 42 L.J.M.C. 105; 28 L.T. 473; A
37 J.P. 424; 14 Digest (Repl.) 37, 66.
- (7) *R. v. Tolson*, (1889), 23 Q.B.D. 168; 58 L.J.M.C. 97; 60 L.T. 899; 54
J.P. 4, 20; 15 Digest (Repl.) 890, 8578.
- (8) *Brooks v. Mason*, [1902] 2 K.B. 743; 72 L.J.K.B. 19; 88 L.T. 24; 67
J.P. 47; 14 Digest (Repl.) 39, 91.
- (9) *Brend v. Wood*, (1946), 175 L.T. 306; 110 J.P. 317; 2nd Digest Supp. B
- (10) *Harding v. Price*, [1948] 1 All E.R. 283; [1948] 1 K.B. 695; [1948] L.J.R.
1624; 112 J.P. 189; 2nd Digest Supp.
- (11) *Reynolds v. G. H. Austin & Sons, Ltd.*, [1951] 1 All E.R. 606; [1951] 2
K.B. 135; 115 J.P. 192; 14 Digest (Repl.) 39, 95.
- (12) *Moussell Brothers v. London & North Western Ry.*, [1917] 2 K.B. 836; 87
L.J.K.B. 82; 118 L.T. 25; 81 J.P. 305; 14 Digest (Repl.) 47, 147. C
- (13) *Quality Dairies (York), Ltd. v. Pedley*, [1952] 1 All E.R. 380; [1952] 1 K.B.
275; 116 J.P. 123; 3rd Digest Supp.

Appeal.

St. Margaret's Trust, Ltd. was convicted before DIPLOCK, J., at the Central Criminal Court on Sept. 16, 1957, of seven offences of disposing of goods contrary to art. 1 of the Hire-Purchase and Credit Sale Agreements (Control) Order, 1956; and Oliver Autos, Ltd., Victor Richard and Sydney John Hone were convicted of aiding and abetting the commission of those offences. D

St. Margaret's Trust, Ltd. was a finance company, which let out motor vehicles on hire-purchase agreements; Oliver Autos, Ltd. were motor dealers and V. Richard and S. J. Hone were employees of the company. On seven occasions in 1956 customers of Oliver Autos, Ltd. obtained motor cars from them on hire-purchase agreements entered into with St. Margaret's Trust, Ltd., the transactions being in fact in contravention of art. 1 of and Sch. 2, para. 3 to the Hire-Purchase and Credit Sale Agreements (Control) Order, 1956, which required that, in the case of a motor car, not less than fifty per cent. of the cash price of the goods must have been paid before a hire-purchase agreement was signed. E
On the seven occasions in question it was proved that, the customer being unable to deposit as much as fifty per cent. of the purchase price, Oliver Autos, Ltd. made out documents to be sent to St. Margaret's Trust, Ltd. showing the figure of the cash price of the car and the amount of the deposit paid by the customer to be greater than they actually were, with the object of obtaining from St. Margaret's Trust, Ltd. a greater amount than the fifty per cent. of the purchase price which was all they should have paid. In each case the car was handed over to the customer before the agreement was actually signed. There was no evidence that St. Margaret's Trust, Ltd. connived at or had any knowledge of the true nature of the transaction entered into by Oliver Autos, Ltd. F
DIPLOCK, J., held that it was not necessary for the prosecution to prove guilty knowledge on the part of St. Margaret's Trust, Ltd. but in view of a contrary ruling by BARRY, J., in *R. v. Lombard Banking, Ltd. & Ors.* (June 27, 1957, unreported) he granted leave to appeal against the convictions. St. Margaret's Trust, Ltd. appealed against conviction on the following grounds that it had been wrongly ruled (1) that mens rea was not a necessary ingredient of the offence and that the onus of proving mens rea was not on the prosecution, (2) that it was no defence for St. Margaret's Trust, Ltd. to show that it did not know that a deposit of less than fifty per cent. had been paid on the motor car and that it had been wrong to direct the jury on the evidence before the court at the trial to find St. Margaret's Trust, Ltd. guilty of the offence charged. Oliver Autos, Ltd. and the individuals convicted appealed against conviction on the ground (among others) that there was no offence by St. Margaret's Trust, Ltd., and therefore they could not rightly be convicted of having aided or abetted such an offence. On Apr. 1, 1958, the Court of Criminal Appeal dismissed the appeals for the reasons subsequently given in the judgment now reported. G
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A *Gerald Gardiner, Q.C., and J. C. Lawrence* for the appellant, St. Margaret's Trust, Ltd.

S. C. Silkin for the other three appellants, Oliver Autos, Ltd., Victor Richard and Sydney John Hone.

F. H. Lawton, Q.C., and Neville Faulks for the Crown.

Cur. adv. vult.

B Apr. 21. **DONOVAN, J.**, delivered the judgment of the court: St. Margaret's Trust, Ltd., a company whose business comprises the financing of hire-purchase transactions, was convicted at the Central Criminal Court before
C **DIPLOCK, J.**, on Sept. 16, 1957, of seven offences of disposing of goods in circumstances which contravened art. 1 of the Hire-Purchase and Credit Sale Agreements (Control) Order, 1956 (S.I. 1956 No. 180), hereinafter called "the order". Oliver Autos, Ltd., a company engaged in buying and selling motor cars, and Mr. Richard and Mr. Hone, two of its officers, were convicted of aiding and abetting the commission of these offences. All the appellants were fined, the fine on St. Margaret's Trust, Ltd. being the nominal one of £5 for each offence.

D The case arose out of what is popularly known as "the credit squeeze". One aspect of this was a decision by the government to restrict the amount of credit given in hire-purchase transactions; and to implement this decision the order was made by the Board of Trade pursuant to its statutory powers in that behalf which the order recites. Article 1 thereof enacts that:

E "A person shall not dispose of any goods to which this order applies in pursuance of a hire-purchase or credit sale agreement entered into after Feb. 24, 1955, unless the requirements specified in Sch. 2 hereto are or have been satisfied in relation to that agreement."

The requirements contained in Sch. 2 include a requirement that a specified percentage of the cash price of the goods must be paid before the signing of the agreement. The percentage is laid down in Sch. 1 to the order and varies with the
F class of goods. In the case of "mechanically propelled vehicles" it is fifty per cent. One effect of the order is therefore this, that a purchaser of a motor car on hire-purchase must pay a deposit of at least fifty per cent. of the cash price. Paragraph 3 of Sch. 2 allows the reasonable value of any car tendered in part exchange to be reckoned as part of the deposit.

G The order considerably restricted, as no doubt it was intended to do, the business of selling motor cars on hire-purchase or credit terms, a business in which Oliver Autos, Ltd. were engaged, and that company, together with Richard and Hone, set themselves out deliberately and dishonestly to break the law. To describe what they did it is unnecessary to go into figures. It is clear that if a customer must pay at least fifty per cent. deposit on a car that he wishes to purchase, any hire-purchase finance company like St. Margaret's Trust, Ltd.
H can advance no more than the remaining fifty per cent. It follows that the higher the cash price the larger will be this advance. If, therefore, the hire-purchase company is told and accepts that the cash price is a higher figure than it really is, the advance will be more than if the true cash price were revealed, and the excess may be used by the car dealer or the customer to make up the customer's deposit of fifty per cent. of the true cash price, if the customer himself is unable to provide it all. That is what was done in the present case. A false inflated cash
I price was stated to St. Margaret's Trust, Ltd., which was thereby induced to advance more than it would had the truth been told to it. It was also informed untruthfully that the customer had already paid his fifty per cent. of this false cash price. In fact he had not even paid the full fifty per cent. of the true cash price, and part of the excessive advance from St. Margaret's Trust, Ltd., was used to supply the deficiency. In these circumstances, since the transaction was carried out in a way which in law made St. Margaret's Trust, Ltd. the owner of the vehicle, and since the word "dispose" in art. 1 of the order by definition includes

the disposal of the right to possession, it follows that St. Margaret's Trust, Ltd. executed a transaction which was forbidden by art. 1, inasmuch as fifty per cent. of the true cash price was not paid before the signing of the hire-purchase agreement. St. Margaret's Trust, Ltd. admittedly acted, however, quite innocently throughout. The fraud by which they were induced to dispose of the vehicle, although an inadequate deposit had been paid, was the result of a conspiracy between Oliver Autos, Ltd., Richard, Hone and the respective customers who wanted the cars. A B

In these circumstances, not surprisingly, St. Margaret's Trust, Ltd. argued before the learned trial judge that in the absence of mens rea on its part, it could not be convicted under art. 1 of the order. Oliver Autos, Ltd., and Richard and Hone in turn submitted that as St. Margaret's Trust, Ltd. in the absence of mens rea on its part had committed no offence they themselves had aided and abetted the commission of no offence. None of the respective customers was charged, they being called instead as witnesses for the Crown. The prosecution, while admitting the absence of mens rea in St. Margaret's Trust, Ltd., contended that this was irrelevant and that the prohibition contained in art. 1 of the order was absolute in the sense that if a prohibited transaction was entered into an offence was committed even if the person concerned did so innocently. DIPLOCK, J., upheld this view. He then granted a certificate of appeal on the ground that in the preceding session of the Central Criminal Court BARRY, J., had come to an opposite conclusion in a similar case. The present appellants, however, had been committed for trial at the time of BARRY, J.'s ruling, so that the prosecution were able, when the matter came before DIPLOCK, J., to argue the point afresh. C D

The language of art. 1 of the order expressly prohibits what was done by St. Margaret's Trust, Ltd., and if that company is to be held to have committed no offence some judicial modification of the actual terms of the article is essential. The appellants contend that the article should be construed so as not to apply where the prohibited act was done innocently. In other words, that mens rea should be regarded as essential to the commission of the offence. The appellants rely on the presumption that mens rea is essential for the commission of any statutory offence unless the language of the statute, expressly or by necessary implication, negatives such presumption. The matter was thus put by WRIGHT, J., in his well-known judgment in *Sherras v. De Rutzen* (1) ([1895] 1 Q.B. 918 at p. 921): E F

"There is a presumption that mens rea, an evil intention, or a knowledge of the wrongfulness of the act, is an essential ingredient in every offence; but that presumption is liable to be displaced either by the words of the statute creating the offence or by the subject-matter with which it deals, and both must be considered." G

A little nearer to the present day KENNEDY, L.J., put the matter in this way in *Hobbs v. Winchester Corpn.* (2) ([1910] 2 K.B. 471 at p. 483): H

"... I think there is a clear balance of authority that in construing a modern statute this presumption as to mens rea does not exist. I think with great respect to my brother CHANNELL that he has applied to the construction of this modern statute a maxim which is recognised as applicable to offences at common law, and it may be, as STEPHEN, J. suggests in *Cundy v. Le Cocq* (3) ([1884], 13 Q.B.D. 207), also to offences under the earlier statutes which are to be treated on the same basis as offences under the common law. To quote his words, so far as they have not been quoted—and I accept the view which STEPHEN, J. there states—'In old time, and as applicable to the common law or to earlier statutes, the maxim'—that is, the maxim that in every criminal offence there must be a guilty mind—'may have been of general application; but a difference has arisen owing to the greater precision of modern statutes. It is impossible now, as illustrated by the cases of *R. v. Prince* (4) ([1875], L.R. 2 C.C.R. 154) and *R. v.* I

A *Bishop* (5) ((1880), 5 Q.B.D. 259), to apply the maxim generally to all statutes, and the substance of all the reported cases is that it is necessary to look at the object of each Act that is under consideration to see whether and how far knowledge is of the essence of the offence created '."

B What KENNEDY, L.J., is here saying, we think, is that modern statutes create offences where knowledge on the part of an offender is not essential, and that accordingly there is no universal prior presumption of mens rea. Each statute must be construed according to its terms and its object. If, so construed, mens rea is not expressly or by necessary implication excluded, it is then that it will be regarded as essential. Other cases cited in the course of the argument included *Nichols v. Hall* (6) ((1873), L.R. 8 C.P. 322); *R. v. Tolson* (7) ((1889), 23 Q.B.D. 168); *Brooks v. Mason* (8) ([1902] 2 K.B. 743); *Brend v. Wood* (9) ((1946), 175 L.T. 306); *Harding v. Price* (10) ([1948] 1 All E.R. 283); *Reynolds v. G. H. Austin & Sons, Ltd.* (11) ([1951] 1 All E.R. 606); *Moussell Brothers v. London & North Western Ry.* (12) ([1917] 2 K.B. 836); *Quality Dairies (York), Ltd. v. Pedley* (13) ([1952] 1 All E.R. 380).

D There is no difference for present purposes between a statute and a statutory instrument and the question for determination is therefore this: Do the words of art. 1 of the order considered together with the object of the order make the prohibited act an offence, even though the doer of the act had no guilty mind and acted innocently?

E The words of the order themselves are an express and unqualified prohibition of the acts done in this case by St. Margaret's Trust, Ltd. The object of the order was to help to defend the currency against the peril of inflation which, if unchecked, would bring disaster on the country. There is no need to elaborate this. The present generation has witnessed the collapse of the currency in other countries and the consequent chaos, misery and widespread ruin. It would not be at all surprising if Parliament, determined to prevent similar calamities here, enacted measures which it intended to be absolute prohibition of acts which might increase the risk in however small a degree. Indeed, that would be the natural expectation. There would be little point in enacting that no one should breach the defences against a flood, and at the same time excusing anyone who did it innocently. For these reasons we think that art. 1 of the order should receive a literal construction and that the ruling of DIPLOCK, J., was correct.

G It is true that Parliament has prescribed* imprisonment as one of the punishments that may be inflicted for a breach of the order, and this circumstance is urged in support of the appellants' argument that Parliament intended to punish only the guilty. We think it is the better view that, having regard to the gravity of the issues, Parliament intended the prohibition to be absolute, leaving the court to use its powers to inflict nominal punishment or none at all in appropriate cases.

H It may also be true that hire-purchase transactions, in order to avoid difficulties under the Bills of Sale Acts, are carried through in such a way that the finance companies concerned become easy victims of such a fraud as was here perpetrated on St. Margaret's Trust, Ltd., for they have no control over the car dealer or the customer. But if Parliament enacts that a certain thing shall not be done it is not necessarily an excuse to say: "I carry on my business in such a way that I may do this thing unwittingly and therefore should suffer no penalty if I transgress". The answer in some cases is that the importance of not doing what is prohibited is such that the method of business must be re-arranged so as to give the necessary knowledge. The present, we think, is such a case.

* The Hire-Purchase and Credit Sale Agreements (Control) Order, 1956, was made under reg. 55 of the Defence (General) Regulations, 1939, S.R. & O. 1939 No. 927. Accordingly contravention of the order was punishable by the penalties prescribed by reg. 92 of S.R. & O. 1939 No. 927 which include imprisonment. For reg. 55 and reg. 92 of S.R. & O. 1939 No. 927, see 23 HALSBURY'S STATUTORY INSTRUMENTS 45, 65.

Stress was also laid during the course of the argument for the appellants on the language of art. 3 of the order which prohibits any person from causing or permitting goods owned by him to be in the possession of another by virtue of a hire-purchase agreement in certain circumstances. It is said that the words "cause or permit" involve that mens rea is essential to the commission of an offence* under art. 3, and it is not to be supposed that the same order requires mens rea for the commission of an offence under one article and not under another. The argument is obviously double-edged: for the prosecution might argue that the presence of the words "cause or permit" in art. 3 shows that their omission in art. 1 was deliberate and that therefore the inference regarding mens rea is the opposite to that contended for by the appellants. It is not, however, possible to deal adequately with the argument without knowing exactly the type of transaction envisaged by art. 3, and this seems to be in doubt. It might be of such a type that in contradistinction to the transactions covered by art. 1 it would be reasonable to imply that mens rea was a necessary ingredient of any transgression. But regarding the matter purely as one of construction we are not prepared to say that the presence of the words "cause or permit" in art. 3 outweighs the considerations we have referred to as bearing on the construction of art. 1.

It should not be inferred from what we have said that we are deciding that mens rea is required by the language of art. 3. We leave that point entirely open, to be decided if and when the issue directly arises, which it does not do in the present case.

Appeal dismissed.

Solicitors: *Dennison, Horne & Co.* (for St. Margaret's Trust, Ltd.); *Barradale, Blacket, Gill, Silkin & Young* (for Oliver Autos, Ltd., Victor Richard and S. J. Hone); *Solicitor, Board of Trade* (for the Crown).

[Reported by E. COCKBURN MILLAR, Barrister-at-Law.]

KRUHLAK v. KRUHLAK (No. 2).

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Cassels and Diplock, JJ.), May 8, 1958.]

Affiliation—Illegitimate child born to married woman—Decree of divorce made absolute later the same day—Father then free to marry—Subsequent marriage of father and mother—Whether affiliation proceedings lay after the parents' marriage—Bastardy Laws Amendment Act, 1872 (35 & 36 Vict. c. 65), s. 3, as amended—Legitimacy Act, 1926 (16 & 17 Geo. 5 c. 60), s. 1 (1).

Legitimation—Legitimatio per subsequens matrimonium—Child born before, but on same day as, decree of divorce of mother made absolute—Father then free to marry—Subsequent marriage of father and mother—Whether child legitimated—Legitimacy Act, 1926 (16 & 17 Geo. 5 c. 60), s. 1 (1).

A married woman separated from her husband gave birth to an illegitimate child at 7.30 a.m. At 10 a.m. the same day a decree nisi of divorce dissolving her marriage was made absolute. The father of the child was at the time free to marry the mother, and subsequently did so. On an application by the mother, who had meanwhile obtained a separation order against the father, for an affiliation order in respect of the child as being a bastard child within s. 3 of the Bastardy Laws Amendment Act, 1872†,

* Compare, e.g., *James & Son, Ltd. v. Smee* ([1954] 3 All E.R. 273).

† Section 3 of the Bastardy Laws Amendment Act, 1872, provides, so far as relevant—*"Any single woman . . . who may be delivered of a bastard child may . . . make application to any one justice of the peace . . . for a summons to be served on the man alleged by her to be the father of the child . . ."* The remainder of s. 3, subsequent to the words last quoted, was repealed by the Magistrates' Courts Act, 1952, s. 132 and Sch. 6. The provision was repealed by the Affiliation Proceedings Act, 1957, s. 12 and schedule and replaced by s. 1 of that Act as from Apr. 1, 1958.

- A **Held:** the decree absolute, being a judicial act, dated from the earliest time of the day on which it was made, and the child was accordingly legitimated* under s. 1 of the Legitimacy Act, 1926, by the subsequent marriage of the child's parents; therefore, the application failed.

Appeal dismissed.

- B [As to the need to show that a child is a bastard to obtain an affiliation order, see 3 HALSBURY'S LAWS (3rd Edn.) 111, para. 172, text and note (c); as to legitimation by subsequent marriage, see *ibid.*, 93, para. 147, and as to the time from which a decree absolute dissolves a marriage, see 12 HALSBURY'S LAWS (3rd Edn.) 409, para. 908.

- C For the Bastardy Laws Amendment Act, 1872, s. 3, see 2 HALSBURY'S STATUTES (2nd Edn.) 478; and for the Legitimacy Act, 1926, s. 1, see *ibid.*, 493.]

Case Stated.

- This was a Case Stated by justices for the County of the West Riding of York, in respect of their adjudication as a magistrates' court, at the instance of Hilda Mary Kruhlak, the mother. At 7.30 a.m. on Dec. 2, 1953, the mother, who was then married to but living apart from her former husband, who had obtained a decree nisi of divorce against her, gave birth to a female child of which the respondent to this application and appeal was the father. The father was then free to marry the mother. At 10 a.m. on the same day the decree nisi was made absolute in favour of the former husband. The mother married the father on Dec. 19, 1953, and on Sept. 22, 1955, a male child was born to the parties. On Mar. 26, 1957, the mother obtained a separation order against the father on the ground of persistent cruelty: this order contained a non-cohabitation clause and provided for the payment of £3 per week maintenance for the mother and £1 10s. per week for the male child. On the court intimating that the female child was a bastard, in respect of whom no maintenance order could be made on that application, the mother did not pursue her application in respect of the female child. On Apr. 5, 1957, the mother preferred this complaint against the father alleging that she was a single woman and that the female child was a bastard child of which he was the father, and asking for an affiliation order. The father admitted paternity, but on May 22, 1957, the justices dismissed the complaint on the ground that it was not open to them to hold that the mother was a single woman quoad the father, to whom she was married. On an appeal by the mother by way of Case Stated the Queen's Bench Divisional Court, on Dec. 19, 1957, held ([1958] 1 All E.R. 154) that the mother could be a single woman quoad the father, reversed the justices' order of May 22, 1957, and ordered a re-hearing. At this re-hearing, on Feb. 5, 1958, the justices held that the female child had been rendered legitimate by the Legitimacy Act, 1926, s. 1, and was not a bastard child within the meaning of the Bastardy Laws Amendment Act, 1872, and they accordingly dismissed the complaint. The mother appealed by way of Case Stated.

R. D. Ranking for the mother.

- I [During the argument of counsel for the mother LORD GODDARD, C.J., referred to the observations of DEVLIN, J., in the previous proceedings ([1958] 1 All E.R. 154 at p. 156, letter H, to p. 157, letter C). At the conclusion of his argument counsel stated that the mother did not wish to bastardize her own child, and therefore hoped her appeal would fail. She had had to appeal in order

* The Legitimacy Act, 1926, s. 1 (1), provides—"Subject to the provisions of this section, where the parents of an illegitimate person marry or have married one another, whether before or after the commencement of this Act, the marriage shall, if the father of the illegitimate person was or is at the date of the marriage domiciled in England or Wales, render that person, if living, legitimate . . . from the date of the marriage . . ."

The Legitimacy Act, 1926, s. 1 (2), provides—"Nothing in this Act shall operate to legitimate a person whose father or mother was married to a third person when the illegitimate person was born."

to get a ruling of the High Court on the proper statute under which to apply A
for maintenance for the child.]

J. B. Deby for the father was not called on.

DIPLOCK, J.: The applicant, the mother, gave birth to a girl named Joan on Dec. 2, 1953, at 7.30 a.m. On the same day a decree absolute was made in favour of the mother's former husband from whom she had been living separate. B
The father of the child was the respondent to the summons, and they were married on Dec. 19, 1953; that is to say, seventeen days after the birth of the child.

In the present proceedings the mother took out a summons under the Bastardy Laws Amendment Act, 1872, s. 3 as amended*, against the father. The magistrates dismissed that summons on the ground that the child in respect of whom the application was made was a legitimate child. They relied on the rule that where a judicial act takes place, such as the granting of a decree absolute, it dates from the earliest time of the day on which it is made; therefore, the mother and her former husband were divorced before the birth of the child at 7.30 on that day. The child is accordingly a legitimate child of the marriage of Dec. 19, 1953, by virtue of s. 1 of the Legitimacy Act, 1926. This appeal D
is therefore dismissed.

LORD GODDARD, C.J.: I agree. Having separated from the father of the child and the child being legitimated, as DIPLOCK, J., has just said, the mother can now go back to the magistrates and ask for an increase in the amount that she has been awarded under the separation order. E

CASSELS, J.: I agree.

Appeal dismissed.

Solicitors: *Long & Gardiner*, agents for *A. Maurice Smith*, Castleford (for the mother); *Collyer-Bristow & Co.*, agents for *Alf. Masser & Co.*, Leeds (for the father).

[Reported by HENRY SUMMERFIELD, Esq., Barrister-at-Law.] F

Re TROTT (deceased). TROTT v. MILES AND OTHERS.

[CHANCERY DIVISION (Upjohn, J.), April 23, 1958.]

Family Provision—Extension of time for application—Birth of posthumous child of testator—Person having an “interest in the estate”—“Circumstance affecting the administration or distribution of the estate”—Jurisdiction to extend time—Inheritance (Family Provision) Act, 1938 (1 & 2 Geo. 6 c. 45), s. 2 (1), (1A) (c) (as amended by the Intestates’ Estates Act, 1952 (15 & 16 Geo. 6 & 1 Eliz. 2 c. 64), s. 7, Sch. 3). G

On Oct. 8, 1954, a testator died and on Nov. 17, 1954, probate of his will was granted. The testator's widow issued an originating summons under the Inheritance (Family Provision) Act, 1938 (as amended by the Intestates' Estates Act, 1952), asking that reasonable provision be made for her maintenance out of the testator's estate. On Apr. 13, 1955, the testator's widow gave birth to his daughter. On May 17, 1955, the period allowed by s. 2 (1) of the Act for the issue of a summons under the Act expired. On July 11, I

* By the Magistrates' Courts Act, 1952, s. 51 (32 HALSBURY'S STATUTES (2nd Edn.) 461).

- A 1955, a summons was issued on behalf of the child under the Act of 1938 to obtain provision for her maintenance.

Held: the time within which the child's summons could be validly issued would be extended to July 12, 1955, the court having jurisdiction to do so under s. 2 (1A)* of the Act of 1938 by virtue of para. (c) of s. 2 (1A) because on the child's birth a circumstance arose "affecting the administration or distribution of the estate", as thereby it was made possible for a summons to be issued on her behalf for an order under the Act of 1938.

- B

[For the Inheritance (Family Provision) Act, 1938, s. 2 (1A), see 32 HALSBURY'S STATUTES (2nd Edn.) 142.]

Adjourned Summons.

- C The widow of a deceased person issued an originating summons under the Inheritance (Family Provision) Act, 1938, s. 1 (as amended by the Intestates' Estates Act, 1952, s. 7 and Sch. 3). Subsequently, after the expiration of the time allowed by s. 2 (1) of the Act of 1938, an originating summons was issued on behalf of the deceased's posthumous child for relief under that Act. The summonses were consolidated, the child being struck out as a plaintiff and added as a defendant. The question arose whether the court had jurisdiction to, and would, extend the time allowed for the issue of the summons by the infant. This report is limited to that question.

W. J. C. Tonge for the plaintiff, the widow.

G. M. Parbury for the executors and a pecuniary legatee.

T. A. Jones for the posthumous child.

- E D. S. Chetwood for the residuary legatees, the children of the testator's first marriage.

UPJOHN, J.: This is an application under the Inheritance (Family Provision) Act, 1938 (as amended by the Intestates' Estates Act, 1952) by the widow of a deceased who died on Oct. 8, 1954. The plaintiff was the second wife of the testator and she married him on June 24, 1950. That was her first marriage. The testator had three sons by a former marriage. He made a will on Jan. 27, 1951, by which he left to the plaintiff a legacy of £100. He left four other legacies amounting to £125. He gave the residue of the estate on trust to divide it into three parts: one part to be held on trust for one son of the former marriage; another equal part on trust for another son of the former marriage; and as to the third part on trust for the issue of the third son of the former marriage.

- The marriage between the plaintiff and the testator was not uniformly a happy one and, indeed, during its course there were two, if not three, periods of separation; but they were short periods and the parties came together again and resumed cohabitation after each separation. When he died in October, 1954, the parties were living happily together, as indeed is shown by the fact that a posthumous child was born to the testator on Apr. 13, 1955, a daughter. There is uncontradicted evidence that before his death the testator knew of this forthcoming event and was indeed very pleased about it. The evidence, therefore, is uncontradicted that the widow was a perfectly satisfactory wife and nothing was to be said against her. At the time of the marriage she was thirty years old, and the testator was considerably older, fifty-five.

Probate was taken out by the executors some five months before the birth of the daughter, viz., on Nov. 17, 1954. Accordingly, the six months' period within which a summons under the Inheritance (Family Provision) Act, 1938, as amended, must be issued expired by May 17, 1955. The widow issued her summons in time. The infant's summons was not issued until July 11, 1955. On Dec. 19, 1955, the two summonses were consolidated.

* The relevant terms of this enactment are stated at p. 298, letter B, post.

The first question that arises is whether, in those circumstances, I have jurisdiction under s. 2 (1A) of the Act of 1938 to extend the period within which the infant's summons may be issued. So far as relevant, that section provides:

"If it is shown to the satisfaction of the court that the limitation to the said period of six months would operate unfairly . . . (b) in consequence of a question whether a person had an interest in the estate, or as to the nature of an interest in the estate, not having been determined at the time when representation was first taken out, or (c) in consequence of some other circumstances affecting the administration or distribution of the estate, the court may extend that period."

It is clear from the definition section, s. 5 (1), in the Act of 1938 that "son" and "daughter" respectively include "son or daughter of the deceased en ventre sa mère at the date of the death of the testator."

It is submitted by counsel for infants interested in the residue that para. (b) has no application because the infant has no "interest in the estate", i.e., under and by virtue of the provisions of the testator's will. I do not find it necessary to decide that matter however as, in my judgment, the infant can clearly rely on para. (c). It is plain that on her birth another circumstance "affecting the administration or distribution of the estate" arose, because she became entitled to issue this summons under the Act of 1938. In the circumstances of this case, viz., that she was born only a few days more than one month before the expiry of the requisite period, the time ought to be extended. I am told in fact that no time was wasted and that application was made for a legal aid certificate, but strictly that is not in evidence. Accordingly I propose to extend the time within which the infant's summons may be issued to July 12, 1955, which makes the summons valid.

Order accordingly.

Solicitors: *Bischoff & Co.*, agents for *Selwood & Leathes*, Brighton (for the widow and posthumous child); *Garrard, Wolfe & Co.* (for the executors and a pecuniary legatee); *Champion & Co.*, agents for *Bonnett, Son & Turner*, Hounslow (for the residuary legatees).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

A

Re TRIFFITT'S SETTLEMENT. HALL v. HYDE AND OTHERS.

[CHANCERY DIVISION (Upjohn, J.), April 15, 16, 1958.]

B

Power of Appointment—Delegation of power—Power with consent to appoint generally except to named persons—Appointment to new trustees on discretionary trusts—Validity.

C

By a marriage settlement dated July 8, 1953, the trust fund was directed to be held "As to the whole . . . and the annual income thereof or any part or parts thereof respectively Upon trust for such person or persons other than and except [T.] and any wife of his and in such manner generally as the wife shall from time to time or at any time by deed revocable or irrevocable with the consent in writing of the trustees for the time being hereof not being less than two in number which consent such trustees may withhold or give at their absolute discretion without being in any way liable for the exercise of such discretion appoint." In default and until and subject to any such appointment the trustees were directed to pay the income of the trust fund to the wife during her life. The wife desired to exercise her power of appointment by deed directing four trustees (three of whom were not trustees of the marriage settlement) to hold the trust fund "Upon trust for the primary and secondary beneficiaries [as therein defined] or any one or more of them exclusive of the other or others in such shares and proportions . . . and subject to such terms limitations and provisions as the trustees shall from time to time by deed or deeds revocable or irrevocable executed before the vesting day . . . appoint".

D

E

Held: so wide a power as that conferred by the marriage settlement was a power conferred on the wife for her benefit, not a fiduciary power: it was implied that she could delegate the discretion conferred by the power and, therefore, she could validly exercise the power by entering into the proposed deed of appointment.

F

Re Dilke ([1921] 1 Ch. 34) applied.

[As to delegation of powers, see 25 HALSBURY'S LAWS (2nd Edn.) 526, 527, para. 955; and for cases on the subject, see 37 DIGEST 407-409, 174-188.]

Cases referred to:

G

(1) *Re Park, Public Trustee v. Armstrong*, [1932] 1 Ch. 580; 101 L.J.Ch. 295; 147 L.T. 118; Digest Supp.

(2) *Re Jones, Public Trustee v. Jones*, [1945] Ch. 105; 115 L.J.Ch. 33; 173 L.T. 357; 2nd Digest Supp.

(3) *Re Harvey, Banister v. Thirtle*, [1950] 1 All E.R. 491; 2nd Digest Supp.

(4) *Re Watts, Coffey v. Watts*, [1931] 2 Ch. 302; 100 L.J.Ch. 353; 145 L.T. 520; Digest Supp.

H

(5) *Re Churston Settled Estates, Freemantle v. Churston (Baron)*, [1954] 1 All E.R. 725; [1954] Ch. 334; 3rd Digest Supp.

(6) *Phillips v. Cayley*, (1889), 43 Ch.D. 222; 59 L.J.Ch. 177; 62 L.T. 86; 37 Digest 445, 487.

I

(7) *Re Byron's Settlement, Williams v. Mitchell*, [1891] 3 Ch. 474; sub nom. *Re Reynolds, Williams v. Mitchell*, 60 L.J.Ch. 807; 65 L.T. 218; 37 Digest 437, 429.

(8) *Platt v. Routh*, (1840), 3 Beav. 257; *affd.* H.L. sub nom. *Drake v. A.-G.*, (1843), 10 Cl. & Fin. 257; 1 L.T.O.S. 382; 8 E.R. 739; 21 Digest 51, 337.

(9) *Re Dilke, Re Dilke's Settlement Trusts, Verey v. Dilke*, [1921] 1 Ch. 34; 90 L.J.Ch. 89; 124 L.T. 229; 37 Digest 416, 256.

(10) *Re Morris' Settlement Trusts, Adams v. Napier*, [1951] 2 All E.R. 528; 2nd Digest Supp.

- (11) *Re Phillips, Lawrence v. Huxtable*, [1931] 1 Ch. 347; 100 L.J.Ch. 65; A 144 L.T. 178; Digest Supp.
- (12) *Re Greaves' Will Trusts, Public Trustee v. Ash*, [1954] 1 All E.R. 771; [1954] Ch. 434; 3rd Digest Supp.
- (13) *Re Somes, Smith v. Somes*, [1896] 1 Ch. 250; 74 L.T. 49; sub nom. *Re Somes, Somes v. Somes*, 65 L.J.Ch. 262; 37 Digest 504, 971.

Adjourned Summons.

By cl. 3 (1) of a settlement dated July 8, 1953, made on her marriage, a power of appointment was conferred on the plaintiff in the terms stated in the head-note. The plaintiff desired to appoint and declare trusts of the settled fund including a discretionary trust in favour of defined beneficiaries. An appropriate deed was therefore drafted and the present originating summons was issued to determine (among other questions) the question whether on the true construction of cl. 3 (1) of the said marriage settlement the plaintiff was entitled to execute an appointment in the terms of the draft deed.

R. W. Goff, Q.C., and *Charles Sparrow* for the plaintiff.

M. J. H. Fairbairn for the defendants, the trustees of the marriage settlement and a person beneficially interested under that settlement.

UPJOHN, J.: This summons raises an interesting question which may be shortly stated thus. Under a settlement, to which I must refer later, the plaintiff, Mrs. Hall, was given a wide power of appointment fettered, however, in this way, that there are two named persons to whom she cannot make an appointment, and any appointment can only be made with the consent of the trustees of the settlement. The plaintiff is anxious to exercise that power of appointment in a way which involves a transfer of property to a new body of trustees and confers on those trustees wide discretionary powers. The question is whether such an exercise of the power of appointment is within the terms of the power conferred on the plaintiff or not.

The settlement is dated July 8, 1953, and was made on marriage. I need not recite the parties or the recitals. Briefly Mrs. Hall, then Miss Triffitt, settled shares set out in Sch. 1 which included twelve thousand ordinary shares of £1 each in Cooper, Triffitt & Co., Ltd., now represented by some sixty thousand shares in that company. Mrs. Hall's father was a party to the deed and he settled six thousand ordinary shares in Cooper, Triffitt & Co., Ltd., now represented by some thirty thousand shares, making a total now of ninety thousand shares in Cooper, Triffitt & Co., Ltd. It is in respect of those shares that Mrs. Hall now desires to exercise the power of appointment.

Clause 3 of the settlement is in these terms:

"The trustees shall stand possessed of the said investments mentioned in the First and Second Schedules hereto respectively and the investments for the time being representing the same (hereinafter called 'the trust fund') and of the annual income thereof Upon the trusts and subject to the powers and provisions following (that is to say). (1) As to the whole of the trust fund and the annual income thereof or any part or parts thereof respectively Upon trust for such person or persons other than and except Mr. Triffitt [that was the father] and any wife of his and in such manner generally as the wife shall from time to time or at any time by deed revocable or irrevocable with the consent in writing of the trustees for the time being hereof not being less than two in number which consent such trustees may withhold or give at their absolute discretion without being in any way liable for the exercise of such discretion appoint. (2) And in default of and until and subject to any such appointment Upon trust to pay the annual income of the trust fund to the wife during her life."

A Then by sub-cl. (3) there was a power to appoint amongst the children or remoter issue of the marriage in wide terms and included in such power was express authority to delegate the exercise of discretions to other persons. Then there followed the usual trusts for the children in default of appointment, and other trusts which I do not think that I need read except to refer to cl. 7 which empowers the wife "with the consent in writing of the trustees" in precisely the same terms as in cl. 3 (1) to appoint

"to or in favour of the husband [who was also a party to the deed] but only in case he survives her during the residue of his life or any less period all or any part of the annual income of the trust fund."

C The marriage followed on July 23, 1953. The plaintiff is now some forty-two years old and so far there has been no issue of the marriage. She is now anxious to exercise the power by a deed (the "deed of appointment"), a draft of which is now in evidence before me and is exhibited to the affidavit of Mr. Albert Edward Cornell. It is a lengthy deed, and I think I can paraphrase its provisions quite shortly. The plaintiff is the party of the first part: the trustees of the marriage settlement referred to as "the settlement trustees" are parties of the second part and then the parties of the third part are four trustees called the resettlement trustees. Of those four trustees three are different from the marriage settlement trustees, but there is one trustee common to both settlements. After reciting the settlement of July 8, 1953, and a deed of partial revocation the deed of appointment defines the trust fund as ninety thousand shares in Cooper, Triffitt & Co., Ltd., and then defines certain classes of beneficiaries. There are the primary beneficiaries, who are the children or adopted children, of the plaintiff, who may be born before the vesting day. Then there is a class described as secondary beneficiaries comprising the nephews of Mrs. Hall and their issue born or adopted and their respective spouses and widows existing before the vesting day. The vesting day is defined as a day to expire at the end of twenty-one years from the date of the settlement of July 8, 1953.

F Then the deed of appointment proceeds to settle these shares and investments for the time being representing the same

"Upon trust for the primary and secondary beneficiaries or any one or more of them exclusive of the other or others in such shares and proportions . . . and subject to such terms limitations and provisions as the trustees shall from time to time by deed or deeds revocable or irrevocable executed before the vesting day . . . appoint."

G There are many other trusts and there is an ultimate trust in favour of the Royal College of Surgeons, but I do not think that I need read any more.

H The question is whether it is proper to confer on the new trustees the discretion which I have read. The trustees of the marriage settlement, who are the first three defendants, have intimated that they will consent to the proposed appointment provided that it is a proper and valid appointment within the terms of cl. 3 (1) of the marriage settlement.

I Counsel for the plaintiff concedes at once that the power of appointment contained in cl. 3 (1) of the settlement is not a general power of appointment, using that phrase in its widest sense: i.e., a power to appoint among the whole world unfettered by any consent. Equally, of course, it is not the usual limited power of appointment where there is a limited class to whom the donee of the power can make the appointment. Counsel on both sides agree that it is really a hybrid power: it has some of the attributes of a general power and some of the attributes of a special power. The validity of such a power is not in dispute, and it has been established in such cases as *Re Park, Public Trustee v. Armstrong* (1) ([1932] 1 Ch. 580), *Re Jones, Public Trustee v. Jones* (2) ([1945] Ch. 105) and *Re Harvey, Banister v. Thirtle* (3) ([1950] 1 All E.R. 491).

I have been referred, quite properly, to a considerable number of authorities. A
It is not in dispute, although I do not have to decide the question, that, for the
purposes of the rule against perpetuities, a power such as I have read must
be treated as a special or limited power. That seems to be the effect of *Re*
Watts, Coffey v. Watts (4) ([1931] 2 Ch. 302) and *Re Churston Settled Estates,*
Freemantle v. Baron Churston (5) ([1954] 1 All E.R. 725). Equally, for the B
purposes of the Wills Act, 1837, s. 27, the power would also seem to have the
character of a limited power: see *Phillips v. Cayley* (6) ((1889), 43 Ch.D. 222),
and *Re Byron's Settlement, Williams v. Mitchell* (7) ([1891] 3 Ch. 474). On the
other hand, under the now obsolete Legacy Duty Act, 1796, it would seem that a
power in these terms has the character of a general power: see *Platt v. Routh* (8)
((1840), 3 Beav. 257).

I am, however, not concerned with those questions, and I do not decide them. C
I have to consider whether there is a power in the plaintiff to delegate the
exercise of discretionary powers to others. That is essentially a question of
construction of the marriage settlement. In my judgment, the donee of the
power can delegate the exercise of discretionary powers to others in two cases.
First, where the donee has a completely general power in its widest sense, that D
is tantamount to ownership, and, therefore, the donee can exercise it in
whatever way he pleases. That is not this case for the reasons that I have
already mentioned. In the first place, there are two persons who are excluded
from being the objects of the appointment, and, secondly, the appointment
can only be made with the consent of the trustees. Counsel for the plaintiff very
properly concedes that this power cannot be treated as tantamount to ownership. E
Secondly the donee may delegate discretionary powers where as a matter of
construction, one can spell out some power enabling the donee of the power
to delegate his discretion. That is frequently done in the case of special powers,
and it was in fact done by cl. 3 (3) of this very marriage settlement. In all
other cases the principle delegatus non potest delegare applies.

Counsel for the trustees submits that properly regarded the power conferred F
by cl. 3 (1) is one of selection among a limited class, limited perhaps somewhat
indefinitely, but, nevertheless, effectively because there are two people who
cannot be objects of the appointment. He refers me to *Re Byron's Settlement* (7),
where KEKEWICH, J., dealt with the matter. It was in fact a decision on the
Wills Act, 1837, but the observations that I am going to read seem to me of G
general application. He says (*ibid.*, at p. 479):

"Thus regarded, one understands without any difficulty the intention
and meaning of the words, 'which he may have power to appoint in any
manner he may think proper'. Anything less than a power to appoint
as he thinks fit is not equivalent to ownership. A power so to appoint, H
but with an exception, is something less than proprietorship. A man is
not any more the proprietor of land or money if he has power to appoint to
all the world except to the children of A. than he is if he has power to
appoint to the children of B. It is, in either case, a power of selection, not
ownership; the appointor cannot deal with the property as he pleases."

Counsel for the trustees submits that that general principle applies and here you I
find a power of selection with no express power to delegate a discretion.

There are one or two general observations to be made before I consider the
actual terms of the power. The first is that it is to be observed that the trust
is to such person or persons as may be appointed, and it does not include
expressly any trust for such purposes as the plaintiff may appoint. I think
that it is clear from *Re Dilke, Re Dilke's Settlement Trusts, Verey v. Dilke* (9)
([1921] 1 Ch. 34) and *Re Harvey* (3) that those words are readily to be implied

A in a power such as this. Secondly, in an ordinary limited power, such as a power to appoint to a class of issue, it is settled that the words "in such manner" as, e.g., the wife shall appoint, do not confer any power to delegate a discretion. That appears from the recent case of *Re Morris' Settlement Trusts, Adams v. Napier* (10) ([1951] 2 All E.R. 528), but that was a case of an ordinary limited power of appointment.

B The next question is this. What is the duty of the trustees in giving consent? Counsel for the plaintiff submits that the matter is covered by the authority of *Re Dilke* (9) and the later authority of *Re Phillips, Laurence v. Huxtable* (11) ([1931] 1 Ch. 347), a decision of MAUGHAM, J. Those authorities seem to establish that the trustees may, quite properly, if they so desire, consent to an appointment in wide terms and are not under any duty as regards the selection of the objects of the power. MAUGHAM, J., in *Re Phillips* (11) put the matter in this way after he had referred to *Re Dilke* (9) (*ibid.*, at p. 355):

C "Stated in other language, their consent was required to the appointment to give validity and effect to the appointment, but there was no reason for holding that they had any duty as regards the selection of the objects of the power."

D Counsel for the trustees has submitted that that does not apply here as, because of the wording at the end of the clause, they are in fact under a duty to consider the selection of the objects of any appointment. The words on which he relies are

E "which consent such trustees may withhold or give at their absolute discretion without being in any way liable for the exercise of such discretion."

F I am not able to accept that argument. In my judgment, the matter is covered by the two authorities that I have mentioned and, therefore, the trustees properly could (if they are so minded) give their consent to an appointment in the widest possible terms. For instance, they could—and this would be closely analogous to the actual facts in *Re Dilke* (9)—give their consent to an appointment by the plaintiff if they thought fit which gave her a general power of appointment in the widest sense. It is quite clear that they could, if they were so minded, quite properly consent to an appointment by the plaintiff in favour of herself. They could quite properly, if they were so minded, consent to an appointment to a charitable organisation such as the Royal College of Surgeons.

H One other matter has been argued before me with which I must deal. It is submitted by counsel for the trustees that the power conferred on the plaintiff is in fact a fiduciary power. The ambit of fiduciary power has recently been considered in the Court of Appeal in *Re Greaves' Will Trusts, Public Trustee v. Ash* (12) ([1954] 1 All E.R. 771). That case was in fact dealing with a release of powers, but SIR RAYMOND EVERSHED, M.R., made some useful observations on this question of fiduciary power and what constitutes a fraud on it. He quoted (*ibid.*, at p. 776) with approval the language of CHITTY, J., in *Re Somes, Smith v. Somes* (13) ([1896] 1 Ch. 250 at p. 255):

I "There is no duty imposed on the donee of a limited power to make an appointment; there is no fiduciary relationship between him and the objects of the power beyond this, that if he does exercise the power of appointment, he must exercise it honestly for the benefit of an object or the objects of the power, and not corruptly for his own personal benefit . . ."

Then he goes on to deal with the release of the powers. Applying that language to this power, in my judgment it does not fit. The plaintiff can appoint to anyone in the world including herself for any purpose except the two persons named provided that she could obtain the consent of the trustees. In my opinion, this is not a fiduciary power at all, but a power conferred on the plaintiff for her own benefit. A

I turn then to the words of this power. It is couched in the ordinary terms of a general power. I have already pointed out that the plaintiff can appoint for any purpose including a charitable purpose or to any charitable organisation. If she appointed to a charitable purpose rather than an existing charitable entity, it would seem extraordinary if she had no power to delegate the exercise of the discretionary power to the persons she appoints as charitable trustees. B
It seems to me quite plain that she can appoint a new body of trustees as she is anxious to do providing, of course, that those trustees do not include Mr. Triffitt or any wife of his. Otherwise she has a complete and unfettered power, subject to consent, to appoint to anyone, and, in my judgment, that includes power to appoint persons as trustees for whatever objects or purposes the plaintiff desires. In my judgment, in a widely drawn power such as this, it is to be implied that the plaintiff can delegate the exercise of discretionary powers entirely. It is a beneficial power conferred on her for her own benefit. She can with consent appoint to any person she likes outside the two prohibited persons, and it would be quite wrong to put any fetter on her powers. I think that a power of delegation is inherent in the words contained in cl. 3 (1). Accordingly, in my view the deed which she wishes to execute is a proper exercise by her of the power conferred by cl. 3 (1). C
D
E

Having heard argument on it, I am satisfied that this is not a future or hypothetical question as the plaintiff is anxious to, and no doubt will now at once, execute this document. I think that it is proper for me to make a declaration that she may validly do so.

Declaration accordingly.

Solicitors: *Bell, Brodrick & Gray*, agents for *Weatherhead & Butcher*, Bingley (for all parties).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

A ANDREWS v. ANDREWS & SULLIVAN.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Wrangham, J.), April 30, 1958.]

Infant—Removal outside jurisdiction—Custody granted to father by Divorce Court—Infants made wards of court in Chancery Division—Application by father to Divorce Division for leave to take infants out of jurisdiction—
B *Law Reform (Miscellaneous Provisions) Act, 1949 (12, 13 & 14 Geo. 6 c. 100), s. 9 (2)—Matrimonial Causes Act, 1950 (14 Geo. 6 c. 25), s. 26 (1)—R.S.C., Ord. 54P, r. 3.*

The father obtained a decree nisi of divorce and was granted the custody of the two infant children. The decree was made absolute. On Apr. 15, 1958, the mother made an application to the Chancery Division by originating summons for an order that the children be made wards of court. Thereupon, by virtue of the Law Reform (Miscellaneous Provisions) Act, 1949, s. 9 (2) and R.S.C., Ord. 54P, r. 3, they became wards of court for the next twenty-one days at the end of which time they would cease to be wards unless an appointment for the hearing of the application had been obtained. On Apr. 24, 1958, the father filed notice of application to the Probate, Divorce and Admiralty Division for leave to take the children out of the jurisdiction permanently; this application was heard on Apr. 29, 1958.

C **Held:** while the children were wards of court the powers of the Chancery Division superseded those of the Divorce Court, and only the Chancery Division, as their guardian, could grant leave to take them out of the jurisdiction or could otherwise control their persons and property.

E *Hyde v. Hyde* ((1888), 13 P.D. 166) and observations of ROXBURGH, J., in *Re E.* ([1955] 3 All E.R. at p. 176) applied; *Manders v. Manders* ((1890), 63 L.T. 627) distinguished.

[Editorial Note. An appeal from this decision was adjourned pending the determination of an application to the Chancery Division that the infants should cease to be wards of court (see p. 308, post).]

F As to an infant becoming a ward of court on issue of summons in Chancery Division, see 21 HALSBURY'S LAWS (3rd Edn.) 217, para. 479, note (g); and as to the effect of order for custody in Divorce Division, see *ibid.*, 218, para. 480, note (k).

As to applications in the Divorce Court for leave to remove children out of the jurisdiction, see 12 HALSBURY'S LAWS (3rd Edn.) 392, para. 869, note (l); and as to removal out of the jurisdiction of wards of court, see 21 HALSBURY'S
G LAWS (3rd Edn.) 218, para. 481, note (l); and for cases on the subject, see 28 DIGEST 338, 339, 2052-2066.

For the Supreme Court of Judicature (Consolidation) Act, 1925, s. 56 (1) (b), see 18 HALSBURY'S STATUTES (2nd Edn.) 490.

For the Law Reform (Miscellaneous Provisions) Act, 1949, s. 9 (2), see 28 HALSBURY'S STATUTES (2nd Edn.) 777.

H For the Matrimonial Causes Act, 1950, s. 26 (1), see 29 HALSBURY'S STATUTES (2nd Edn.) 413.]

Cases referred to:

(1) *Hyde v. Hyde*, (1888), 13 P.D. 166; 57 L.J.P. 89; 59 L.T. 529; 27 Digest (Repl.) 525, 4679.

(2) *Re E.*, [1955] 3 All E.R. 174; [1956] Ch. 23; 3rd Digest Supp.

(3) *Manders v. Manders*, (1890), 63 L.T. 627; 27 Digest (Repl.) 668, 6320.

Summons.

This was an application by the father for leave to take the two infant children out of the jurisdiction permanently. The summons was adjourned into court for judgment and the facts appear in the judgment.

John Latey, Q.C., Victor Williams and J. C. J. Tatham for the father.

Sir Frank Soskice, Q.C., and C. D. E. Rich for the mother.

Cur. adv. vult.

Apr. 30. **WRANGHAM, J.**, read the following judgment: This summons by the father for leave to take his children out of the jurisdiction permanently raises an important question on which I think it right to deliver a judgment in open court, having heard a full argument from counsel in chambers. The facts relevant to this question are not in dispute. On Oct. 25, 1957, a decree nisi for dissolution of the marriage of the father and the mother was pronounced, custody of the two infant children being granted to the father, who was the petitioner, and the decree was made absolute on Feb. 12, 1958. On Apr. 15, 1958, the mother applied to the Chancery Division for an order that the infants be made wards of court. On Apr. 24, 1958, the father made the application to the Probate, Divorce and Admiralty Division which is now before me. The mother opposes this application; first, on the ground that in the circumstances this Division has no jurisdiction which it can or ought to exercise; and, secondly, on the merits. For reasons that will appear I have not investigated the merits of the application at all.

Section 9 (2) of the Law Reform (Miscellaneous Provisions) Act, 1949, provides that where application is made for an order that an infant be made a ward of court the infant shall become a ward of court on the making of the application, but shall cease to be a ward of court at the expiration of such period as may be prescribed by rules of court unless within that period an order has been made in accordance with the application. The period has been fixed by R.S.C., Ord. 54r, r. 3, at twenty-one days, the rule providing that if within the twenty-one days an appointment for the hearing is obtained the infant shall continue to be a ward of court until the hearing. It follows that when the father issued his summons in this Division nine days after the mother's originating summons in the Chancery Division, and also when it was heard by me five days later, the children were both wards of court. The question therefore arises whether this Division can or ought to make such an order as is here applied for in the case of infants who are wards of court.

The jurisdiction of this Division to make such an order is derived from s. 26 (1) of the Matrimonial Causes Act, 1950, which re-enacted s. 193 (1) of the Supreme Court of Judicature (Consolidation) Act, 1925. That section empowers the court to make such provision as appears just with regard to the custody, maintenance and education of the children, the marriage of whose parents is the subject of the proceedings, or, if it thinks fit, to direct proper proceedings to be taken for placing the children under the protection of the court. This last phrase clearly means proceedings to make the children wards of court in which event the Chancery Division, to which the wardship of the infants is specifically assigned by s. 56 (1) (b) of the Act of 1925, would have power to control their persons and property including, e.g., the power to give or refuse leave to them to quit the jurisdiction. It seems obvious that the section contemplates that an infant who has been made a ward of court of the Chancery Division as a result of proceedings directed by this Division shall no longer be subject to the control of this Division. It would be absurd if in such a case an infant wishing, e.g., to go abroad, had to apply for leave to both Divisions the judges of which might, indeed, take contrary views on the merits of his application. Of course, it does not follow from this that this Division cannot or should not exercise its jurisdiction over infants who have become wards of court without its direction, because it could be argued that by making such a direction this Division impliedly abdicated in favour of the Chancery Division or delegated its powers thereto. I was told by counsel for the father that in practice where an infant was subject to the control of one Division as a ward of court and the other Division under s. 26 (1) of the Matrimonial Causes Act, 1950, either Division exercised jurisdiction on any matter on which it was

A seized before the other. Logically this seems to me to be indefensible. If an infant subject to the control of this Division under s. 26 (1) becomes a ward of court one of three positions, as I think, is created; either the infant is subject to both courts so that, e.g., on wishing to go abroad he must ask leave of both Divisions or the jurisdiction of the Chancery Division supersedes that of this Division, or the converse occurs. In my opinion the true view is that the jurisdiction of the Chancery Division supersedes that of this Division.

The jurisdiction of this Division was originally conferred on the Divorce Court by s. 35 of the Matrimonial Causes Act, 1857, which was in somewhat similar terms to s. 26 (1) of the Act of 1950, save that there was a specific reference to the Court of Chancery as the court of protection of children. Thirty-one years later the Court of Appeal had to consider in *Hyde v. Hyde* (1) ((1888), 13 P.D. 166), whether the Divorce Division had under s. 35 powers in relation to infants as full as those possessed by the old Court of Chancery. They held that it had not. COTTON, L.J., said (*ibid.*, at p. 174):

“ . . . the 35th section of the Divorce Act does not enable the court by its order to make the infants wards of the Divorce Division . . . ”

BOWEN, L.J., said (*ibid.*, at p. 176): “ . . . the Divorce Division has no wards of court . . . ”, and FRY, L.J., said (*ibid.*, at p. 178):

“ . . . I think that the section itself shows it was not intended by the legislature to clothe the Court of Probate with as wide a jurisdiction as the Court of Chancery had in respect of infants, because it enables the Court of Divorce and Matrimonial Causes, if it see fit, to direct proceedings to be taken for placing the children under the protection of the Court of Chancery.”

If then the powers of this Division over infants are less extensive than those possessed by the Chancery Division over wards of court it seems likely that when the latter came into existence they superseded the former.

There is, however, another aspect of the matter. The Chancery Division is in effect the guardian of a ward of court either by itself or by any guardian appointed by it: see *Re E.* (2) ([1955] 3 All E.R. 174 at p. 176). It cannot therefore be right for any other court to issue orders or directions about the control of the person of an infant who is in the custody or what amounts to the custody of the Chancery Division. No statute or rule draws any distinction between the position of an infant who has a guardian appointed by the Chancery Division and an infant, such as the children in this case, for whom no such guardian has been appointed; indeed, it is clear from *Re E.* (2), that no such distinction can exist.

H Counsel for the father relied on *Manders v. Manders* (3) ((1890), 63 L.T. 627). In that case the decree nisi had been pronounced giving custody of a child to her father. The mother applied by originating summons under the Guardianship of Infants Act, 1886, to the Chancery Division for access, but STIRLING, J., refused the application on the ground that it ought to have been made to the Divorce Court. In my view, that case is distinguishable on the ground that the jurisdiction of the court under the Guardianship of Infants Act, 1886, is less extensive than that possessed by the Chancery Division over wards of court: see *Re E.* (2). There was in *Manders v. Manders* (3) no question of the Chancery Division being in any sense the guardian of the child; the jurisdiction under the Guardianship of Infants Act, 1886, being in no way superior to or more extensive than the jurisdiction of the Divorce Court there was no reason for the latter to give way to the former. In my judgment the children in this case became on Apr. 15, 1958, and still are, wards of court and as such in the custody of the

Chancery Division. The Chancery Division is their guardian and it is only their guardian who can give them leave to go out of the jurisdiction or otherwise control their persons and property. It follows that I decline to exercise jurisdiction and dismiss this application accordingly.

Application dismissed.

Solicitors: *Boxall & Boxall* (for the father); *Wegg-Prosser & Co.* (for the mother).

[*Reported by A. T. HOOLAHAN, Esq., Barrister-at-Law.*]

Re ANDREWS (Infants).

[CHANCERY DIVISION (Upjohn, J.), May 6, 7, 8, 1958.]

Infant—Removal outside jurisdiction—Custody granted to father by Divorce Court—Infants made wards of court in Chancery Division—Application by father to Chancery Division that infants should cease to be wards of court—Law Reform (Miscellaneous Provisions) Act, 1949 (12, 13 & 14 Geo. 6 c. 100), s. 9 (3).

Ward of Court—Application that infant should cease to be a ward of court—Relationship of the jurisdiction over infants of the Chancery Division and of the Probate, Divorce and Admiralty Division.

Where an infant has been made a ward of court before any order of a judge of the Divorce Division is made in relation to the infant, it is universally accepted, probably as a matter of law, but certainly as a matter of comity between judges, that no order will be made by a judge of the Divorce Division and that the matter will be left with the judge dealing with the wardship proceedings.

Where a judge of the Divorce Division makes an order as to custody, care or control before an infant has become a ward of court and the infant is thereafter made a ward of court by the issue of a summons for that purpose in the Chancery Division, the judge of the Chancery Division before whom the matter is brought will normally refuse to consider an application on its merits, but will leave it to the judge of the Divorce Division, and, to avoid any difficulty of jurisdiction in that division, will de-ward the infant. That, however, does not apply where the order of the judge of the Divorce Division is made without any determination on the merits, e.g., where an order for custody follows almost as a matter of course in an undefended divorce petition, or where the order is made by consent.

Even where there has been an earlier investigation into the merits by a judge of the Divorce Division, it may become necessary for a judge of the Chancery Division, in exercise of his undoubted discretion, to entertain applications relating to an infant who has been the subject-matter of orders as to custody, care and control in the Divorce Division, at any rate where there has been a change of circumstances since the order of the Divorce Division, or some wholly new question arises. (See p. 310, letters F to I, post.)

[As to placing children under the protection of the Chancery Division, see 21 HALSBURY'S LAWS (3rd Edn.) 214-218, paras. 473-475, 478-480; and for cases on the subject, see 28 DIGEST 335, 336, 2017-2030.]

For the Law Reform (Miscellaneous Provisions) Act, 1949, s. 9, see 28 HALSBURY'S STATUTES (2nd Edn.) 777.]

Adjoined Summons.

On Apr. 15, 1958, the mother applied by originating summons in the Chancery Division that her two infant children (who, by an order of the Probate, Divorce and Admiralty Division made in October, 1957, were in the custody of the father, but could not be taken out of the jurisdiction of the court without leave)

- A should be declared to be wards of the court. By virtue of the Law Reform (Miscellaneous Provisions) Act, 1949, s. 9 (2), and R.S.C., Ord. 54P, r. 3, on her issuing the summons the children became wards of court for twenty-one days. On Apr. 24, 1958, the father, who wished to take the children to New Zealand, applied to the Probate, Divorce and Admiralty Division for an order permitting him to take them permanently out of the jurisdiction. The application having
- B been dismissed (see p. 305, ante) and an appeal having been adjourned pending an application being made in the Chancery Division that the children should cease to be wards of court, the father applied for such an order. The application was heard, and judgment was given, in camera, refusing the father's application. UPJOHN, J., subsequently adjourned the matter into open court and made observations on the relationship between the Probate, Divorce and Admiralty
- C Division and the Chancery Division in regard to their respective jurisdictions in respect of infants.

R. W. Goff, Q.C., and J. W. Mills for the father.

Sir Frank Soskice, Q.C., and C. D. E. Rich for the mother.

- UPJOHN, J.: I have just delivered in camera judgment in this case, but
- D having regard to the course which the case has taken in another division of this court and in the Court of Appeal, I think it proper to make a few observations on it in open court.

- I must mention a few essential facts. The parties were married in 1944. There were two daughters of the marriage, Deirdre, now nearly eleven, and Caroline, just over six. The mother left the father for another man, one Sullivan, in 1956,
- E and the father began divorce proceedings against the mother in December, 1956, on the ground of the mother's adultery. That came on for hearing before Mr. Commissioner BUSH JAMES on Oct. 25, 1957, being undefended except as to custody and damages to be paid by the co-respondent, Mr. Sullivan. The learned commissioner made a decree nisi, and, by consent, ordered that the custody of the infant daughters should be the father's until further order. The
- F order provided for access by the mother on every alternate Sunday, and contained the usual prohibition against removing the infants out of the jurisdiction of the court. The mother married the co-respondent in April, 1958. On Apr. 15, 1958, the mother, for the reasons which I have dealt with fully in the judgment I have delivered, and being a shrewd woman, became suspicious that the father was about to remove the children from the jurisdiction without the leave of the court.
- G On that day she issued an originating summons in the Chancery Division which made the infants wards of court. Her suspicions were fully justified. The father had long planned a voyage with his children to New Zealand, and I have little doubt that if it had not been for the mother's astuteness he would have disappeared with the children without a trace. However, the issue of the originating summons put an end to that. His solicitors had not previously been consulted,
- H and when they became aware of their client's intentions they drew his attention, very properly, to the fact that it would be necessary for him to obtain the leave of the Divorce Court to take the children out of the jurisdiction, and on Apr. 22 he began proceedings for that purpose.

- I may say (and I propose to say no more about the facts) that having been into the merits, the husband's application to take the children out of the jurisdiction permanently and take them to New Zealand was not, in my opinion, a proper application at all. For example, he swore that he had a salaried position to go to. In fact, he had no such thing. That circumstance however formed by no means the only ground for reaching my decision. However, on Apr. 30, 1958, the divorce summons came before WRANGHAM, J., who decided that as the children had become wards of court he had no jurisdiction to entertain an application. That same day an appeal from that decision was brought before the Court of Appeal, who gave leave to advance the hearing having regard to the obvious urgency of the matter. The next day the father's advisers applied to the Chancery master

dealing with the Chancery summons which had been issued by the mother, and applied to de-ward the infants in pursuance of the powers conferred by the Law Reform (Miscellaneous Provisions) Act, 1949, s. 9 (3), in order that the Divorce Division might consider the father's application unfettered. That application was adjourned, and came before me on May 6, 1958. I have since heard the matter for nearly three days. I have read a large number of affidavits and heard a great deal of cross-examination, and the order which I have made is that the father's application is refused and the children remain wards of court. A B

I think it is desirable to state why I have taken this course, for at first sight there might appear to be some conflict of jurisdiction, or at any rate some competition of jurisdiction, in the question of the custody, care and control of infants between the two divisions of this court. In my opinion, however, there is no such conflict or competition. The decision by WRANGHAM, J., is under appeal, and it would be impertinent of me to express any views on it. In any event, I am not exercising any jurisdiction conferred on the judges of the Divorce Division with which alone his judgment was concerned. C

One thing is, I think, clear: an exercise by the judges of the Divorce Division of their statutory powers cannot in any way fetter the powers of the Chancery Division exercising the jurisdiction of the Crown as *parens patriae* over wards of court. That, however, does not conclude the matter, for the judges of both divisions are judges of the High Court, and by a natural comity of judges of that court, no judge desires to trespass or even to appear to trespass on a matter of which another judge is rightly and properly seized in the exercise of his jurisdiction. This seems to me an appropriate time to state, as I understand them, the principles on which the judges of the High Court habitually act in this delicate and often overlapping jurisdiction with regard to the custody, care and control of infants who are subject to an order of the Divorce Division and who are also wards of court. D E

First, where an infant has been made a ward of court before any order of a judge of the Divorce Division is made in relation to infants, it is, I think, universally accepted, probably as a matter of law, but certainly as a matter of comity between judges, that no order will be made by a judge of the Divorce Division, but the matter will be left with the judge dealing with the wardship proceedings, for the reason that, unlike judges of the Divorce Division, a judge of this division nearly always retains each infancy matter that comes before him under his own particular and personal control. F

Secondly, where a judge of the Divorce Division makes an order as to custody, care or control before an infant has become a ward of court and the infant is thereafter made a ward of court by the issue of a summons for that purpose in the Chancery Division, the judge of the Chancery Division before whom the matter is brought, exercising that comity which I have mentioned, will normally refuse to consider an application on its merits, but will leave it to the judge of the Divorce Division, and, to avoid any difficulty of jurisdiction in that division, will de-ward the infant under the powers conferred by the Act of 1949. That, however, does not apply where the order of the judge of the Divorce Division is made without any determination on the merits; e.g., where an order for custody follows almost as a matter of course in an undefended divorce petition, or where (as in this case) the order is made by consent. In such cases comity between the judges does not seem to demand such respect as will preclude investigation of the merits by a judge of the Chancery Division where there has been none by the judge of the Divorce Division. G H

Thirdly, even where there has been an earlier investigation into the merits by a judge of the Divorce Division, it may become necessary for a judge of the Chancery Division, in exercise of his undoubted discretion, to entertain applications relating to infants who have been the subject-matter of orders as to custody, care and control in the Divorce Division, at any rate where there has I

A been a change of circumstances since the order of the Divorce Division, or some wholly new question arises.

It is impossible to attempt any classification of such cases, but I may usefully give one or two examples. As WRANGHAM, J., fully recognised in his judgment last week, the jurisdiction of the Chancery Division over wards is, in certain circumstances, fuller and more complete, and it may be essential in the interests of the infants that, notwithstanding the order of the Divorce Division, even after a hearing on the merits, that wardship jurisdiction should be exercised. This very case provides a striking example. I have already stated that the mother was fully justified in thinking that her husband was intending secretly to remove the children from the jurisdiction. By making them wards in Chancery and informing the Home Office (as her advisers did), automatically no air or sea port will permit them to depart. At my request counsel have made inquiry as to the procedure available on the making of a decree and order for custody in the Divorce Division. I understand that no such automatic prohibition against departure is available, although possibly after application orders can be obtained, or protection can be obtained, in certain cases; but in the meantime valuable hours, or even days, may have been lost. That is one example where it seems to me that this division must step in. The wife in this case was abundantly justified in issuing her summons, and, being so justified, it must necessarily become the duty of the judge of the Chancery Division to inquire into the merits, even had there been some earlier investigation into questions of custody, care and control by a judge of the Divorce Division.

Another example is where questions of education arise. That is sometimes more conveniently dealt with in this division than in the Divorce Division, and where a judge of this division is once seized of the matter, it is sometimes better (although it is a matter of discretion in each case) for him to retain control over the matter, notwithstanding some earlier order of the Divorce Division.

A further example is where some direction is required regarding the property of an infant.

F This seems an appropriate occasion on which to make these remarks as to the exercise of this delicate jurisdiction for the guidance of the profession.

Solicitors: *Boxall & Boxall* (for the father); *Wegg-Prosser & Co.* (for the mother).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

G

Re Nos. 55 AND 57, HOLMES ROAD, KENTISH TOWN.

[CHANCERY DIVISION (Harman, J.), April 30, May 1, 1958.]

Landlord and Tenant—New tenancy—Business premises—Landlord a company

H —*Wrong company made respondent to tenant's originating summons—Summons amended by making landlord company respondent—Amendment not made within time prescribed for making application—Landlord and Tenant Act, 1954 (2 & 3 Eliz. 2 c. 56), s. 29 (3)—R.S.C., Ord. 53D, r. 6 (3), Ord. 70, r. 1.*

I

On Apr. 16, 1957, landlords, B. B. (Properties) Ltd., who were assignees of the freehold reversion on a lease of business premises originally granted by another company, B. B. Ltd., served a notice, under s. 25 of the Landlord and Tenant Act, 1954, on their tenants terminating the tenancy at Christmas, 1957. Though the two companies, B. B. (Properties) Ltd. and B. B. Ltd., were closely related and had the same directors, secretary and office, neither company was a subsidiary of the other. The tenants knew that B. B. (Properties) Ltd. were their landlords and duly gave notice to them that they would not be willing to give up possession. On July 30, 1957, the tenants issued an originating summons, applying under s. 24 (1) of the Act of 1954 for a new tenancy. B. B. Ltd. was made respondent to the summons,

which was served on the secretary of the two companies on Aug. 8, 1957. On Aug. 12, 1957, the companies' solicitors told the tenants' solicitors that the wrong company was respondent to the summons. On Aug. 16, 1957, the four months limited by s. 29 (3)* of the Act of 1954 for bringing an application under s. 24 (1) expired. On Oct. 17, 1957, leave was granted to amend the summons by altering the name of the respondent to B. B. (Properties) Ltd. That company having subsequently taken objection to the amendment having been allowed,

Held: leave to amend the summons should not have been granted for the following reasons—

(i) as the tenants knew of both the two companies and that their landlord was B. B. (Properties) Ltd., naming the wrong company as respondent was not a mere misnomer.

Hill & Son v. Tannerhill ([1944] K.B. 472) and *Alexander Mountain & Co. v. Rumere, Ltd.* ([1948] 2 All E.R. 482) distinguished.

(ii) B. B. (Properties) Ltd., had acquired a vested right when the time limit for bringing proceedings for a new tenancy expired, and the discretion conferred by R.S.C., Ord. 70, r. 1† and Ord. 53D, r. 6 (3)† should not be so exercised as to defeat the vested right by allowing a subsequent amendment, particularly having regard to the provision of R.S.C., Ord. 16, r. 11 by which, if a party were added to an action, the proceedings were deemed to have begun as against that party only when the amended process was served on him.

[As to the time for applying for a new tenancy under the Landlord and Tenant Act, 1954, Part 2, see 23 HALSBURY'S LAWS (3rd Edn.) 891, para. 1714.

For the Landlord and Tenant Act, 1954, s. 24 (1), s. 25, and s. 29, see 34 HALSBURY'S STATUTES (2nd Edn.) 409, 410, 413.

For R.S.C., Ord. 16, r. 11, Ord. 53D, and Ord. 70, r. 1, see the ANNUAL PRACTICE, 1958, 344, 1383, 1986.]

Cases referred to:

(1) *Hill & Son v. Tannerhill*, [1944] K.B. 472; 113 L.J.K.B. 456; 170 L.T. 404; 2nd Digest Supp.

(2) *Mabro v. Eagle, Star & British Dominions Insurance Co., Ltd.*, [1932] 1 K.B. 485; 101 L.J.K.B. 205; 146 L.T. 433; Digest Supp.

(3) *Alexander Mountain & Co. v. Rumere, Ltd.*, [1948] 2 All E.R. 482; [1948] 2 K.B. 436; 2nd Digest Supp.

Adjourned Summons.

The applicants, Beardmore Motors, Ltd., who were the tenants of business premises known as No. 55 and No. 57, Holmes Road, Kentish Town, London, applied to the court by originating summons for the grant of a new tenancy, under Part 2 of the Landlord and Tenant Act, 1954, for a period of fourteen years from Dec. 25, 1957.

The applicants' current tenancy of the property arose under a lease, dated Oct. 31, 1907, which expired by effluxion of time on Dec. 25, 1957. The original landlords were Birch Bros., Ltd. By a transfer dated June 2, 1947, the freehold reversion expectant on the termination of the lease was transferred from Birch Bros., Ltd. to a newly formed company, Birch Bros. (Properties) Ltd., and the transfer was registered at the Land Registry on Sept. 10, 1947. By a letter, dated Jan. 14, 1957, the applicants requested Birch Bros. (Properties) Ltd. to grant to them a new lease of the property, but the request was refused. On Apr. 16, 1957, Birch Bros. (Properties) Ltd. served a notice on the applicants, under s. 25 of the Landlord and Tenant Act, 1954, terminating their tenancy on Dec. 25, 1957, and stating the ground on which an application for a new tenancy

* The terms of this sub-section, so far as relevant, are printed at p. 314, letter I, to p. 315, letter A, post.

† The terms of these rules, so far as relevant, are printed at p. 317, letters E and H, post.

A would be opposed. On June 13, 1957, the applicants served a notice on Birch Bros. (Properties) Ltd. saying that they were not willing to give up possession of the property. On July 30, 1957, the applicants issued an originating summons applying for the grant of a new tenancy. Birch Bros., Ltd. were made the respondents to the summons. On Oct. 17, 1957, when the summons came before the master, counsel for Birch Bros., Ltd., pointed out that they were not the landlords, and the applicants obtained *ex parte* leave to amend by substituting Birch Bros. (Properties) Ltd. as the respondents, subject to the approval of the judge. On Nov. 14, 1957, when the amended summons came before the master, counsel for Birch Bros. (Properties) Ltd. took the objection that the amendment should not have been allowed, and on Mar. 19, 1958, the summons was adjourned into court.

C *Arthur Bagnall* for the applicants, the tenants.
P. G. Langdon-Davies for the respondents, the landlords.

HARMAN, J.: These proceedings under the Landlord and Tenant Act, 1954, raise a troublesome point which has been ably argued by counsel on both sides. The property in question is known as 55 and 57, Holmes Road, Kentish Town. It was held until Christmas Day, 1957, under a lease of rather over fifty years which expired or would have expired, at that date. The lessors were a company called Birch Bros., Ltd., and the lessees were W. Parkin & Sons, Ltd. In 1932 the term was assigned to the applicants (referred to hereinafter as "the tenants"). In 1947 the freehold reversion expectant on the term was assigned by Birch Bros., Ltd. to another company called Birch Bros. (Properties) Ltd. These two companies are not, as I am told, subsidiaries one of the other. They have, however, a common directorate, office and secretary, and, when their writing paper is looked at, it appears that the same die forms the basis of both, one in blue and one in green, both of them bearing the words "Birch Bros.", but one has the addition of the word "Ltd.", and the other has not; and written at the top of the paper of one is "Birch Bros., Ltd.", and of the other "Birch Bros. (Properties) Ltd." Therefore, they are very closely related concerns. Nevertheless, they are, in law, separate entities, and, as I am told, not intimately connected so far as shares are concerned.

Birch Bros. (Properties) Ltd. were registered as the freeholders in September, 1947. There was necessarily a number of communications between the tenants and their landlords, and it is fair to say that in the very large majority of them both the landlords and the tenants used the landlords' proper style, though one finds instances where letters are written to the tenants by "Birch Bros., Ltd.", meaning to be written by "Birch Bros. (Properties) Ltd."—in other words, the secretary has taken the writing paper out of the wrong drawer. On the whole, however, it is quite clear that the tenants knew perfectly well that their landlords were Birch Bros. (Properties) Ltd., although they forgot it occasionally.

H On Oct. 1, 1954, the Landlord and Tenant Act, 1954, came into operation. By Part 2 of the Act, which commences at s. 23, tenancies to which that Part of the Act applies (which include this lease, which is a tenancy for this purpose) are not to come to an end when they would normally expire by effluxion of time. Section 24 (1) provides:

I "A tenancy to which this Part of this Act applies shall not come to an end unless terminated in accordance with the provisions of this Part of this Act . . ."

Section 25 allows a landlord to terminate such a tenancy. He may not terminate it before the date at which it would expire, or would have expired but for the Act, and he must give a notice as provided by the section. One of the things which the landlord has to do, under s. 25 (5), is to ask the tenant, in the notice, whether the tenant is willing to give up at the expiration of the notice or no.

Such a notice was served in this case. On Apr. 16, 1957, the solicitors for

Birch Bros. (Properties) Ltd. served a notice in the proper form, giving notice to the tenants to terminate their tenancy at Christmas, 1957 (which was the earliest date possible), requiring them to say whether they were willing so to do, and adding the ground on which an application to the court for the grant of a new tenancy would be opposed. The tenants replied by a notice dated June 13, 1957, from their solicitors and addressed to Birch Bros. (Properties) Ltd., saying: "We . . . give you notice that [the tenants] will not be willing . . . to give up possession of the property . . ." So the field was now set, and the proper notices had been given. A B

Section 24 (1) of the Act authorises the tenant to apply to the court for a new tenancy if the landlord has given the notice to which I have just referred. The tenants were minded to apply to the court for a new tenancy, and on July 30, 1957, they issued an originating summons for that purpose. That is the proceeding now before me. The summons is dated July 30, 1957, and, in accordance with R.S.C., Ord. 53D, r. 5 (1), it is intitled: "In the matter of . . . 55 and 57 Holmes Road . . . and In the Matter of the Landlord and Tenant Act, 1954". It summoned Birch Bros., Ltd. to attend at the date specified in the margin, and so forth, for the grant of a new tenancy specified in the schedule, namely, a tenancy for a period of fourteen years from Christmas, 1957, at a rent of £1,000 a year. This document was served by a process server on the secretary of both the two companies on Aug. 8, 1957. It appears that the secretary looked at it, and said: "You have named the wrong respondents", to which the process server replied: "I am only a process server, and I propose to stick to that". The secretary communicated with the companies' solicitors, and, on Aug. 12, the solicitors telephoned to the tenants' solicitors and pointed out to them that they had named the wrong respondents. The tenants' solicitors, however, took no steps in the matter. C D E

Before serving the summons, the tenants' solicitors, as they were bound to do, obtained a return date, namely, Thursday, Oct. 17, 1957. On that day the then respondents to the summons, Birch Bros., Ltd., appeared by counsel and pointed out to the master that they were not the landlords, whereon the tenants asked for leave to amend, and obtained that leave, which was effected simply by putting in the word "Properties" in brackets between "Birch Bros." and "Ltd.", with one consequential amendment of a like kind in the body of the summons. A new return date was then obtained for Nov. 14. The amended summons was served on Oct. 28, 1957, and service was accepted on that day. Unfortunately for everybody, as I think, it was seen fit by the Rules Committee to provide* that this is the kind of application where no appearance need be entered. Why they should take such a step in matters which are necessarily highly controversial, and which I should have preferred to see started by writ, I am quite unable to understand. If appearance were necessary, either Birch Bros., Ltd. would have appeared and would then have been in a position to take the point that they were not the landlords straight away, or Birch Bros. (Properties) Ltd. would have appeared under protest and moved to set aside the proceedings. Either way, the issue would have been properly raised at an early stage. As it is, it did not come up until the further hearing before the master on Nov. 14, 1957, when Birch Bros. (Properties) Ltd. appeared by counsel, and they then took the point (that being the first opportunity which they had to do so) that the amendment ought not to have been allowed, and, I think, the further point (which may be the same thing in another way) that the time limit provided by the Act of 1954 had passed and the proceedings were incompetent for that reason. That question is the one which has been adjourned to me. F G H I

The section relevant for this purpose is s. 29 of the Act of 1954. Section 29 (3) reads:

"No application under s. 24 (1) of this Act shall be entertained unless it

* See R.S.C., Ord. 53D, r. 5 (1).

- A is made not less than two nor more than four months after the giving of the landlord's notice under s. 25 . . ."

The landlords' notice under s. 25 was given on Apr. 16, 1957. Therefore, the four months within which the application had to be made ended on Aug. 16. Consequently, the originating summons issued on July 30 was within time, but the amendment on Oct. 17 was beyond the time.

- B The first objection taken is that it is not a matter of discretion. It was submitted that the court had no power to entertain this application, because it was not "made" within four months of Apr. 16. The first point taken by the tenants in answer to that objection is that the application was "made" on July 30. They say that it is true that they misdescribed the respondents, but that is not a matter which can be fatal. A mere misdescription, they say, will never be effective to defeat the application: it is a mistake, and the necessary amendments can and ought to be allowed, and that will not cause the application to bear a later date than that of its original issue, because there is an inherent jurisdiction to put the name right in a case of this sort, there being no rule of policy against it.

- C The first case cited in support of that contention was *Hill & Son v. Tannerhill* (1) ([1944] K.B. 472). The headnote reads:

- "W. Hill, an individual trading alone and without partners as 'W. Hill & Son', issued a writ in the firm name contrary to R.S.C., Ord. 48A, r. 1.* The period of time prescribed by the Limitation Act, 1939, within which the action must be brought having expired, W. Hill applied for an order substituting as plaintiff in the action 'W. Hill trading as W. Hill & Son':—
E Held, that, as W. Hill was an actually existing person and the real plaintiff in the action, he was entitled to the order."

- SCOTT, L.J., in the leading judgment, acknowledged the principle that an amendment must not be made so as to divest a vested right of another party, the leading case for that proposition being *Mabro v. Eagle, Star & British Dominions Insurance Co., Ltd.* (2) ([1932] 1 K.B. 485), but he said that the principle did not apply to the kind of case which he had before him. He said that the plaintiff in that case always was W. Hill. He misdescribed himself, having regard to the rules, as "W. Hill & Son"; but to put that right was not to interpose a new plaintiff or to alter the effect of the Statute of Limitations, because the right person was always there.

- I understand and accept that principle, but is that, I ask myself, the case here? I ought, in this connexion, to refer to *Alexander Mountain & Co. v. Rumere, Ltd.* (3) ([1948] 2 All E.R. 482), where it was held that, in the case of the mere misnomer of a plaintiff on a writ, the defendant, by a summons supported by an affidavit, could compel the plaintiff to amend; if the defendant did not exercise this power, and the matter proceeded to trial, the misnomer could then be amended, and in no circumstances could it affect the substantive judgment which the court was called on to pronounce. The Court of Appeal overruled LORD GODDARD, C.J., in the matter ([1948] 2 All E.R. 144), and COHEN, L.J., decided the point largely on an article in the "Law Journal" of May 9, 1942, at p. 150, to which he lent his approval in his citation ([1948] 2 All E.R. at p. 484):

- "... it is submitted that there never was a time, not even in the days before the rigour of the procedure at common law had been modified by statute, when such a judgment† on the trial of an action could have been appropriate in a mere case of misnomer. It may be doubted whether it would have occurred to anyone in the above case† to suggest a judgment in this form

* By R.S.C., Ord. 48A, r. 1, an action can be brought in a firm's name only when there are two or more partners.

† The judgment referred to is that in *Glanville & Co., Ltd. v. Lyne*, [1942] W.N. 65; 2nd Digest Supp.

if the plaintiff had been an individual, one of whose names had been omitted, or wrongly abbreviated, instead of a corporation. There is, however, no magic in the name of a corporation. It is true that a corporation, whether a limited company or otherwise, can sue only in its corporate name, but, equally, an individual can sue only in his proper name.”

Counsel for the tenants, in a persuasive argument, submitted that this was merely a case of the landlord being sued in the wrong name; the tenants intended to sue the right respondents, but, by a slip of the pen, a word was left out and the wrong corporate name was given, but the identity of the person (albeit an artificial person) remained the same. Therefore, said counsel, the application was made within time, and the mere amendment of the name would not be against the policy of the law. The answer put forward to that argument—and I think the conclusive answer—is that there are two existing companies, one Birch Bros., Ltd., and the other Birch Bros. (Properties) Ltd. The tenants knew that there were two such companies. They knew also that Birch Bros. (Properties) Ltd. were their landlords, but they chose to sue Birch Bros., Ltd. Why they did that, I do not know, and I cannot speculate. I cannot say that they intended, when they used the one title, to use the other. It is not as if the other title were that of a non-existing person, or as if the tenants were under any misapprehension. For some reason which I cannot fathom, the tenants simply gave the name of an existing company whom they knew were not their landlords, as respondents to the summons. In those circumstances it is not open to me, in my view, to say that this was a mere misnomer. I can only assume that they intended to sue Birch Bros., Ltd., of whom they knew perfectly well (and who were the original freeholders of this property), when they issued the summons in the way that they did. Therefore, as it seems to me, cases about mere misnomer have nothing whatever to do with this point.

The second point taken by the tenants is that the application was made on the day when the summons was first issued, namely, July 30, 1957, notwithstanding that the wrong respondents were there named, and that to put the right respondents there is a mere exercise of the amending power which the Rules of the Supreme Court give and which is frequently resorted to. The rules in regard to proceedings under the Landlord and Tenant Act, 1954, are embodied in R.S.C., Ord. 53d. They are mandatory in form and are made by the Rules Committee under s. 99 of the Supreme Court of Judicature (Consolidation) Act, 1925, not under any rule-making power given by the Landlord and Tenant Act, 1954, which does not provide that proceedings shall be in a prescribed form. R.S.C., Ord. 53d, r. 3 (1), reads:

“An application for a new tenancy under s. 24 of the Act of 1954 shall be made by originating summons in the Chancery Division stating—(a) the premises to which the application relates and the business carried on there; (b) particulars of the applicant’s current tenancy . . . and (c) the applicant’s proposals [in regard to the new tenancy].”

Rule 3 (2) reads:

“The person who is the applicant’s landlord as defined in s. 44 of the Act of 1954 shall be made respondent to the summons.”

Rule 5 (1) provides that no appearance need be entered to the summons. I have already commented on that, as I think, undesirable provision. By r. 5 (2) the summons must be returnable at a date which will allow at least fourteen days to elapse between the date of service and the return date. What the effect of that may be remains to be seen. As far as I can see, the applicant, having issued his summons, may put it in his pocket for as long as he chooses.

- A The objection taken by Birch Bros. (Properties) Ltd. to this summons is that it did not, as issued, name as the respondent to the summons the person who is the tenants' landlord as defined in s. 44 of the Act of 1954. There is no doubt that the tenants' landlords are Birch Bros. (Properties) Ltd. They were not named. Rule 3 (2), therefore, was not complied with. It was submitted, therefore, that this was not an application under s. 24 (1) of the Act because it was not made in accordance with the rules. Prima facie, I think that that must be so. The summons did not comply with the rules, and, therefore, was not an application made under s. 24 (1). The tenants, on the other hand, say that r. 3 (2) is only a rule like any other made by the Rules Committee under the Supreme Court of Judicature (Consolidation) Act, 1925, and that applications under all such rules may be amended as justice requires. Section 99 (1) of the Supreme Court of Judicature (Consolidation) Act, 1925, reads:
- B
- C

" Rules of court may be made under this Act for the following purposes:—
(a) For regulating and prescribing the procedure . . . and the practice to be followed in the . . . High Court . . . in all causes and matters whatsoever in or with respect to which [the court has] jurisdiction . . . and any matters incidental to or relating to such procedure or practice, including . . . the manner in which, and the time within which, any applications which under this or any other Act are to be made . . . to the High Court shall be made . . . "

D

Thus the mandatory part of the rule [R.S.C., Ord. 53D, r. 3 (2)] which says that the landlord must be made a respondent is a provision which the Rules Committee were expressly entitled to make under s. 99 (1) (a) of the Act of 1925. But it is a rule which, of course, is subject to any other relevant rule, and I was referred to R.S.C., Ord. 70, r. 1, which reads:

E

" Non-compliance with any of these rules . . . shall not render any proceedings void unless the court or a judge shall so direct, but such proceedings may be set aside either wholly or in part as irregular, or amended, or otherwise dealt with in such manner and upon such terms as the court or judge shall think fit."

F

I do not see any reason why I should direct that these proceedings are void. The question is whether I ought to allow them to be amended under the discretion given to me by R.S.C., Ord. 70, r. 1, and here comes in the question of policy.

- G It is said, on behalf of the tenants, that the analogy to the passing of time under the Statute of Limitations has no bearing on the present case, because R.S.C., Ord. 53D, is a code, and the court has power to amend, as the court chooses, and to add parties, as the court, in its discretion, sees fit, and no analogy to other statutes ought to be allowed to affect the matter. R.S.C., Ord. 53D, r. 5 and r. 6 between them, it is said, are a code. Rule 6 (3) reads:

- H " The preceding provisions of this rule are without prejudice to the power of the court or judge . . . to order notice of the proceedings to be given to any person or any person to be made a party to the proceedings . . . "

Therefore, the rules themselves contemplate that a party may be added to the proceedings if the court thinks that they ought properly to be so added.

- I The question for me, therefore, really is whether I ought to allow an amendment of this sort, or whether I ought not to do so, by analogy to the refusal of the court to make amendments which divest a vested right. There is no doubt in the present case that, when Aug. 16, 1957, came, Birch Bros. (Properties) Ltd. could say to themselves: " We have got through the four months since we served our notice, and, although the tenants served a counter notice, they have not taken any proceedings against us. We are therefore free ". That seems to me to be a vested right. They were entitled, as it seems to me, to congratulate themselves and say that they were free of that worry, anyhow. Ought I to take that vested right away from them by a subsequent amendment ? R.S.C., Ord. 16, r. 11

(which is, at least, analogous, even if it is not the pertinent rule in the case), A
is the rule dealing with misjoinder and nonjoinder, and it reads:

“No cause or matter shall be defeated by reason of the misjoinder or non-
joinder of parties . . . The court . . . may, at any stage of the proceedings
. . . order that . . . any parties . . . be added.”

At the end of the rule is this:

“Every party whose name is so added as defendant shall be served with
a writ of summons or notice in manner hereinafter mentioned, or in such
manner as may be prescribed by any special order, and the proceedings as
against such party shall be deemed to have begun only on the service of
such writ or notice.”

If the present proceedings had been begun by writ and an amendment had been C
allowed, adding Birch Bros. (Properties) Ltd., and they had been served (as
they must have been) with the writ, the writ would have counted against them
only from the date of its service, and would, therefore, be out of time. It is
suggested that that analogy ought to apply here, and that I ought not to allow
the amendment by adding Birch Bros. (Properties) Ltd. at all, because this is
not a matter of mere procedure but affects fundamental vested rights. It is D
further submitted that, if I do allow them to be added, it would be quite futile
because they could then plead they had been added as from the day when the
amendment was made, which was too late.

I do not see any answer to the last argument. It seems to me that, once I
conclude (as I have done) that this was not a case of mere misnomer or mis-
description, I ought not to depart from the well-settled rule that, where a man
has a vested right in favour of which time has run—for instance, under the Statute
of Limitations, or in respect of the right to sue under the Fatal Accidents Act,
1846—then this right ought not to be taken from him either by adding parties
or adding causes of action which would bring in a fresh liability. It seems to
me that, even if R.S.C., Ord. 53D, is a code, I should go on the analogy of R.S.C.,
Ord. 16, r. 11, which specifically provides that, when an amendment is made by
adding a defendant, proceedings shall not be, so to speak, antedated as against
him. Therefore, I conclude that the application to amend ought not to have been
successful, and that the objection taken succeeds. I say with the greatest regret,
that it seems to me that the tenants are the authors of their own misfortune,
having been given every chance to remedy what they had done, and having
refused to take the chance. I do not think that any weight ought to be put on the
fact that the two companies, Birch Bros., Ltd. and Birch Bros. (Properties) Ltd.,
each knew, no doubt, what the other knew by virtue of their common board and
common secretary.

Amendment disallowed.

Solicitors: *Ballantynes* (for the applicants); *Gouldens* (for the respondents).

[Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.]

A

Re HAMILTON-SNOWBALL'S CONVEYANCE.

[CHANCERY DIVISION (Upjohn, J.), April 18, 1958.]

B

Sale of Land—Requisitioned land—Compensation in respect of the taking possession of land—Land derequisitioned after date of contract but before conveyance—Whether compensation comprehended in sale—Compensation (Defence) Act, 1939 (2 & 3 Geo. 6 c. 75), s. 2 (1) (b), (3).

Requisition—Compensation—Sale of requisitioned land—Derequisitioned before completion—Entitlement to compensation—Compensation (Defence) Act, 1939 (2 & 3 Geo. 6 c. 75), s. 2 (1) (b), (3).

C

H., who was in occupation of a requisitioned dwelling-house, contracted to buy it subject to the requisition. On the same day he agreed to sell it to the purchaser, no reference to the requisition being made in this contract. After the house was conveyed to H. and before it was conveyed by him to the purchaser it was derequisitioned, and £248 compensation in respect of the requisition became payable to H. under the Compensation (Defence) Act, 1939, s. 2 (1) (b) and s. 2 (3)*. The purchaser claimed that H. was a trustee of the compensation for her.

D

Held: the purchaser was not beneficially entitled to the compensation, because H. did not contract to sell it to her, and, though after contracting to sell the dwelling-house H. became a trustee of it for the purchaser, yet he was a trustee for her only of that which he had contracted to sell to her, viz., the dwelling-house.

E

Dictum of SARGANT, J., in *Re Lyne-Stephens & Scott-Miller's Contract* ([1920] 1 Ch. at p. 477) applied.

[For the Compensation (Defence) Act, 1939, s. 2, see 3 HALSBURY'S STATUTES (2nd Edn.) 989-991.]

Cases referred to:

F

(1) *Shaw v. Foster*, (1872), L.R. 5 H.L. 321; 42 L.J.Ch. 49; 27 L.T. 281; 40 Digest 180, 1497.

(2) *Aberdeen Town Council v. Aberdeen University*, (1877), 2 App. Cas. 544; 43 Digest 638, 760.

(3) *Re Armitage's Contract, Armitage v. Inkpen*, [1949] Ch. 666; [1949] L.J.R. 1511; 2nd Digest Supp.

G

(4) *Lysaght v. Edwards*, (1876), 2 Ch.D. 499; 45 L.J.Ch. 554; 34 L.T. 787; 40 Digest 182, 1518.

(5) *Rayner v. Preston*, (1881), 18 Ch.D. 1; 50 L.J.Ch. 472; 44 L.T. 787; 45 J.P. 829; 40 Digest 178, 1481.

(6) *Re Lyne-Stephens & Scott-Miller's Contract*, [1920] 1 Ch. 472; 123 L.T. 8; sub nom. *Re Stephens' & Scott-Miller's Contract*, 89 L.J.Ch. 125, 287; 40 Digest 186, 1547.

H

Adjourned Summons.

By her originating summons taken out under the Law of Property Act, 1925, s. 49, the applicant, the purchaser of No. 77, Glendale Avenue, Edgware, claimed declarations (i) that she was entitled to be paid by the Hendon Borough Council the sum which the said council was willing to pay for compensation under the Compensation (Defence) Act, 1939, s. 2 (1) (b), in respect of the requisitioning of the said property under war-time emergency powers, viz., £236 with surveyors' fees amounting to £12 7s. 9d. making in all the sum of £248 7s. 9d.; and (ii) that the vendor was a trustee for the purchaser of all moneys which he might be entitled to claim from the said council by way of compensation under s. 2 (1) (b) of the said Act in respect of the requisitioning of the said premises. The applicant also claimed an order that the vendor authorise the said council to pay to

I

* These provisions are printed at p. 321, letters C and D, post.

the purchaser all the moneys which might be due to the owner of the said premises as compensation as aforesaid. A

L. A. Blundell for the applicant, the purchaser.

W. G. H. Cook for the respondent, the vendor.

UPJOHN, J.: This is a vendor and purchaser summons under the Law of Property Act, 1925, s. 49, for the determination of the interesting question which has arisen between the applicant, the purchaser of certain premises, and the respondent, the vendor of those premises, as to which of them is entitled to certain compensation moneys payable after the date of the contract, but before completion, under the provisions of the Compensation (Defence) Act, 1939. B

Premises known as No. 77, Glendale Avenue, Edgware, had been requisitioned, and for many years had been in the occupation of the respondent, Mr. George Hamilton-Snowball. On Jan. 26, 1956, he entered into a contract with the then owners to purchase the premises at a price of £2,100, completion to be on or before Feb. 26, 1956. The property was sold expressly subject to the requisitioning of the property by the Hendon Borough Council and the occupation of the property by the respondent. On the same day (but presumably subsequently) the respondent sold the premises to the applicant in this summons. C D

The agreement for sale to the applicant provides:

"The vendor will sell and the purchaser will purchase the freehold property described in the schedule hereto at the price of £3,550."

Then the agreement provides for the payment of a deposit. Clause 2 of the agreement provides: E

"The property is sold subject to the conditions following and to the conditions known as the National Conditions of Sale 16th Edn. (except conditions 13 and 16 (3)) so far as such national conditions are not inconsistent with the conditions following and are applicable to a sale by private treaty." F

The schedule merely sets out a full description of the property No. 77, Glendale Avenue, Edgware. It is to be observed that there were no conditions in this contract that the property was sold subject to the occupation of the respondent or subject to requisition. That was so for the reason, which is common ground between the parties, that where premises, occupied under requisition, are purchased by the occupier, derequisitioning will shortly afterwards follow; and indeed the premises were derequisitioned on Feb. 6, 1956. Before that, however, the premises had been conveyed on Feb. 3, 1956, by the original owners to the respondent. I need not refer to the terms of that conveyance for nothing turns on them. At the date of derequisitioning, therefore, it followed that the respondent was the owner at law of the premises, but he had already contracted to sell them to the applicant and on Feb. 23, 1956, he conveyed the legal title to the applicant who thereupon entered into possession and occupation of the premises. G H

Pursuant to the provisions of the Compensation (Defence) Act, 1939, to which I shall refer in a moment, a claim was made by the applicant for compensation and the Hendon Borough Council, which is the local authority responsible, is willing to pay £236 plus £12 7s. 9d. fees as compensation under s. 2 (1) (b) of that Act. It is in dispute whether at the date of the transaction which I have mentioned at the beginning of 1956 the premises were dilapidated or not, but, in my opinion, that is really irrelevant. A sum of compensation had been agreed to be due and the sole question is who is entitled to that sum. I understand that the local authority has given an undertaking to abide by my decision, and for that reason, quite properly, it was not made a party. I

I now turn to the relevant provisions of the Compensation (Defence) Act, 1939. Section 1 (1) provides:

- A "Where, in the exercise of emergency powers during the period beginning with Aug. 24, 1939, and ending with such day as His Majesty may by Order in Council declare to be the day on which the emergency came to an end,—(a) possession of any land has been taken on behalf of His Majesty . . . then, subject to the following provisions of this Act, compensation assessed in accordance with those provisions shall be paid, out of moneys provided
- B by Parliament, in respect of the taking possession of the land, the requisition or acquisition of the property, or the doing of the work, as the case may be."

Section 2 (1) provides:

- C "The compensation payable under this Act in respect of the taking possession of any land shall be the aggregate of the following sums, that is to say . . . (b) a sum equal to the cost of making good any damage to the land which may have occurred during the period for which possession thereof is so retained (except in so far as the damage has been made good during that period by a person acting on behalf of His Majesty), no account being taken of fair wear and tear or of damage caused by war operations."

- It is under para. (b) that the compensation of £248 has been agreed to be payable.
- D Section 2 (3) deals with the compensation payable under para. (b) of s. 2 (1) and is in these terms:

- E "Any compensation under para. (b) of sub-s. (1) of this section shall accrue due at the end of the period for which possession of the land is retained in the exercise of emergency powers, and shall be paid to the person who is then the owner of the land."

Pausing there, it is therefore clear that the compensation money is payable to the person who on Feb. 6, 1956, was properly described as the owner of the land. "Owner" is defined in s. 17 (1):

- F "'owner' means—(a) in relation to land, the person who is receiving the rackrent of the land, whether on his own account or as agent or trustee for any other person, or who would so receive the rackrent of the land if it were let at a rackrent."

- Counsel for the applicant concedes that, having regard to condition No. 5 of the National Conditions of Sale, the respondent is, within the definition I have read, the owner who is entitled to give a good discharge to the local authority,
- G for he was the person who on Feb. 6, 1956, would be entitled to receive the rackrent of the land if it were let at a rackrent because that was before the date of completion. Counsel for the applicant submits that, although the respondent was entitled to give a good receipt so far as the local authority is concerned, he in law holds that compensation money as trustee for the applicant. He submits that, having regard to the general law applicable as between vendor
- H and purchaser, the respondent is a trustee of the property contracted to be sold and trustee of all the accretions thereto that may happen to arise between the date of the contract and the date of completion; e.g., timber that may fall, minerals that may be dug otherwise than under some pre-existing contract, and there may be various other accretions. He submits that the compensation is an accretion of that nature. He points out, quite rightly, that this is not
- I a sum which accrued due to the respondent before the date of the contract. It accrued due after the date of the contract when the derequisitioning was completed. He submits that it comes to the respondent solely as owner and not under any collateral contract, and must, therefore, be accounted for by him as such. Counsel agrees that the rights arising under some collateral agreement such as a policy of insurance do not inure for the benefit of the purchaser, but he submits what does inure for the benefit of the purchaser is all rights which accrue to him solely as owner of the property. He referred me for the general proposition to *Shaw v. Foster* (1) ((1872), L.R. 5 H.L. 321), for the

statement by LORD CAIRNS (*ibid.*, at p. 338)*. He also referred me to *Aberdeen Town Council v. Aberdeen University* (2) ((1877), 2 App. Cas. 544), where the Aberdeen Town Council under a transaction which was in Scottish form acquired certain fishing rights for themselves although they held the property as trustee for the Aberdeen University. It was held that they were accountable for those fishing rights to the Aberdeen University and could not use them themselves. That was a case of an express trustee and a cestui que trust, and it is only an illustration of a very much wider proposition that in such a case a trustee may not make any profit out of his trust. It does not seem to me to be helpful on a question as between vendor and purchaser.

Counsel for the applicant also referred me to *Re Armitage's Contract, Armitage v. Inkpen* (3) ([1949] Ch. 666). In that case a somewhat similar problem arose, but VAISEY, J., determined the matter solely on the question of the true construction of certain express words appearing in the contract of sale, and it is no decision on the matter which I have to consider where there are no such express words. Counsel for the applicant, however, rightly pointed out that, if the respondent is right, that would have made it quite unnecessary to consider in *Re Armitage* (3) the construction of the agreement and he naturally relies on the fact that it seems to have been assumed as far as one can make out that if the compensation had not belonged to the vendor personally under the express words of the contract it would have belonged to the purchaser. The arguments and judgment are, however, entirely silent on the point.

On the other side counsel for the respondent says that the fiduciary relation between vendor and purchaser is a very special one, and the vendor is only trustee of the property contracted to be sold, and, he submits, of any physical accretions thereto. He referred me to the observations of JESSEL, M.R., in *Lysaght v. Edwards* (4) ((1876), 2 Ch.D. 499), where he says (*ibid.*, at p. 506):

"It appears to me that the effect of a contract for sale has been settled for more than two centuries; certainly it was completely settled before the time of LORD HARDWICKE, who speaks of the settled doctrine of the court as to it. What is that doctrine? It is that the moment you have a valid contract for sale the vendor becomes in equity a trustee for the purchaser of the estate sold, and the beneficial ownership passes to the purchaser, the vendor having a right to the purchase-money, a charge or lien on the estate for the security of that purchase-money, and a right to retain possession of the estate until the purchase-money is paid, in the absence of express contract as to the time of delivering possession."

Counsel for the respondent referred me also to some observations in the later case of *Rayner v. Preston* (5) ((1881), 18 Ch.D. 1), a decision of the Court of Appeal, which dealt with the question of insurance money arising between the date of the contract and the date of completion. He referred me in particular to the words of COTTON, L.J. (*ibid.*, at p. 6):

"It was said that the vendor is, between the time of the contract being made and being completed by conveyance, a trustee of the property for the purchaser, and that as, but for the fact of the legal ownership of the building insured being vested in him, he could not have recovered on the policy, he must be considered a trustee of the money recovered. In my opinion, this

* The relevant passage is as follows:

"The vendor was a trustee of the property for the purchaser; the purchaser was the real beneficial owner in the eye of a court of equity of the property, subject only to this observation, that the vendor, whom I have called the trustee, was not a mere dormant trustee, he was a trustee having a personal and substantial interest in the property, a right to protect that interest, and an active right to assert that interest if anything should be done in derogation of it. The relationship, therefore, of trustee and cestui que trust subsisted, but subsisted subject to the paramount right of the vendor and trustee to protect his own interest as vendor of the property."

A cannot be maintained. An unpaid vendor is a trustee in a qualified sense only, and is so only because he has made a contract which a court of equity will give effect to by transferring the property sold to the purchaser, and so far as he is a trustee he is so only in respect of the property contracted to be sold. Of this the policy is not a part."

B Finally he referred me to *Re Lyne-Stephens & Scott-Miller's Contract* (6) ([1920] 1 Ch. 472). In that case the property had been contracted to be sold with vacant possession. There was in existence a lease which came to an end between the date of the contract and the date fixed for completion. The lease having expired the dilapidations under the provisions thereof were agreed at £2,060 which was paid by the purchaser. SARGANT, J., whose decision was affirmed in the Court of Appeal, held that the dilapidations were payable to the vendor.

C He dealt with the position of vendor and purchaser in a passage which was expressly approved by LORD STERNDALÉ, M.R., in the Court of Appeal in that case. SARGANT, J., said (*ibid.*, at p. 477):

D "The purchaser says that a vendor, speaking generally, is a trustee for him of the property sold, subject to the completion of the contract, and that when the completion takes place the trust becomes an absolute one. A number of decisions were cited for that proposition, one instance being the right of the purchaser to any windfall of timber. The vendor does not dispute that general proposition, but says: 'What was it that was sold? It was not the house subject to and with the benefit of the lease which was existing at the date of the contract, but it was the house with possession, altogether

E apart from and independent of the lease, the obligations and rights under which were simply and solely a matter between the vendor and the lessee'. In my judgment, that contention of the vendor is correct."

That seems to me to be the principle which must govern this case and I must look and see what was the property sold. It is quite clear that it was only the property No. 77, Glendale Avenue, Edgware, with a right, though not

F expressed in the contract, to vacant possession on completion. There is nothing in that contract, therefore, which expressly includes the right to the compensation money.

The compensation money, as is now conceded, was properly payable to the respondent, because at the date when it became payable on Feb. 6, 1956, he was the person who satisfied the definition of "owner" in the Act in that he was

G entitled to receive the rackrent if there was any. It seems to me that the respondent was entitled to receive this sum under the Compensation (Defence) Act, 1939, because the Act says that he is the person to receive it, and I cannot see that he has sold or assigned that right away under any contract of sale. The contract of sale did not, in my judgment, include or comprehend this compensation money. Had that been intended then, in my view, it should have been

H expressly put in as part of the subject-matter of the sale. I cannot see how it is possible to say, in the circumstances of this case, that the respondent, who is entitled to receive it under the terms of the Act, becomes in some way a constructive trustee of that sum which he has not contracted to sell to the purchaser. Accordingly, I must dismiss this summons with costs.

Application dismissed.

Solicitors: *Frank J. French & Co.* (for the applicant); *Worrell, Fordyce & Lys* (for the respondent).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

GOODYEAR TYRE & RUBBER CO. (GREAT BRITAIN), LTD.
v. LANCASHIRE BATTERIES, LTD.

[CHANCERY DIVISION (Upjohn, J.), May 2, 1958.]

Restrictive Trade Practices—Price maintenance—Sale by retailer below fixed price—Notice of the condition relating to price—What constitutes notice—Restrictive Trade Practices Act, 1956 (4 & 5 Eliz. 2 c. 68), s. 25 (1).

The plaintiffs imposed, as a condition of sale, a price restriction on the sale of tyres manufactured by them. The British Motor Trade Association sent a circular to the defendants (among others) who were retailers of motor accessories including tyres. The circular stated the effect of s. 25 of the Restrictive Trade Practices Act, 1956, whereby a supplier of goods sold by him subject to price restriction might enforce the restriction against a person not a party to the sale who acquired the goods "with notice of" the price restriction. The circular further stated that the association had been authorised by various bodies (including the plaintiffs) to give notice on their behalf that they each individually supplied "for resale each of their new products . . . specified in the schedule subject to conditions as to price, including a condition that they shall not be resold or offered for resale at a price other than the appropriate price prescribed by the manufacturers" concerned. The circular pointed out that s. 25 of the Act of 1956 provided that action might be taken against those who infringed the price stipulation and drew attention to the fact that details of "the conditions as to price prescribed for any of the specified products may be obtained on application to the manufacturer" concerned. The defendants sold tyres manufactured by the plaintiffs at less than the prescribed price, and the plaintiffs applied for an interlocutory injunction under s. 25 of the Act of 1956 to restrain them from selling goods manufactured by the plaintiffs at prices lower than those prescribed.

Held: the notice given by the circular did not satisfy s. 25 (1) (which must be strictly construed) because it did not give express notice of the actual terms and conditions sought to be enforced, and the application must be dismissed.

Dictum of HARMAN, J., in *County Laboratories, Ltd. v. J. Mindel, Ltd.* ([1957] 1 All E.R. at p. 808) applied.

Per CURIAM: it is immaterial whether the notice [for the purposes of s. 25 of the Restrictive Trade Practices Act, 1956] was received by the person ultimately acquiring the goods before or after the goods started on their way through the chain of wholesalers and distributors to the defendants (see p. 327, letter H, post).

[For the Restrictive Trade Practices Act, 1956, s. 25, see 36 HALSBURY'S STATUTES (2nd Edn.) 958.]

Cases referred to:

- (1) *County Laboratories, Ltd. v. J. Mindel, Ltd.*, [1957] 1 All E.R. 806; [1957] Ch. 295.
- (2) *Manchester Trust v. Furness*, [1895] 2 Q.B. 539; 73 L.T. 110; sub nom. *Manchester Trust, Ltd. v. Turner, Withy & Co., Ltd.*, 64 L.J.Q.B. 766; 20 Digest 319, 569.
- (3) *Columbia Graphophone Co., Ltd. v. Murray*, (1922), 39 R.P.C. 239; 36 Digest (Repl.) 924, 2779.

Motion.

The plaintiffs claimed an interlocutory injunction under the Restrictive Trade Practices Act, 1956, s. 25 (4), restraining the defendants from reselling or offering

A for resale any tyres, tubes or other goods manufactured and sold by the plaintiffs at prices other than the prices prescribed by the plaintiffs for the resale of such goods.

G. T. Aldous, Q.C., and S. J. Waldman for the plaintiffs.

D. H. M. Davies for the defendants.

B UPJOHN, J.: This is a motion pursuant to the provisions of the Restrictive Trade Practices Act, 1956, s. 25, by the plaintiffs against the Lancashire Batteries, Ltd., who trade at No. 370, Blackburn Road, Accrington, under the name of Tower Batteries, to restrain the defendants from selling certain goods at prices other than those prescribed by the plaintiffs.

C The defendants deal in motor accessories. In February, 1958, they had a campaign to sell those accessories at a discount of 2s. in the pound off the ordinary list price. That appears from the "Evening Telegraph" of Wednesday, Feb. 12, 1958, where there is this advertisement:

"Last few days! Motorists! Sale now on. Normal prices slashed!

A further 2s. in the £ discount on all goods."

D Then is set out a long list of articles such as "batteries, car radios" and tools, and ending up with "roof racks, tyres, oils".

"Obtain all your accessories at sale prices. Watch our windows for bargains! Tower Battery Depot."

E Then it gives the address. That apparently came to the attention of the plaintiffs, and no doubt they communicated with the British Motor Trade Association, who sent an investigator, quite frankly, to make what is usually referred to as "a trap order".

F The investigator, Mr. Ireland, a retired inspector of the Manchester City Police, entered the defendants' shop and asked to purchase one or two types of goods. Then he asked about tyres and he ordered two Goodyear all weather tyres, and a deposit of £1 was given. Later he visited the premises to see if the tyres had been delivered, and they had not. He called again on Friday, Feb. 21, 1958, and was told there had been a muddle and they had not got the all weather tyres but two Goodyear suburbanite ultra grip tyres had been supplied, and the list price was £6 18s. each. So far there is no dispute between Mr. Ireland and the assistant, Mr. Nicholson, who served him in the shop, as to what took place. There is, however, a dispute, with which I cannot deal on motion, at this point.

G Mr. Ireland says that he was offered ten per cent. discount, there being a notice to that effect in the window. Mr. Nicholson says that Mr. Ireland drew his attention to the notice and demanded a ten per cent. reduction. However, it is common ground that a ten per cent. reduction was granted, and, accordingly, a deposit of £1 having already been paid the amount remaining payable was £11 8s. 5d. which was duly paid. Further it is common ground that Mr. Ireland at no time disclosed his identity, and that no letter was addressed to the defendants before action.

H The first that the defendants knew about it was when they were served with a writ which was issued on Mar. 10, 1958.

I The claim in the writ was for an injunction to restrain the defendants "whether acting by themselves or by their servants or agents from reselling or offering for resale any tyres tubes or other goods manufactured and sold by the plaintiffs at prices other than the respective prices prescribed by the plaintiffs for the resale of such goods". I need not read the rest of it. The claim depends on the Restrictive Trade Practices Act, 1956, s. 25, which provides:

"(1) Where goods are sold by a supplier subject to a condition as to the price at which those goods may be resold, either generally or by or to a specified class or person, that condition may, subject to the provisions of this section, be enforced by the supplier against any person not party to the sale who subsequently acquires the goods with notice of the condition as if he had been party thereto. (2) A condition shall not be enforceable

by virtue of this section—(a) in respect of the resale of any goods by a person who acquires those goods otherwise than for the purpose of resale in the course of business, or by any person who acquires them, whether immediately or not, from such a person . . . ”

The plaintiffs, in common with a number of other manufacturers of motor car tyres, had imposed, as part of the conditions of sale, a price restriction on the sale of all their tyres. The conditions of sale imposed by the plaintiffs are to be found in their trade price list which is before me. The conditions are headed: “Conditions of Sale”, and cl. 5, which is headed “Price maintenance” provides:

“(a) No person shall sell or supply any of the company’s products to any trader at prices and/or terms directly or indirectly higher or lower than the prices specified in the company’s current trade price lists and/or the terms for the time being authorised by the company. (b) No person shall sell or supply any of the company’s products to any commercial vehicle user (other than a commercial vehicle user whose name and discount category appear in the register of users approved by the company) or to any other person whatsoever, except a trader, at prices and/or terms directly or indirectly higher or lower than the prices specified in the company’s current retail price lists and/or the terms for the time being authorised by the company. No settlement discounts may be allowed.”

There are several restrictive provisions contained in sub-paras. (c), (d) and (e) which I need not read. Paragraph 6 (a) is in these terms:

“No person shall advertise or publicly offer for sale any of the company’s products to any person whatsoever (including traders or commercial vehicle users) at prices directly or indirectly higher or lower than the company’s current retail prices.”

There follow other provisions restrictive of advertisements. As appears from the price list, the current price for suburbanite tyres was £6 18s. which was the charge, less the discount of 2s. in the pound, made by the defendant to Mr. Ireland.

The British Motor Trade Association sent circulars to a large number of traders, and it is not disputed that those circulars and notices were sent both to the defendants at their headquarters in Darwen, where they were received on May 31 and on Nov. 19, 1957, and to the Tower Battery Depot at Accrington, where they were received on June 24 and on Nov. 25, 1957. It is sufficient, therefore, to say that for the purposes of this motion the defendants received this document on May 31, 1957. The document is headed “Restrictive Trade Practices Act, 1956”, and says in para. 1:

“List and addresses of manufacturers and concessionaires who prescribe conditions as to price for their respective specified products. Important notice under the Restrictive Trade Practices Act, 1956. To: All traders in motor goods take notice that . . . ”,

and then it sets out the general effect of s. 25 of the Act of 1956. Paragraph 2 is in these terms:

“The undermentioned manufacturers and concessionaries have authorised the British Motor Trade Association to give notice on their behalf that they each individually supply for resale each of their new products of the kind or kinds specified in the schedule subject to conditions as to price, including a condition that they shall not be resold or offered for resale at a price other than the appropriate price prescribed by the manufacturer or concessionaire concerned, plus the actual amount of purchase tax (if any) for which such products are liable and such delivery charges as the manufacturer or concessionaire may prescribe.”

A Paragraph 3 points out that s. 25 provides that action may be taken against those who infringe the price stipulations. Paragraph 4 is:

“Details of the conditions as to price prescribed for any of the specified products may be obtained on application to the manufacturer or concessionaire concerned, quoting details of the goods in question.”

B Then the schedule contains a very long list not only of tyre manufacturers, including the plaintiffs, but of large numbers of manufacturers of motor cars and motor accessories.

C The question that I have to determine is this. Are the conditions of s. 25 satisfied in this case? The first condition is this. Goods have to be sold by the supplier subject to the condition “as to the price at which those goods may be resold”. In my judgment, at all events, for the purposes of this motion, that condition is satisfied because, although I have no particulars as to whom these particular tyres were sold by the plaintiffs in the first place, the plaintiffs’ duly authorised representative has sworn that all tyres are sold subject to the conditions regulating the price at which they are to be sold.

D It was submitted to me, however, that there was no evidence on this matter, and that the tyres might have been intermediately acquired by some person otherwise than for the purpose of resale in the course of business. If that were so, then under s. 25 (2) (a) no injunction could be granted. It is true that there is no evidence before me as to the exact chain of sales and purchases between the plaintiffs and the ultimate receipt in the hands of the defendants. I am told, E however, that the tyres were manufactured on Jan. 19, 1958, and it seems to me that the inference which I must draw is this. These defendants, trading not very often in Goodyear tyres but able to obtain them on the request of a customer, purchased these tyres through normal trade channels, and I do not think it would be right for me to speculate that these tyres might at some stage in their passage F from trader to trader, between the plaintiffs and the defendants, have passed through the hands of somebody of whom it could be predicated that he had bought them otherwise than for the purposes of resale in the ordinary course of business, there being no evidence whatever on that matter. So far, therefore, the condition of the section is satisfied.

G Then it is said in reliance on a recent judgment of HARMAN, J., in *County Laboratories, Ltd. v. J. Mindel, Ltd.* (1) ([1957] 1 All E.R. 806), that the tyres might have been manufactured and sold to some trader, probably a wholesaler, before May 31, when the defendants first received this circular to which I have already referred. In my judgment, that is not the relevant date to consider. All that has to be shown is a sale by the supplier subject to a condition as to price and the subsequent acquisition of those goods by a person with notice of those conditions. It does not seem to me to matter at all whether the notice H was received by the person ultimately acquiring the goods before or after the goods started on their way through the chain of wholesalers and distributors to the defendants’ place of business. All that is essential, in my judgment, is that the person who is sought to be made subject to an injunction must have received the notice before he acquires the goods. Reliance was placed on the sentence in HARMAN, J.’s judgment where he said (*ibid.*, at p. 808):

I “They had not, nevertheless, notice that the original sale was necessarily subsequent to the notice . . .”

As in that case the notice and the coming into force of the Act were both in November, 1956, there was no real gap between the two, and I think that it is plain, looking at the judgment of HARMAN, J., as a whole, that he was really intending to refer to the coming into force of the Act. Then it was sought to say that these goods might have been purchased, or might have been manufactured, before the coming into force of the Act, but on the facts of this case, I will

not presume, certainly in the absence of any evidence on the part of the defendants, that any reasonable trader would have assumed that these tyres ordered in February, 1958, had been manufactured and originally sold before Nov. 2, 1956 (when the Act came into force), or even before May 31, 1957, although I have already given my reasons for thinking that the latter date is not relevant. A

The real point of difficulty in this case is a point which counsel takes on behalf of the defendants. He submits that the circular notice sent round by the British Motor Trade Association did not comply with the requirements of s. 25, for it was not, for the purposes of that section, a notice of the condition as to prices. It is common ground that in the area of trading the doctrine of constructive notice, as it is understood in law relating to the title to real estate, has no place at all. If authority be wanted for that proposition it is to be found in *Manchester Trust v. Furness* (2) ([1895] 2 Q.B. 539) in the judgment of LINDLEY, L.J. (ibid., at p. 545), and in the judgment of HARMAN, J., in *County Laboratories, Ltd. v. J. Mindel, Ltd.* (1) ([1957] 1 All E.R. at p. 807). The real question is what notice is sufficient for the purposes of s. 25. The section provides that the condition may B C

“enforced by the supplier against any person not party to the sale who subsequently acquires the goods with notice of the condition as if he had been party thereto.” D

If the trader had been party to the original contract of sale, he would have had express notice of the actual terms of the restrictive condition. The section seems designed to put both parties in the same position. I have in mind and agree with the observation of HARMAN, J. (ibid., at p. 808), that E

“... s. 25 limits the freedom of trade, and, therefore, although I am bound to give to s. 25 that effect which its language expresses, I am not prepared to go beyond that so as to produce an effect which the express language of s. 25 does not warrant.”

Counsel for the defendants submits that it is not sufficient merely to give notice that there is a condition restrictive of price, but you must give them actual express notice of the actual terms of the condition, and he submits that the Motor Trade Association's circular does not give notice of that restriction. It merely points out that there is a restriction precluding a resale at a price other than the appropriate price prescribed by the manufacturer, and that the details and conditions of price may be obtained on application to the manufacturer or concessionaire concerned. That he submits is akin to constructive notice and is not a proper compliance with the requirements of the section that there must be an express notice of the actual terms. F G

On the other hand, counsel for the plaintiff submits two points. First, that it is sufficient to bring to the attention of the trader concerned the fact that there is a restriction, and he draws my attention to the analogous case of a purchaser of a patented article with notice of a limited licence. In *TERRELL AND SHELLEY ON PATENTS* (9th Edn.) at p. 264, it is said: H

“It is not essential that the purchaser should have knowledge of the precise restrictions concerned so long as he has knowledge of their nature and existence and means of knowledge of their exact extent.”

The editor relies for that proposition on the authority which was quoted to me of *Columbia Graphophone Co., Ltd. v. Murray* (3) ([1922], 39 R.P.C. 239). But in truth this is a question of the proper construction of s. 25. I

Secondly, he submits that in any event the notice given in fact is a substantial compliance with the terms of the section. As to that it is to be observed that the conditions sought to be imposed on the defendant trader were the conditions of sale imposed on the original sale by the plaintiffs, i.e., the conditions contained in the trade price list, and it is of those conditions that notice has to be given, and are said to be contained in the circular. It is pointed out by counsel

- A for the defendants that in para. 2 of the circular there is only notice of a very general kind applying to a very large number of manufacturers who may have many different types of restriction. It has been pointed out, for instance, that it does not tell the person sought to be enjoined that he may sell without restriction to a commercial vehicle user providing his name and style and factory appear in a certain register. The circular again, it is said, does not tell him
- B that he must not sell at prices "indirectly" higher or lower than the prices specified. Exactly for what purpose the word "indirectly" is used, I am not going to say. Whether it means a sale in part exchange or not is a matter I need not decide. Counsel for the defendants uses these points to illustrate his proposition that in fact the circular does not give him notice of the actual terms of price restriction but only a general warning that there are restrictions.
- C In my judgment, the section must be strictly construed, and on its true construction I come to the conclusion that it contemplates that no trader should be in a worse position than if he had been a party to the original contract of sale and requires an express notice of the actual terms and conditions sought to be enforced. The notice issued does not give such express notice of the actual terms, and, therefore, for the purposes of the section in my judgment the defendants have not received the requisite notice. Accordingly, I dismiss the motion with costs.
- D

Motion dismissed.

Solicitors: *Osmond, Bard & Westbrook* (for the plaintiffs); *Gregory, Rowcliffe & Co.*, agents for *Read, Roper & Read*, Manchester (for the defendants).

[*Reported by F. GUTTMAN, ESQ., Barrister-at-Law.*]

E

IN THE MATTER OF THE PARLIAMENTARY PRIVILEGE ACT, 1770.

F

[PRIVY COUNCIL (Viscount Simonds, Lord Goddard, C.J., Lord Morton of Henryton, Lord Reid, Lord Radcliffe, Lord Somervell of Harrow and Lord Denning), March 10, 11, 12, 13, May 7, 1958.]

Parliament—Privilege—Writ beginning action against member of Parliament in respect of a speech or proceeding by him in Parliament—Whether to treat the issue of such a writ as a breach of Parliamentary privilege was contrary to statute—Parliamentary Privilege Act, 1770 (10 Geo. 3 c. 50), s. 1.

G

The House of Commons would not be acting contrary to the Parliamentary Privilege Act, 1770*, if it treated the issue of a writ against a member of Parliament in respect of a speech or proceeding by him in Parliament as a breach of its privileges.

H

[As to the protection of members of Parliament from legal proceedings, see 24 HALSBURY'S LAWS (2nd Edn.) 348, 349, para. 701; and for cases on the subject, see 36 DIGEST (Repl.) 395-397, 421-448.

For the Parliamentary Privilege Act, 1770, s. 1, see 17 HALSBURY'S STATUTES (2nd Edn.) 484.]

I

* Section 1 of the Parliamentary Privilege Act, 1770, provides: "Any person or persons shall and may at any time commence and prosecute any action or suit in any court of record or court of equity or of admiralty, and in all causes matrimonial and testamentary, in any court having cognizance of causes matrimonial and testamentary, against any peer or lord of Parliament of Great Britain, or against any of the knights, citizens, and burgesses, and the commissioners for shires and burghs of the House of Commons . . . for the time being, or against their or any of their menial or any other servants, or any other person entitled to the privilege of Parliament of Great Britain; and no such action, suit, or any other process or proceeding thereupon shall at any time be impeached, stayed, or delayed by or under colour or pretence of any privilege of Parliament."

Cases referred to:

- (1) *Burdett v. Abbot*, *Burdett v. Colman*, (1817), 5 Dow, 165; 3 E.R. 1289; 36 Digest (Repl.) 397, 455.
- (2) *Stockdale v. Hansard*, (1839), 9 Ad. & El. 1; 3 State Tr. N.S. 732, 849; 8 L.J.Q.B. 294; 112 E.R. 1112; 36 Digest (Repl.) 393, 396.
- (3) *Middlesex Sheriff's Case*, (1840), 11 Ad. & El. 273; 3 State Tr. N.S. 1239; 113 E.R. 419; sub nom. *R. v. Evans*, 8 Dowl. 451; 9 L.J.Q.B. 82; 36 Digest (Repl.) 397, 457.

Reference to the Judicial Committee.

By Order in Council dated Dec. 13, 1957, Her Majesty by and with the advice of the Privy Council was pleased to refer to the Judicial Committee for their hearing and consideration the question of law* whether the House of Commons would be acting contrary to the Parliamentary Privilege Act, 1770, if it treated the issue of a writ against a member of Parliament in respect of a speech or proceeding by him in Parliament as a breach of its privileges. The facts appear in the judgment of the Judicial Committee.

The Attorney-General (Sir Reginald Manningham-Buller, Q.C.), and *Rodger Winn* appeared in support of the submission of Her Majesty's Attorney-General that the House of Commons would be acting contrary to the Parliamentary Privilege Act, 1770, if it treated the issue of a writ against a member of Parliament in respect of a speech or proceeding by him in Parliament as a breach of its privileges.

Sir Frank Soskice, Q.C., and *B. J. H. Clauson* appeared in support of the submission of the Solicitor for the affairs of Her Majesty's Treasury that the House of Commons would not be acting contrary to the Parliamentary Privilege Act, 1770, if it treated the issue of a writ against a member of Parliament in respect of a speech or proceeding by him in Parliament as a breach of its privileges.

Gerald Gardiner, Q.C., and *C. H. Gage* for the London Electricity Board supported the same submission as that made by the Attorney-General.

VISCOUNT SIMONDS: The following question has been referred to the Judicial Committee of the Privy Council under s. 4 of the Judicial Committee Act, 1833,

"whether the House of Commons would be acting contrary to the Parliamentary Privilege Act, 1770, if it treated the issue of a writ against a member of Parliament in respect of a speech or proceeding by him in Parliament as a breach of its privileges."

A few words of introduction are necessary. On Feb. 8, 1957, the Right Honourable G. R. Strauss, a member of the House of Commons, wrote a letter to the Paymaster-General in which he called his attention to certain conduct of the London Electricity Board. The Paymaster-General, being of opinion that the question related to a matter of day-to-day administration, replied to Mr. Strauss that the responsibility lay with the board not with the Minister and he had arranged for his officials to bring the views of Mr. Strauss to the attention of the board's chairman as a matter of urgency. An interview was, accordingly, held between the chairman and Mr. Strauss and some of his associates, after which the chairman wrote to Mr. Strauss demanding the unqualified withdrawal of the latter's statements in his letter of Feb. 8 which he regarded as casting grave reflections on the integrity of the board's personnel and on the board's attitude towards its public duty. Receiving no satisfactory reply to this or a subsequent letter, he then put the matter into the hands of the board's solicitors who wrote to Mr. Strauss demanding a withdrawal and an

* Under s. 4 of the Judicial Committee Act, 1833, it is lawful for Her Majesty so to refer "any such other matters whatsoever as Her Majesty shall think fit". The Judicial Committee thereupon must hear or consider the same and must advise Her Majesty thereon (*ibid.*).

A apology and stating that, if these were not forthcoming, they were instructed to issue a writ for libel against him. To this letter, the solicitors for Mr. Strauss replied that it appeared to them that the letter in question was written on an occasion of qualified privilege and that they were prepared to accept service of any proceedings on his behalf.

B No writ had, in fact, been issued when, on Apr. 8, 1957, Mr. Strauss called the attention of the House of Commons to the letters that had passed between himself and the board and its solicitors, and claimed that the threats of an action for libel in those letters were a breach of the privilege of Parliament. The Speaker of the House of Commons ruled that the threats constituted a prima facie case of breach of privilege and the House resolved to refer the matter to its Committee of Privileges. On Oct. 30, 1957, that committee reported.

C They pointed out that the answer to the question whether these threats constituted in themselves a breach of privilege depended in the main on the meaning of art. 9 of the Bill of Rights, but, having had their attention called to the possible impact of the Parliamentary Privilege Act, 1770, on the question, they came to the following conclusions:—(a) In writing the letter of Feb. 8, 1957, to the Paymaster-General of which the London Electricity Board complained,

D Mr. Strauss was engaged in a “proceeding in Parliament” within the meaning of the Bill of Rights of 1688. (b) The London Electricity Board, in threatening by the letters from themselves and their solicitors to commence proceedings for libel against Mr. Strauss for statements made by him in the course of a proceeding in Parliament, were threatening to impeach or question the freedom of Mr. Strauss in a court or place outside Parliament, and, accordingly, the

E London Electricity Board and their solicitors had acted in breach of the privilege of Parliament. (c) The opinion of the Judicial Committee of the Privy Council should be sought on the question whether the House would be acting contrary to the Parliamentary Privilege Act, 1770, if it treated the issue of a writ against a member of Parliament in respect of a speech or proceeding by him in Parliament as a breach of its privileges. On Dec. 4, 1957,

F the House of Commons presented a humble address to Her Majesty in accordance with conclusion (c) of the committee and on Dec. 13 an Order in Council was made accordingly.

Their Lordships now turn to the question referred to them. They point out at the outset that this question is a very narrow one. It is independent of the conclusions (a) and (b) above set out. On them their Lordships are required to

G express, and express, no opinion. Before considering the text of the Act of 1770 and certain other Acts with which it is inseparably connected, it is only necessary to observe that the words “in respect of a speech or proceeding by him in Parliament” refer (though not quite accurately) to that part of the Bill of Rights by which, after reciting that

H “the late King James the Second by the assistance of divers evil counsellors judges and ministers employed by him did endeavour to subvert and extirpate the Protestant religion and the laws and liberties of this Kingdom”

by the divers means therein set out,

I “the Lords Spiritual and Temporal and Commons pursuant to their respective letters and elections being now assembled in a full and free representative of this nation . . . do in the first place (as their ancestors in like case have usually done) for the vindicating and asserting their ancient rights and liberties, declare . . . That the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament.”

The Bill of Rights was enacted in 1688. In 1700 the first of the group of Acts was passed which fall for their Lordships' consideration. They are clearly of

opinion, and it appeared to be common ground between the parties, that the ambit of the later Acts was no greater than that of the earlier. This Act must, therefore, be closely examined. It is the Act 12 & 13 Will. 3 c. 3*, and is entitled "An Act for preventing any inconveniences that may happen by privilege of Parliament". Its opening words, which can hardly be called a preamble, are significant.

"For the preventing of all delays the King or his subjects may receive in any of his courts of law or equity, and for their ease in the recovery of their rights and titles to any lands, tenements or hereditaments, and their debts or other dues, for which they have cause of suit or action"

—here is the declared purpose of the Act, which goes on to enact that from and after June 24, 1701, any persons may commence and prosecute any action or suit in any of His Majesty's courts of record, or other courts therein enumerated, against any peer of this Realm, or Lord of Parliament, or against any of the Knights, Citizens and Burgesses of the House of Commons for the time being, or against any of their menial or other servants, or any other person entitled to the privilege of Parliament, at any time from and immediately after the dissolution or prorogation of any Parliament, until a new Parliament shall meet, or the same be reassembled, and from and immediately after any adjournment of both Houses of Parliament for above the space of fourteen days, until both Houses shall meet or reassemble; and that the said respective courts shall and may, after such dissolution, prorogation, or adjournment proceed to give judgment, and to make final orders, decrees and sentences, and award execution thereupon, any privilege of Parliament to the contrary notwithstanding.

It is convenient to pause at these words, which conclude the first section of the Act, and to ask what is its scope. It is not in doubt that its language is comprehensive. It is apt to cover any suits, including suits for defamation whether in or out of Parliament, and in every case to bar the plea of any privilege of Parliament. It should, therefore, *prima facie* be read in this sense. But there are considerations, which will be strengthened by later sections, pointing to a necessary limitation of its meaning. In the first place, as has already been noted, the declared purpose of the Act is to prevent delay in the bringing of those actions to which the Act relates. The members of both Houses had long notoriously abused their privileges in respect of immunity from civil actions and arrest, which, by ancient usage, extended during the sitting of Parliament and for forty days after every prorogation and forty days before the next appointed meeting. It was to curtail this delay in the commencement and prosecution of suits that the Act was avowedly passed, and, by clear implication, it referred only to those suits which, subject to delay, were ultimately enforceable. But there was no right at any time to impeach or question in a court or place out of Parliament a speech, debate or proceeding in Parliament. No question of delay or ultimate enforceability could arise in regard to that privilege, which demanded that a member should be able to speak without fear or favour in Parliament in the sure knowledge that, neither during its sitting nor thereafter, would he be liable to any man for what he said, and that Parliament itself would protect him from any action in respect of it either by the Crown or by a fellow subject. Here, then, is a strong reason for limiting the meaning of the general words which have been quoted.

In the second place, the section empowers not only the subject to "commence and prosecute any action or suit" but the court "to proceed to give judgment and to make final orders, decrees and sentences, and award execution thereon". The last words of the section "any privilege of Parliament to the contrary notwithstanding" must apply equally to all the preceding words. If, then, the Act is read so to have any application to speeches made in Parliament, the

* Repealed by the Statute Law Revision Act, 1867.

A effect is substantially to repeal the ninth article of the Bill of Rights. It is not a question of a writ being issued in a court of law and the defendant then making a plea in bar or a plea to the jurisdiction on the ground of privilege of Parliament. Final orders, decrees, sentences and execution may follow the commencement and prosecution, and no plea of privilege is to be available. It appears to their Lordships that a consideration of this consequence supports the view that the

B Act applies only to proceedings against members of Parliament in respect of their debts and actions as individuals, and not in respect of their conduct in Parliament as members of Parliament, and does not abridge or affect the ancient and essential privilege of freedom of speech in Parliament. The conclusion that this privilege, solemnly reasserted in the Bill of Rights, was within a few years abrogated or at least vitally impaired cannot lightly be reached.

C The following sections of the Act of 1700 support, or at least do not militate against, the same view. The second section provides that the Act shall not extend to subject the person of any of the Knights, Citizens and Burgesses of the House of Commons, or any other person entitled to the privilege of Parliament, to be arrested "during the time of privilege"—a significant phrase. Section 3 again emphasises the temporal aspect of the impediment to a plaintiff pursuing

D his proper remedy by providing that, if he shall, by reason of privilege of Parliament, be stayed or prevented from prosecuting any suit by him commenced, he shall not for that reason be barred by any Statute of Limitation, or non-suited, dismissed, or his suit discontinued, but shall from time to time, on the rising of the Parliament, be at liberty to proceed to judgment and execution. Section 4 makes special provision in regard to actions against the King's original and immediate debtors and other persons therein mentioned which do not appear to call for comment. Section 5 provides that neither that Act, nor anything therein contained, shall extend to give any jurisdiction, power or authority, to any court, to hold plea in any real or mixt action, in any manner than such court might have done before the making of that Act. Of this section, it may be safely said that it does not touch the question of the privilege of freedom of

E speech in Parliament.

F The Act of 1700 having been closely examined, the succeeding Acts can be briefly dealt with. An Act of 1703 (2 & 3 Anne c. 18)* entitled "An Act for the further explanation and regulation of privilege of Parliament in relation to persons in public offices" throws no additional light on the scope of the earlier Act, nor does an Act of 1737 (11 Geo. 2 c. 24)† which purported to do no more than

G amend the Act of 1700 by further curtailing the so-called time of privilege. An Act of 1763 (4 Geo. 3 c. 33)‡ sufficiently indicates its purpose and effect by its title

"An Act for preventing inconveniences arising in cases of merchants, and such other persons as are within the description of the statutes relating to bankrupts, being entitled to privilege of Parliament, and becoming insolvent."

H It is in no way relevant to the question that has to be determined. Finally comes the Act of 1770, the immediate subject of reference, and little remains to be said about it, for it is clear, as has already been stated, that it did not extend the ambit of s. 1 of the Act of 1700, and that its only relevance is that it altogether abolished the time of privilege during which suits might not be commenced or

I prosecuted against members of Parliament.

Their Lordships have already expressed their views on the Act of 1700, and it follows that they must answer the question referred to them by saying that the House would not be acting contrary to the Parliamentary Privilege Act,

* Repealed by the Statute Law Revision Act, 1867.

† The Parliamentary Privilege Act, 1737, repealed, except for s. 4, by the Statute Law Revision Act, 1867.

‡ Repealed by 6 Geo. 4 c. 16, s. 1.

1770, if it treated the issue of a writ against a member of Parliament in respect of a speech or proceeding by him in Parliament as a breach of its privileges. It is proper, however, that they should mention certain arguments that were addressed to them. A

It is a commonplace in the interpretation of statutes that the court may be assisted by a consideration of the existing law at the time of the passing of the statute under review and of the evil which it was designed to remedy. Accordingly, the Attorney-General, as he was well entitled to do, invited their Lordships to consider what was the law in regard to the issue of a writ against a member of Parliament at the relevant date, which by common consent was the year 1700. Counsel for the Solicitor for the affairs of Her Majesty's Treasury, who assisted their Lordships by contending that the Act did not affect the privilege of freedom of speech, in effect made the same plea, for he opened his speech by asking that it should be decided, first, whether, if the Act of 1770 and the earlier Acts had not been passed, the issue of a writ would, in the circumstances mentioned in the reference, be a breach of privilege, and, secondly, if the answer was in the affirmative, whether it was the effect of those Acts to prevent the issue of such a writ being any longer a breach. As a result of this approach to the construction of the Act of 1700 and, accordingly, of the Act of 1770, the argument on both sides ranged widely over the field of Parliamentary privilege. In particular, their Lordships were reminded of the manner in which, from the earliest times, the right of freedom of speech had been asserted. Strode's Act passed in the fourth year of Henry VIII* was recalled, by which it was declared that all suits and proceedings against Richard Strode and against every other member of the then present Parliament or of any Parliament thereafter. B C D E

"for any bill speaking reasoning or declaring of any matter or matters concerning the Parliament to be communed and treated of, be utterly void and of none effect."

Nor was there any doubt that, though the form was new, this was but the assertion of an ancient privilege. F

Then their Lordships were invited to examine, and examined, a large number of cases through the seventeenth and following centuries, in which many aspects of privilege were discussed, but it did not appear to them that there was any authority relevant to the only question referred to them—viz., the meaning of the Act of 1770. For even if it is assumed, as the Attorney-General contended (and their Lordships do not pronounce on it), that the mere issue of a writ for defamation in respect of a speech in Parliament is not a breach of privilege, the assumption does not assist his argument that the Act of 1770 is to be construed so as to cover suits against members of Parliament in respect not only of their actions as individuals but also of their speeches in Parliament. Nor can it be relevant first to determine, as counsel for the Solicitor for the affairs of Her Majesty's Treasury invited their Lordships to do, what would have been the state of the law if the Act of 1770 and the related Acts had not been passed. The single question is whether G H

"the House of Commons would be acting contrary to the Parliamentary Privilege Act, 1770, if it treated the issue of a writ against a member of Parliament in respect of a speech or proceeding by him in Parliament as a breach of its privileges." I

This question can, for the reasons already given, be answered by saying "No" without embarking on a general consideration of Parliamentary privilege.

Their Lordships repeat that they answer this and no other question. It was referred to them, and it became their duty to answer it. But they do not intend, expressly or by implication, to pronounce on any other question of law. In

* The Privilege of Parliament Act, 1512 (4 Hen. 8 c. 8).

- A particular, they express no opinion whether the proceedings referred to in the introductory paragraph were "a proceeding in Parliament", a question not discussed before them, nor on the question whether the mere issue of a writ would, in any circumstances, be a breach of privilege. In taking this course, they have been mindful of the inalienable right of Her Majesty's subjects to have recourse to Her courts of law for the remedy of their wrongs, and would not
- B prejudice the hearing of any cause in which a plaintiff sought relief. As was justly observed by the Select Committee of the House of Commons appointed in 1810 to consider the famous case of *Burdett v. Abbot* (1) ((1817), 5 Dow, 165) (see HATSELL'S PARLIAMENTARY PRECEDENTS (4th Edn.), Vol. I, p. 293)

- "... it appears, that in the several instances of actions commenced in breach of the privileges of this House, the House has proceeded by commitment, not only against the party, but against the solicitor and other persons concerned in bringing such actions; but your committee think it right to observe, that the commitment of such party, solicitor, or other persons, would not necessarily stop the proceedings in such action."
- C

- This is an aspect of the matter which cannot be ignored, for, in the words of
- D SIR ERSKINE MAY'S PARLIAMENTARY PRACTICE (16th Edn.), p. 172,

- "The House of Commons... claims to be the absolute and exclusive judge of its own privileges, and that its judgments are not examinable by any other court or subject to appeal. On the other hand, the courts regard the privileges of Parliament as part of the law of the land, of which they are bound to take judicial notice. They consider it their duty to decide any question of privilege arising directly or indirectly in a case which falls within their jurisdiction, and to decide it according to their own interpretation of the law. The decisions of the courts are not accepted as binding by the House in matters of privilege, nor the decisions of the House by the courts. Thus the old dualism remains unresolved."
- E

- An example of this dualism may be seen in *Stockdale v. Hansard* (2) ((1839), 9 Ad. & El. 1) and the subsequent *Middlesex Sheriff's Case* (3) ((1840), 11 Ad. & El. 273), which are part of history.
- F

In accordance with the views expressed above, their Lordships humbly report to Her Majesty that the question referred to them should be answered in the negative*.

Solicitors: *Treasury Solicitor; Sydney Morse & Co.* (for the London Electricity Board).

[Reported by G. A. KIDNER, ESQ., Barrister-at-Law.]

* Her Majesty in Council, having considered the report made to Her, commanded that it be communicated to the House of Commons. The consequent proceedings are reported in *Hansard, House of Commons*, May 7, 1958, col. 1229.

Re JARVIS (*deceased*). EDGE v. JARVIS.

[CHANCERY DIVISION (Upjohn, J.), March 18, 19, 20, 21, April 2, 1958.]

Trust and Trustee—Constructive trust—Business and lease bequeathed to executors beneficially—New lease granted to one executor—Business carried on by one executor—Form of account to be taken—Laches.

Laches—Constructive trust—Business—Promptitude necessary in pursuing remedy against a constructive trustee in relation to such an asset as a business.

The testator had conducted for many years a business as a tobacconist, newsagent and confectioner at No. 7, W. Road. In 1940 the premises were damaged by a bomb and thereafter no real business was carried on there until the premises were restored in 1944. By his will dated Sept. 9, 1940, the testator, who died on Sept. 17, 1941, appointed his daughters, the plaintiff and the defendant, to be his executrices and trustees, and gave his business to them, declaring that "for the purposes of this my will the expression 'my business' shall mean and include the existing lease of the premises No. 7, [W.] Road and the right of renewal or extension thereof or grant of a new lease . . . and the goodwill of my said business and the stock in trade fixtures fittings and effects used for the purposes thereof or belonging thereto and the book debts due to me in connexion therewith and the benefit of all contracts relating thereto but not the cash in hand at my death or the amount standing to the credit" of any business banking account. The testator further provided that the gift of his business was subject to the payment by the plaintiff and the defendant of annuities to the testator's wife and (on her death) to another daughter. The will conferred no power on the executrices to carry on the business. At the date of the testator's death, he held No. 7, W. Road under a lease for three years expiring on Mar. 25, 1944, at a rent of £70 per annum, but the business was insolvent, the debts exceeding the assets by some £350. The defendant since 1930 had carried on her own tobacco and confectionery business at premises (No. 230, T. Road), which were near to No. 7, W. Road. The plaintiff took little part in the administration of the estate. The defendant paid the business debts out of her own pocket so far as necessary. The landlords of No. 7, W. Road sued the plaintiff and defendant for possession and arrears of rent, for which they obtained judgment in default of appearance. The defendant arranged to pay off the arrears by instalments. Subsequently in May, 1944, the landlords granted a tenancy to the defendant on substantially the same terms as the former tenancy. The defendant re-opened the shop and ran it as a joint business with that at No. 230, T. Road. In April, 1951, the plaintiff issued a writ claiming an account in respect of the defendant's occupation of No. 7, W. Road and of the profits of the business carried on by the defendant there. The defendant made payments on account of the annuity to the testator's wife until the latter's death in 1956. The action came on for hearing in March, 1958. The defendant conceded that she was constructive trustee of the lease of the premises for herself and the plaintiff equally, but contended that the plaintiff's claim was barred by her laches, acquiescence and delay.

Held: (i) the plaintiff was entitled, notwithstanding her delay, to an inquiry what rent, if any, ought to be charged to the defendant, year by year, in respect of her beneficial occupation of No. 7, W. Road.

(ii) apart from laches, the defendant would have been accountable as constructive trustee for such benefits to the business that she resurrected as accrued to her by reason of her position as a trustee of the testator's estate, and, though the form of inquiry must vary according to circumstances, in the present case the defendant would have been accountable as a constructive trustee of the whole business, subject to all just allowances for her time,

- A energy and skill, for the assets that she had contributed, the testator's debts that she had paid and her payments in respect of her mother's annuity; but (iii) the plaintiff was not entitled to relief against the defendant as a constructive trustee of the business because a right to claim in equity on the ground of constructive trust must be pursued promptly in relation to such an asset as a business, the running of which required time, care, attention and skill and involved risk of capital and possibility of losses, and the plaintiff, though aware of her rights, had delayed from 1945 to 1951 before asking for her remedy.
- B

Dictum of KNIGHT BRUCE, L.J., in *Clegg v. Edmondson* ((1857), 8 De G.M. & G. at p. 814) applied.

- C [As to the remedy by account, see 14 HALSBURY'S LAWS (3rd Edn.) 486 et seq.

As to the liability of a trustee to account for profit from use of the trust property, see 33 HALSBURY'S LAWS (2nd Edn.) 312, 313, para. 545; and for cases on the subject, see 43 DIGEST 974-976, 4145-4164.

- D As to the need for promptitude in pursuing remedies against a constructive trustee, see 14 HALSBURY'S LAWS (3rd Edn.) 646, para. 1188, text and notes (c)-(e); and as to acquiescence as an element of laches, see *ibid.*, p. 645, para. 1187; and for cases on the subject of laches, see 43 DIGEST 1008-1010, 4489-4502.]

Cases referred to:

- (1) *Keech v. Sandford*, (1726), Sel. Cas. Ch. 61; 2 Eq. Cas. Abr. 741; Cas. temp. King, 61; 25 E.R. 223; 43 Digest 633, 720.
- E (2) *Regal (Hastings), Ltd. v. Gulliver*, [1942] 1 All E.R. 378; 2nd Digest Supp.
- (3) *Clegg v. Edmondson*, (1857), 8 De G.M. & G. 787; 26 L.J.Ch. 673; 29 L.T.O.S. 131; 44 E.R. 593; 20 Digest 525, 2495.

Action.

- The plaintiff brought an action by writ issued on Apr. 19, 1951, in which she claimed (i) a declaration that the business of a tobacconist, confectioner and newsagent now carried on by the defendant at or from No. 7, Woolwich Road, Greenwich, formed part of the estate of her father William James Jarvis, deceased, and that the defendant was accountable for all or any profits made and received by her since his death in carrying on the business; (ii) a declaration that the defendant held and stood possessed of any tenancy or lease granted to her in respect of the premises No. 7, Woolwich Road, as part of her father's estate, and (iii) an account of all moneys (including profits) received by the defendant as part of her father's estate or which but for her wilful default she would have received as part of that estate. By her defence the defendant, among other pleas, denied that she held No. 7, Woolwich Road and the tenancy or lease thereof and the business carried on thereon as part of her father's estate and claimed that if, contrary to her contention, she was not beneficially entitled to the premises and business then in taking accounts against her the plaintiff ought to bring into account the wages paid to her in connexion with the business and an occupation rent in respect of a period while she was in occupation of the premises. In addition to all other defences the defendant relied on alleged laches, acquiescence and delay of the plaintiff in that, among other matters, with full knowledge of all the circumstances in which the defendant had carried on business since June, 1944, at No. 7, Woolwich Road, the plaintiff at no time before the issue of the writ claimed to be beneficially interested in that business or required any accounts thereof and accepted wages from the defendant as her employee.
- H
- I

The plaintiff, who was born in 1918, and the defendant, who was about ten years older, were sisters. Their father had carried on, for many years before his retirement, business as a tobacconist, newsagent and confectioner at No. 7, Woolwich Road, Greenwich, of which premises he was lessee. In about 1930 the defendant started a tobacco and confectionery business at No. 230, Trafalgar

Road, Woolwich, which was not far from the father's business. The father retired from active management of his business in 1934 or 1935 and went to live out of London. In 1939 his business was in the hands of his son, Ernest, though at some time before then, apparently, the business had been managed by the defendant in conjunction with her own. In December, 1940, No. 7, Woolwich Road was badly damaged by bombing and thereafter, until the premises were restored in 1944, no real business of selling goods retail to the public was carried on on the premises. The father (hereinafter referred to as "the testator") made a will dated Sept. 9, 1940, and died on Sept. 17, 1941. At the time of his death he had a tenancy of No. 7, Woolwich Road for three years, expiring on Mar. 25, 1944, at a rent of £70 per annum. By his will he appointed the plaintiff and the defendant to be executrices and trustees. Paragraph 4 of the will provided:

"I give and bequeath to my said daughters [the defendant and the plaintiff] my business of a tobacconist, confectioner and newsagent, now carried on by me at No. 7, Woolwich Road, Greenwich, aforesaid, and I declare that for the purposes of this my will the expression 'my business' shall mean and include the existing lease of the premises No. 7, Woolwich Road and the right of renewal or extension thereof or grant of a new lease and the right to compensation on the refusal to grant a renewal or extension thereof or the grant of a new lease and the goodwill of my said business and the stock in trade fixtures fittings and effects used for the purposes thereof or belonging thereto and the book debts due to me in connexion therewith and the benefit of all contracts relating thereto but not the cash in hand at my death or the amount standing to the credit of any banking account kept by me at my death for the purposes of such business or in connexion therewith and this gift and bequest is subject to and shall stand charged with the payment by my said daughters to my wife the said Irene Ada Jarvis of the sum of £3 per week during the joint lives of herself and [another daughter of the testator, Ida Sybil Jarvis] and of the payment by my said daughters from the date of the death of my said wife of the sum of £1 10s. per week to my said daughter Ida Sybil Jarvis during her life."

The will conferred no power on the executrices to carry on the business. The plaintiff and defendant proved the will on Feb. 6, 1942. From about 1938 to 1941 the plaintiff acted as a shop assistant for the defendant at No. 230, Trafalgar Road. In 1941 she went into a Ministry of Food office at New Cross. All this time she was living with the defendant. In March, 1943, the plaintiff volunteered for and joined the W.A.A.F., and she was sent to a station at Innsworth in Gloucestershire. After that the plaintiff left the whole of the administration of the estate to the defendant, who had had the real conduct thereof throughout.

The business debts at No. 7, Woolwich Road at the time of the testator's death amounted to about £457; the goodwill was estimated at nil and the fixtures and fittings valued at about £22 and the cash in the business at £96. The business was insolvent. The defendant paid all the business debts out of her own pocket so far as necessary. She did this because she wanted to keep the goodwill of the suppliers as she was hoping to re-open the shop. In order to keep quotas and allocations alive for the re-opening of No. 7, Woolwich Road the plaintiff tried to get them transferred to No. 230, Trafalgar Road, but had no great success in this. Rent for No. 7, Woolwich Road was accruing due and the landlords were pressing for payment. After some correspondence with the defendant, in 1943 the landlords issued a writ against the defendant and the plaintiff as executrices for possession and arrears of rent. The landlords obtained judgment in default of appearance. The defendant arranged to pay off the judgment debt at the rate of £5 a month, which she did. She asked the landlords to grant her a new tenancy of the premises, but this was refused. Some months later, however, the landlords offered to grant the defendant a new

- A tenancy and, in May, 1944, the landlords made a new agreement with the defendant whereby she became yearly tenant of No. 7, Woolwich Road, at a rent of £70 per annum, which was the same rent as before the war, and otherwise substantially on the same terms as the old tenancy agreement with the testator. The defendant re-opened the shop at No. 7, Woolwich Road. Most of the firms with which the testator had formerly done business did not re-open accounts with the defendant, but she started with tobacco, newspapers and odd novels, though she had no points allocation and therefore could not trade in confectionery. Her quota for cigarettes and an allocation of newspapers was obtained from suppliers of the old business. Apart from a short time of a few months when the defendant had a partner in the business at No. 7, Woolwich Road, the defendant ran the business herself, as a joint business with that at No. 230, Trafalgar Road.
- C In January, 1945, the plaintiff was invalidated out of the W.A.A.F., and went to live at No. 230, Trafalgar Road with the defendant, where the plaintiff acted as a counter assistant. She was paid two or three pounds a week by the defendant and was provided with free board and lodging. In 1946 the plaintiff was living with a Mr. Edge. The defendant moved to No. 7, Woolwich Road, leaving the plaintiff and Mr. Edge in possession of No. 230, Trafalgar Road. In 1947 the plaintiff was seriously ill in hospital while having a baby. After coming out of hospital the plaintiff went back as a counter assistant at No. 230, Trafalgar Road and was paid £4 a week by the defendant and had free lodging for herself and Mr. Edge at No. 230. In 1947 the plaintiff, with the consent of the defendant, started a lending library at No. 230, which apparently was very successful. For this purpose the defendant lent to the plaintiff £100, which she paid off by working without wages. In 1948 the confectionery business was transferred from No. 230, Trafalgar Road to No. 7, Woolwich Road. Probably the tobacconist business was also transferred at the same time. There was thus left at No. 230, Trafalgar Road only the defendant's ice-cream business and the plaintiff's lending library. The defendant continued to pay the plaintiff £4 a week for selling ice-cream on the average of only one day a week owing to the very limited supplies available and continued to allow her and Mr. Edge to occupy No. 230, Trafalgar Road rent-free. According to the defendant's evidence, which on this matter UPJOHN, J., preferred, the plaintiff never after the war asked about the testator's business and appeared quite indifferent to the business and never entered into discussion about it. His LORDSHIP found that after the war the plaintiff never made any claim to the business; and there was no suggestion that she had ever made any contribution to her mother's annuity. He found that equally it was clear that, though the defendant had originally intended to re-open the business at No. 7, Woolwich Road for the family, by the time when the writ commencing the present action was issued she regarded the business as her own. The writ was issued on Apr. 23, 1951, without any previous warning or letter before action. In 1953 the ice-cream business was transferred to No. 7, Woolwich Road from No. 230, Trafalgar Road. The mother of the plaintiff and defendant died in April, 1956.

Lionel Edwards, Q.C., and C. R. D. Richmond for the plaintiff.

Michael Albery, Q.C., and A. J. Belsham for the defendant.

Cur. adv. vult.

- I Apr. 2. UPJOHN, J., after stating the facts, continued: Two questions arise. The first question is as to the new lease of No. 7, Woolwich Road, Greenwich, granted to the defendant in 1944. On the principle of *Keech v. Sandford* (1) ((1726), Sel. Cas. Ch. 61) counsel for the defendant concedes that she is a constructive trustee of this leasehold interest for herself and the plaintiff in equal shares, but counsel submits that the plaintiff is barred from making a claim by her laches, acquiescence and delay. There had been a great deal of delay in making a claim in regard to the lease, viz., from January, 1945, until the issue of the writ in 1951, a period of more than six years. The delay has not been

accompanied, however, by any other relevant circumstance except the plaintiff's silence until the issue of the writ and the very generous treatment of the plaintiff by the defendant. It is not, in my view, open to me to take into account the great delay since the issue of the writ, though where the court is asked to exercise a discretionary remedy, such as granting an injunction or specific performance, delay since the writ may be as important as delay before the issue of the writ. I am not asked, however, to exercise any discretionary remedy, but to enforce the plaintiff's right as a beneficiary under a constructive trust. If the plaintiff establishes her rights as at the date of the writ, she is entitled to enforce them. I may add that I am not dealing with the case where the action has gone to sleep for so many years that the delay may itself be evidence of abandonment. I called for evidence on this point, as I was so shocked at the delay; but I am satisfied that the action did more or less continuously progress, though at the pace of a snail. I cannot regard the delay in this case as sufficient to defeat the plaintiff's claim. There must be an inquiry as to what rent, if any, year by year, ought to be charged to the defendant in respect of her beneficial occupation of No. 7, Woolwich Road.

The second question is as to the position with regard to the business carried on thereat by the defendant. A trustee must not place himself in a position where his duty and interest conflict, and if he does so he must account for any profit thereby made or for the property thereby acquired. The earlier authorities were all reviewed and the principle was again stated in the House of Lords in *Regal (Hastings), Ltd. v. Gulliver* (2) ([1942] 1 All E.R. 378). The old business had been closed down after the bombing, but in a sense its ghost lay there waiting for a new lease of life. When the defendant resurrected the business on the premises at No. 7, Woolwich Road, she was undoubtedly putting herself to some extent in a position where her duty and interests conflicted. In another sense the business that she opened was a new business, but it was of the same character as the old. It necessarily benefited from the goodwill attaching to the premises, because the newspaper and tobacconist business had been carried on there for forty or fifty years down to the end of 1940. It may well be that the virtual closure for over three years, coupled with the great excess in those days of demand over supply, made the value of the goodwill small; but it was there, because of the former activities of the testator of whose estate the defendant was a trustee. Furthermore the defendant was able to get some supplies of cigarettes and newspapers by reason of the testator's earlier connexion with the suppliers. It seems to me to be clear on principle that the defendant must be accountable as a constructive trustee for those benefits which came to her because of her position as a trustee of the testator's estate.

What, then, is the proper method of assessing the accountability? Counsel for the defendant submits that one must look to see what is pleaded and what has been proved at the trial; that only those assets of the estate or benefits which have been so pleaded and proved at the hearing to have flowed to the defendant by reason of her position as a trustee of the estate must be taken and must be valued. Counsel for the plaintiff says, on the other hand, that that would be an impossible inquiry and that the defendant should be made accountable for the whole business and its profits, making allowances for the time, energy and skill that she has expended, the assets that she has brought in, the testator's debts that she has paid and, of course, her mother's annuity. No authority is precisely in point. Although *Regal (Hastings), Ltd. v. Gulliver* (2), which was so strongly relied on by the plaintiff, contains some helpful observations on the general principle, it certainly does not cover this case. I do not think that it is possible to lay down any general rule in relation to businesses beyond the general principle already stated, that a trustee may not make a profit out of his trust. To take an example: suppose that the defendant, by virtue of her position as trustee, had been able to influence (as possibly she did) increased supplies to the shop at No. 230, Trafalgar Road, without re-opening No. 7,

A Woolwich Road, she would clearly be accountable, though surely she should be accountable rather on the basis submitted by counsel for the defendant than on that submitted by counsel for the plaintiff. Each case must depend on its own facts, and the form of inquiry which ought to be directed must vary according to the circumstances. In this case, where the defendant reincarnated the testator's own business on the same premises as formerly and obtained supplies, so far
 B as she was able, from the suppliers of the former business, I think that the proposition propounded by counsel for the plaintiff is correct and that, subject to laches, acquiescence and delay, the defendant is accountable as constructive trustee of the business opened by her at No. 7, Woolwich Road in 1944, subject to all just allowances for her own time, energy and skill, for the assets that she has contributed, and the debts of the testator which she has paid, and for her mother's
 C annuity.

Then, as to laches, acquiescence and delay for six years before the issue of the writ, the plaintiff has stood by and has observed her sister running the business, incurring debts and liabilities, paying her mother £10 a month, and in 1948 transferring assets and business from No. 230, Trafalgar Road to No. 7, Woolwich Road. In that connexion it is a remarkable circumstance, strongly
 D relied on by the plaintiff, that the last transfer of assets took place after the issue and service of the writ. The defendant's venture at No. 7, Woolwich Road, has in fact proved remarkably successful. Until the issue of the writ in 1951, the plaintiff, I am satisfied, made no claim whatever but was paid a weekly wage as a counter assistant at No. 230, Trafalgar Road. It is possible that she took some small part in the administration of No. 7, Woolwich Road by helping with
 E the accounts. Furthermore, although permitting her sister and Mr. Edge to reside at No. 230, Trafalgar Road may be attributed to sisterly love on the part of the defendant, yet the fact that the defendant permitted the plaintiff to open her own business at No. 230 is in my judgment a circumstance which I ought to bring into the scales. Throughout all this time the plaintiff was fully aware of her rights but took, I am fully satisfied on the evidence, no step to assert them
 F or to make any claim at all until the issue of the writ.

The principles applying in relation to a business are quite different from those applying in the case of a specific asset, such as a renewed lease. The principle was stated in *Clegg v. Edmondson* (3) ((1857), 8 De G.M. & G. 787). There KNIGHT BRUCE, L.J., said (*ibid.*, at p. 814):

G "A mine which a man works is in the nature of a trade carried on by him. It requires his time, care, attention and skill to be bestowed on it, besides the possible expenditure and risk of capital, nor can any degree of science, foresight and examination afford a sure guarantee against sudden losses, disappointments and reverses. In such cases a man having an adverse claim in equity on the ground of constructive trust should pursue it promptly,
 H and not by empty words merely. He should show himself in good time willing to participate in possible loss as well as profit, not play a game in which he alone risks nothing."

That was the case of a mine, which may be regarded as an exceptionally hazardous undertaking, and the delay which was held to be fatal in that case was ten years,
 I i.e., four more than here; but the principle as stated is of general application.

The plaintiff is seeking to say that the defendant has been a trustee for her of one moiety of this highly successful business, although she has never been at risk for one penny. I have been referred to a number of text-books and authorities on this question of laches, acquiescence and delay, but I forbear from referring to them, for in this realm of law each case depends so much on its own facts that the citation of other cases having some points of similarity and some of difference does not really assist. I do not overlook the circumstance that the plaintiff has said that she could not afford a solicitor; but I have to try to do

justice to both sides. In my judgment, in the whole of the circumstances of this case in relation to the business, the plaintiff, by waiting until 1951, has not been sufficiently prompt in asking her remedy, and this part of the action fails.

Order accordingly.

Solicitors: *James & Charles Dodd* (for the plaintiff); *Budd Hart & Son* (for the defendant).

[*Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.*]

SAYERS v. HARLOW URBAN DISTRICT COUNCIL.

[COURT OF APPEAL (Lord Evershed, M.R., Morris and Ormerod, L.JJ.), May 6, 7, 1958.]

Damage—Remoteness—Negligence—Risk taken to avoid inconvenience—Plaintiff shut in cubicle of public lavatory owing to defective lock—No attendant present—Plaintiff injured while returning to the ground after endeavouring to climb out of cubicle.

The defendants, a local authority, owned and operated a public lavatory. The plaintiff, who with her husband had arranged to catch a bus which was due at a bus stop nearby twenty minutes later, entered the public lavatory and paid for admission to a cubicle by putting a penny in the slot provided for the purpose. On entering the cubicle she found that she was unable to re-open the door as the inside handle was missing. There was no warning notice outside the cubicle, and there was no attendant at the lavatory. Having tried unsuccessfully to operate the lock, the plaintiff tried, also unsuccessfully, to put her hand through a window to attract attention. She then banged on the door and shouted, but no one came. After some ten or fifteen minutes, she decided to see whether it would be possible for her to climb out through the space between the top of the door and the ceiling, and, in order to do so, she stood with her left foot on the seat of the lavatory and rested her right foot on the toilet roll and fixture, holding the pipe from the lavatory cistern with one hand and resting the other hand on the top of the door. Finding that it would be impossible to get out over the door, she proceeded to come down, and, as she was doing so, the toilet roll rotated, owing to her weight on it, and upset her balance. She fell to the ground and was injured. In an action by the plaintiff for damages against the defendants, the defendants were found to have been negligent.

Held: the damage was not too remote because it was reasonable in the circumstances for the plaintiff to try to see whether it was possible for her to climb out of the cubicle, which was not a very hazardous thing to attempt, but, having found it impracticable to achieve, she was careless in the process of returning to the ground by allowing her balance to depend on the toilet roll; damages were, therefore, recoverable by the plaintiff, but would be reduced by one quarter in respect of her share of the responsibility for the damage.

Adams v. Lancashire & Yorkshire Ry. Co. ((1869), L.R. 4 C.P. 739) distinguished on the facts.

Appeal allowed.

[As to remoteness of damage, see 11 HALSBURY'S LAWS (3rd Edn.) 268, 269 and 273, paras. 445, 446 and 451; and for cases on the subject, see 17 DIGEST (Repl.) 114, 115, 268-276.]

As to reduction of damages for contributory negligence, see 11 HALSBURY'S LAWS (3rd Edn.) 316, para. 512.]

A Cases referred to:

- (1) *Hadley v. Baxendale*, (1854), 9 Exch. 341; 23 L.J.Ex. 179; 23 L.T.O.S. 69; 156 E.R. 145; 17 Digest (Repl.) 91, 99.
- (2) *Jones v. Boyce*, (1816), 1 Stark. 493; 171 E.R. 540; 36 Digest (Repl.) 23, 101.
- (3) *Adams v. Lancashire & Yorkshire Ry. Co.*, (1869), L.R. 4 C.P. 739; 38 L.J.C.P. 277; 20 L.T. 850; 36 Digest (Repl.) 191, 1010.
- (4) *Robson v. North Eastern Ry. Co.*, (1875), L.R. 10 Q.B. 271; 44 L.J.Q.B. 112; 32 L.T. 551; *affd.* C.A., (1876), 2 Q.B.D. 85; 46 L.J.Q.B. 50; 35 L.T. 535; 41 J.P. 294; 36 Digest (Repl.) 135, 699.

B

Appeal.

- C His Honour JUDGE LAWSON CAMPBELL, given at Bishop's Stortford County Court on Nov. 25, 1957, as adjudged that the plaintiff's claim for damages for personal injuries failed and that judgment on the claim be entered for the defendants, Harlow Urban District Council.

- On Jan. 14, 1956, the plaintiff, having paid for admission, entered a cubicle in a public lavatory provided and maintained by the defendants. Finding that there was no handle on the inside of the door and no means of opening the cubicle, the plaintiff tried for some ten to fifteen minutes to attract attention and then tried to see if there was some way of climbing out of the cubicle. With this object, she placed one foot on the seat of the water closet and balanced the other on the toilet roll and its fixture. Realising that it would be impossible to climb out, she started to come down, slipped and injured herself. In her action against the defendants, the plaintiff alleged (i) that there was an implied warranty on the part of the defendants in regard to the safety of the cubicle, and that the defendants were in breach of the warranty; and (ii) negligence on the part of the defendants, their servants or agents in failing to inspect or repair the handle of the door of the cubicle or to warn members of the public of the condition of the cubicle. The county court judge found that there was a breach of duty on the part of the defendants, but that the plaintiff was in no danger on that account, and he held that, as the plaintiff chose to embark on a dangerous manoeuvre, she must bear the consequences of her action.

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J. J. Davis for the plaintiff.

J. B. Elton for the defendants.

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LORD EVERSHERD, M.R.: In this appeal a difficult question has arisen as to the liability of the defendants to the plaintiff, in the circumstances which I shall relate. On the morning of Jan. 14, 1956, the plaintiff, with her husband, left home with a view to going to Olympia in London. They intended to travel to London on an omnibus, and they were on their way to the bus stop. The plaintiff then was minded to visit the public lavatory owned and operated by the defendants. She went to the lavatory, her husband going on to the bus stop. She went to the furthest cubicle, and on entering the lavatory put a penny in the slot provided for the purpose, opened the door, went in, and found that the door had shut and left her with no means from the inside of re-opening it. It then appears that she spent some time in trying to attract attention orally and visually from the window in the lavatory, and, that having failed, proceeded to try to see if she could escape via the door, or make her presence known from or over the door. She stood with her left foot on the seat of the lavatory. With her left hand she seized the pipe from the lavatory cistern. Her right hand she put on top of the door, and her right foot rested on the toilet roll and the small fixture in which it was inserted. She had got so far in the belief that she would be able by a feat not too acrobatic to get out over the door, which was seven feet high and left a space of about two feet four inches between the top of the door and the ceiling. Having arrived in the posture which I have stated, she concluded, quite rightly, that the feat which she had envisaged was not within

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the bounds of her performance, and she then proceeded to start to regain the ground. It was at that stage, or very shortly afterwards, that the misfortune occurred; for she allowed some degree of her weight to be on the toilet roll, and her balance to depend on it. The toilet roll, true to its mechanical requirement, rotated, and that unfortunately disturbed her equilibrium. She fell and sustained injury. The injury was not trivial, though I understand that it was not serious. We have not gone into the quantum of damages.

In those circumstances, the plaintiff claimed that the damage which she had suffered was due to the fault of the defendants, that fault being in the form of breach of the duty of care owed to her, whether or not arising under the implied contract when she made use of the lavatory. Nothing turns on the foundation of liability, nor, indeed, on the finding of the learned judge that the defendants were negligent; for there has been no appeal on the part of the defendants from that finding. The issue before us has been confined to the second part of the judge's conclusion, namely, that the damage suffered was in the circumstances too remote from the negligent act or omission of the defendants and fell outside the famous formula of being the natural and probable consequence of the wrongful act. In those circumstances, he dismissed the plaintiff's claim. The questions, therefore, which have been present on appeal can be stated thus: (i) Was the damage suffered by the plaintiff too remote? Put otherwise, was her activity, which I have briefly described, and from which the damage ensued, not a natural and probable consequence of the negligent act of the defendants within the famous formula in *Hadley v. Baxendale* (1) ((1854), 9 Exch. 341)? (ii) If the damage was not too remote, then was the plaintiff herself guilty of some degree of fault, of what is called contributory negligence, so as to reduce the total liability of the defendants to her?

I return now for a more close consideration of the exact facts which I have so far briefly described as they are stated in the evidence, and as the learned judge found them. I must observe (and it is not unimportant) that there was here no claim or suggestion on the part of the plaintiff that she was acting in panic. In other words, this is not a case in which it was said that what the plaintiff did, if it was mistaken in any degree, was something done in what is called "the agony of the moment". [HIS LORDSHIP reviewed the evidence, and continued:] From the evidence it seems clearly to follow that the plaintiff, acting quite calmly and on reflection, thought that she would, or at least might, be able to get out of this cubicle by climbing over the top of the door; that she achieved the first stage of that operation; and then, quite sensibly, and without trying anything hazardous or impossible, concluded that after all she was wrong, and that she could not do it. She thereupon proceeded to lower herself in order to regain the ground. It seems to me, therefore, that, so far, she must be taken as having acted entirely rationally. I cannot, for my part, think that she could be condemned for having failed to see from the very start that the whole thing was impossible; and, secondly, it appears to me to be quite clear that there was no damage suffered by her from anything that she did in what I call the first stage of the operation. In other words, the damage did not flow from attempting to do something which she could not do, and had no business to try to do. The damage was suffered by her after she had realised that the attempt could not be carried out, and while she was trying to return to the ground.

The findings of the learned judge on this matter are expressed as follows. After stating his conclusion about the negligence, he said:

"There is, however, a second question. The plaintiff had left her husband ten minutes before, and he knew where she was going and that the bus was due to leave in twenty minutes. She had been in the lavatory for ten minutes without avail before she attempted to climb out, and the time for the bus was approaching. What would have been a reasonable thing for her to do? To climb out was a very hazardous undertaking. Counsel for the plaintiff

A says that it was perfectly reasonable for a lady of thirty-six with skirts and, no doubt, high heels, to do it . . . The consequences might have been very serious indeed. I think what she was undertaking was an exceedingly perilous manoeuvre. It does not follow that a person put in difficulty may not undertake a risk . . .”

B Then there was a reference to the stage coach case, *Jones v. Boyce* (2) ((1816), 1 Stark. 493), and the judge went on to say:

C “I must apply a balance between risk taken by the plaintiff against the consequences of the defendants’ breach of duty. The plaintiff was not in any sort of danger, nor, indeed, in any real discomfort. It was not as though it were late at night. She knew, or ought to have known, that at 8.32 a.m. her husband must come and find out what had happened to her. The only consequence would have been the wrath of her husband, and an hour’s delay. She took an extremely dangerous course, and I have to balance the inconvenience against the danger. I feel that this case is similar to *Adams v. Lancashire & Yorkshire Ry. Co.* (3) ((1869), L.R. 4 C.P. 739).”

D With all respect to the learned judge, I have formed a different view. I agree with the learned judge when he stated that it was the duty of the court to balance the risk taken against the consequences of the breach of duty: in other words, as was put in the argument, to weigh the degree of inconvenience to which the plaintiff had been subjected with the risks that she was taking in order to try to do something about it. Where I part company with the judge is, first, that, as I have read and understood the evidence, I do not think it true to say that the damage was suffered by the plaintiff in undertaking something very hazardous which, as a rational human being, she had no business to undertake. I further venture to think that the case is not, in truth, on all fours with or covered by *Adams v. Lancashire & Yorkshire Ry. Co.* (3).

E The argument of the defendants, of course, is to the contrary effect. Counsel for the defendants, basing himself on *Adams v. Lancashire & Yorkshire Ry. Co.* (3), F contended that the most the plaintiff was suffering was a minor inconvenience, and that she was not entitled to take a grave risk in an attempt to put an end to the inconvenience. In my view, the adjectives are inappropriate. I cannot think that the inconvenience can be called minor in the sense in which the word is used in such a context; nor do I think that the risk was grave. I think that here we have to apply the ordinary common-sense tests. A woman goes to a G public lavatory and finds that she is immured in it. She finds, after ten or fifteen minutes, that the obvious and proper means of attracting attention have been entirely without avail; shouting and waving through the window have produced no result at all. It is an extremely disagreeable situation in which to find oneself; and it seems to me to be asking too much of the so-called reasonable man or woman to suppose that he or she would just remain inactive until H her husband, or someone else, chose to come and look for her and find her. It is to be observed here that the attendant employed by the defendants was not, in fact, there at the time (and was not called as a witness). I think that, applying the ordinary tests of reasonableness, it was not an unreasonable thing to do, nor was it indulging in grave risk for the plaintiff to see whether her first impression was right, namely, that by standing on the seat she might be able to I hoist herself out over the door. It is also to be observed that she quite properly and reasonably concluded, when she had got on the seat, that the manoeuvre was beyond her capacity. Therefore I am unable to accept the view expressed by the learned judge, with all respect to him, that what she was doing was attempting a very hazardous undertaking in climbing out.

Secondly, it was put by counsel for the defendants (and put, if I may say so, with great force) in this way. He said, in effect: “I quite agree that this is a difficult matter. A judge of fact or a court might well have held that what the plaintiff did was a natural and probable consequence of her being immured in the

lavatory, and that, therefore, the damage flowed, or partly flowed, from the negligent act; but, after all, this was a finding by the learned judge who saw all the witnesses in the case. He is most certainly a careful and experienced judge, and this court ought not to interfere with his conclusion". With that I should, in the ordinary way, be most sympathetic, and, indeed, I must say I am not unsympathetic. But I have read the passage in his judgment, including particularly that in which the judge came to the conclusion that the case was similar to, and therefore covered by, the decision in *Adams v. Lancashire & Yorkshire Ry. Co.* (3). I turn, therefore, for a moment to that case. The plaintiff was travelling as a passenger in a train operated by the Lancashire and Yorkshire Railway Company in the month of July, in the year 1868. The door of the carriage was faulty and would not keep shut, and, as the train proceeded on its journey, it flew open not once but three or four times. The plaintiff, having three times shut the door without any permanent result, made a fourth attempt, in the course of which, from the facts found, it appears that he allowed the whole of his weight to rest against the door. The result was that, the plaintiff being no more successful in making the door keep shut than he had been on the three previous occasions, and the door inevitably opening, he fell out and was injured, as well he might be since the train was moving. I have emphasised the date and the time, first, because it was pointed out that the plaintiff was found not to have suffered any inconvenience at all. It might, no doubt, be irritating to see a door open, but it was summer, and it was not suggested that he was cold, or subjected to any draughts; and, what is more, the train would, in the course of about three minutes, stop at a station. It follows, therefore, looking at the matter from the point of view of inconvenience, that the plaintiff's inconvenience or annoyance at seeing the door open is not really comparable with what any ordinary person would feel at finding himself or herself incarcerated in a lavatory. Secondly, it is to be noted that this was a moving train; and it must, I should have thought, be quite plain to any intelligence that, if one puts oneself in a position which involves one in the risk of falling out of a moving train, one is doing something hazardous in the extreme. There is, finally, the third point, which arises from the date when this case was decided, that is, at a time long before the recent amendment of the law*, so that a finding of any degree of contributory negligence would be fatal to the plaintiff's claim; and when, moreover, as a consequence of the rule of law which I have just indicated, there was currently held, or apt to be applied, what is sometimes called the "last opportunity" principle. I mention that because it is, I think, fair to say, as counsel for the plaintiff pointed out, that if one examines the judgments of these three learned judges of the Court of Common Pleas, although two may well have decided the case on the ground that the damage was too remote from the negligent act in having an improperly working door, the third of them, BRETT, J., who in fact had tried the case before the jury, based his opinion on the contributory negligence point. I do not propose to read all the judgments, but, as the learned county court judge attached importance to the case, I should perhaps make two references, one to the judgment of MONTAGUE SMITH, J., and the other to that of BRETT, J. MONTAGUE SMITH, J., said (L.R. 4 C.P. at p. 742):

"At the time the plaintiff got up to shut the door he was in a position of entire safety, and it is not even stated in the evidence that he was suffering inconvenience from draughts or otherwise. Such being the case, he voluntarily undertook to shut the door, and, in doing so, used both hands, and did not hold on with either of them. He was obviously doing that which was dangerous, and the ground upon which the plaintiff puts his case is, that it was necessary to do so to obviate the results of the defendants' negligence. I quite agree that, if the negligence of a railway company puts a passenger

* See the Law Reform (Contributory Negligence) Act, 1945, s. 1 (1); 17 HALSBURY'S STATUTES (2nd Edn.) 12.

- A in a situation of alternative danger, that is to say, if he will be in danger by remaining still, and in danger if he attempts to escape, then, if he attempts to escape, any injury that he may sustain in so doing is a consequence of the company's negligence; but if he is only suffering some inconvenience, and, to avoid that, he voluntarily runs into danger, and injury ensues, that cannot be said to be the result of the company's negligence. It is hardly necessary
- B to say, that though I use the words 'danger' and 'inconvenience', yet, if the inconvenience is very great and the danger run in avoiding it very slight, it may not be unreasonable to incur that danger."

If I leave out the qualifying "very", I think that the statement of MONTAGUE SMITH, J., would be no less true:

- C "It is hardly necessary to say, that though I use the words 'danger' and 'inconvenience', yet, if the inconvenience is . . . great and the danger run in avoiding it . . . slight, it may not be unreasonable to incur that danger."

Before further comment, I read this passage from the judgment of BRETT, J. (*ibid.*, at p. 744), because it is one which has later received much commendation:

- D "I think, if the inconvenience is so great that it is reasonable to get rid of it by an act not obviously dangerous, and executed without carelessness, the person causing the inconvenience by his negligence would be liable for any injury that might result from an attempt to avoid such inconvenience."

I observe that the words "and executed without carelessness" would not now be necessary, because, if it were executed with some carelessness today, it would result not in a total failure of the plaintiff's claim, but might lead to an apportionment of the damage. At the end of his judgment, BRETT, J., said (*ibid.*):

- E "... under these circumstances, I think the putting himself into peril was contributory negligence, and that the case therefore ought not to have been left to the jury."

- F I now return to the first citation from the judgment of BRETT, J., and the passage which I read from the judgment of MONTAGUE SMITH, J. With all respect to the learned county court judge, it does not seem to me that it can be said that those passages, in the light of the facts in the present case, determine the case against the plaintiff as they did in *Adams v. Lancashire & Yorkshire Ry. Co.* (3). As I have already said, the inconvenience to the plaintiff was, to my mind, appreciable, if not substantial, and so would be, I think, to any ordinary
- G person. I think that she was not, in truth, engaged in a hazardous enterprise. She was doing something, as I venture to think, not at all unreasonable, and she did it up to the point where, quite properly, she reached the conclusion that the possibilities which the gap above the door of itself presented were not available to her. For those reasons, therefore, I think that the conclusion of the judge wholly adverse to the plaintiff ought not to stand.

- H That is, however, still not the end of the matter. In the passage which I read from the judgment of BRETT, J., there occur the words "executed without carelessness". Now what is the situation here? Counsel for the defendants did not really emphasise this aspect of the case much, although, very properly and naturally, he claimed that, if the activity of the plaintiff ought to be treated as the natural and probable consequence of her incarceration, still to some
- I degree at least, to use the judge's own phrase, she was the author of her own calamity. I have given very careful thought to this aspect of the matter; and I think, in justice to the defendants, and in deference to the view which the learned judge took of the plaintiff, it would not be right to say that the plaintiff was herself free from blame. I think that, in getting to the position where she could see, and did see, that escape via the top of the door was impossible, she acted without carelessness; but it is true to say—though, no doubt, it is being wise after the event—that, in getting back to terra firma again, she should have appreciated that she could not and ought not to allow her balance to depend

on anything so unstable as a toilet roll and a fixture of a somewhat slender kind. A
It was not a grave error, and I think that the consequences were unduly unfor-
tunate in the circumstances; but it is impossible to acquit the plaintiff altogether
from some carelessness. In these matters the apportionment must be largely a
question of, I will not say hazard, but at any rate of doing the best one can in
fractions; and applying myself to it in that way, and not desiring to do more
than indicate that the plaintiff was, as I think, in some degree careless and in B
some degree, therefore, blameworthy, I would apportion the matter as to three-
fourths liability to the defendants, and one-fourth to her. In other words,
I think that the plaintiff ought to recover from the defendants seventy-five per
cent., or three-fourths, of whatever be the appropriate measure of damage
suffered.

MORRIS, L.J.: It was held by the learned judge in this case that there C
was a breach of duty on the part of the defendants. That finding is not, and
I think could not be, challenged. The defendants provided conveniences for
the use of the public. The plaintiff paid for admission to a cubicle. Its lock
was defective in that there was no handle inside. From the outside there was
no indication of such state of affairs. The result was that, after the plaintiff D
had entered the cubicle, she was a prisoner therein. The cubicle was one which
women members of the public were invited to use. It ought not to have been in
use. There was no warning, and there was no attendant at the lavatory. The
defendants were clearly responsible for the circumstance that the plaintiff was
permitted to enter a cubicle from which there was no ordinary method of egress.
The defendants should be responsible for the direct and natural consequence of E
their breach of duty. The most natural and reasonable action on the part of
someone who finds herself undesignedly confined is to seek the means of escape.
Those who are responsible for the unjustifiable detention can hardly, either
with good grace or with sound reason, be entitled to be astute in offering criticism
of the actions of the unfortunate victim.

In *Robson v. North Eastern Ry. Co.* (4) ((1875), L.R. 10 Q.B. 271), FIELD, J., F
in giving the judgment of the court, used these words (*ibid.*, at p. 274):

"... it has been long established that, if a person by a negligent breach of
duty expose the person towards whom the duty is contracted to obvious
peril, the act of the latter in endeavouring to escape from the peril, although
it may be the immediate cause of the injury, is not the less to be regarded
as the wrongful act of the wrongdoer: *Jones v. Boyce* (2) ((1816), 1 Stark. G
493); and this doctrine has, we think, been rightly extended in more recent
times to a 'grave inconvenience', when the danger to which the passenger is
exposed is not in itself obvious. In *Adams v. Lancashire & Yorkshire Ry.*
Co. (3) ((1869), L.R. 4 C.P. 739 at p. 744), the doctrine was accurately
expressed by BRETT, J., who says: 'If the inconvenience is so great that
it is reasonable to get rid of it by an act, not obviously dangerous, and H
executed without carelessness, the person causing the inconvenience by
his negligence would be liable for any injury that might result from an
attempt to avoid such inconvenience'."

At the same time, however, even those in breach of duty are not to be held I
liable in respect of what cannot fairly and reasonably be regarded as a con-
sequence of the breach. *Jones v. Boyce* (2) was the case in which an action was
brought against a coach proprietor for so negligently conducting the coach that
the plaintiff, who was an outside passenger, was obliged to jump off the coach
as a result of which his leg was broken. What had happened was that a coupling
rein broke, and, one of the leading horses being ungovernable, while the coach
was on a descent, the coachman found it necessary to draw the coach to the side
of the road where it came in contact with some piles, one of which it broke:
afterwards the wheel was stopped by a post. The coupling rein was defective,

A and the breaking of the rein had rendered it necessary for the coachman to drive to the side of the road. In directing the jury in that case, LORD ELLENBOROUGH told them (1 Stark. at p. 494) that there were two questions for their consideration: (i) whether the proprietor of the coach was guilty of any default in omitting to provide the safe and proper means of conveyance; and (ii) if they thought that he was, whether the default was conducive to the injury which the plaintiff
B sustained. LORD ELLENBOROUGH went on to direct the jury that it was sufficient if the plaintiff was placed by the misconduct of the defendant in such a situation as obliged him to adopt the alternative of a dangerous leap, or to remain at certain peril. LORD ELLENBOROUGH went on to say, on the other hand, that, if the plaintiff's act resulted from a rash apprehension of danger which did not exist, and the injury which he sustained was to be attributed to rashness and imprudence, then he was not entitled to recover.
C

The conduct being examined has to be tested and considered in the light of all the circumstances. The question in the present case is whether the injury sustained by the plaintiff resulted either entirely or partly from the defendants' breach of duty. The defendants assert that, as the plaintiff was in no danger and was in no serious inconvenience, she acted unreasonably in doing what she
D did, so that she and she alone was the authoress of the injury that befell her.

I do not think that the plaintiff should be adjudged in all the circumstances to have acted unreasonably or rashly or stupidly. As to nearly everything that she did, in my judgment she acted carefully and prudently. Indeed, she showed a very considerable measure of self-control. My Lord has fully recited the facts, and there is no need for me to refer to them again. The learned
E judge has found them carefully, and the only advantage that he has over us is that he actually saw the plaintiff herself. Subject to that advantage which in the present is comparatively slight, we are in as good a position as the judge to determine this matter. What did the plaintiff do? First, she did her best to operate the lock. She tried with her finger to see whether there was any way of making it work. There was not. She then tried to get her hand through
F the window. She was unable to do that. She then banged on the door. Nobody came. She shouted. There was no response. Ten or fifteen minutes went by. The situation could not have been an agreeable one. What did she then do? It appears to me on the evidence that what she did was to explore the possibility of climbing over the door. That I cannot think was unwise or imprudent, or rash or stupid. I have therefore come to the same conclusion as that
G expressed by my Lord. Like my Lord, I feel that the plaintiff cannot entirely be absolved from some measure of fault—the fault described by my Lord—and I am in agreement that that measure should be marked by depriving her of one quarter of that to which she would otherwise be entitled. I consider that the appeal should be allowed to the extent that my Lord has indicated.

H **ORMEROD, L.J.:** I agree that this appeal should be allowed. The case depends very largely on the view to be taken and the inferences to be drawn from the evidence of the plaintiff herself, evidence which the learned judge quite clearly has accepted as being an accurate recollection of the facts as they took place. The learned judge, however, appears to have based his judgment on the finding that at the time of the accident the plaintiff was actually attempting
I to climb over the door of the cubicle, and that this was, to use his words, "an exceedingly perilous manoeuvre", the risks of which were not warranted by the situation in which the plaintiff found herself. For my part, I am not satisfied that that view is in accordance with the evidence. The situation, as I see it, appears to be, as has been stated by LORD EVERSHERD, M.R., and MORRIS, L.J., that the plaintiff, finding that her efforts to draw attention to her plight were unavailing, decided to try to climb over the door, or at least to explore the possibility of escape by that means. She said in her evidence that she was confident that she could do it, and that, no doubt, is the opinion which she

formed when she was considering, apparently quite collectedly, the situation in which she found herself. She then stood on the seat of the lavatory, holding the pipe running from the cistern in her left hand, and the top of the door with her right hand. Up to that time I do not think anyone could say that she had done anything unreasonable or run any unusual or improper risk. Indeed, counsel for the defendants agreed that, had she slipped and been injured in getting down from that position, he would have been unable to resist a claim for damages. However, the plaintiff went a little further than that. She put her right foot on the toilet roll, the position of which was some three feet from the ground on the wall on her right hand side. Having put her foot on the toilet roll, she kept her left foot on the lavatory seat, still grasping the water pipe and the top of the door with her hands in the way described. She appears to have put her foot on the toilet roll with the object of exploring the possibility of getting enough leverage, as she described it, to enable her to pull herself up to the top of the door; and, as might be expected, having got into that position, she realised that she would not have enough leverage, and decided to give up the attempt. It was in trying to get down from that position that she had the misfortune to slip and sustain the injuries.

Apart from the question of contributory negligence, it does not appear to me that at that stage the plaintiff had taken any risk which was in any way disproportionate to the necessities of her situation, or which could have been regarded as unreasonable in the circumstances in which she found herself. She was locked in the lavatory. She had been unable to attract attention, and she therefore investigated the possibility of climbing up as she described, but decided on such investigation that she was unable to do it. Had she decided to continue with her attempt to get out by using the toilet roll as a foothold, she would, in my judgment, have been taking risks not justified by the circumstances; but she gave up the attempt before reaching that stage; and in these circumstances the plaintiff, in my judgment, was behaving in a way which was reasonable and, indeed, which was foreseeable having regard to the defendants' breach of duty. I agree, therefore, that she is entitled to succeed. I agree, however, with my brethren that it is impossible in the circumstances to acquit the plaintiff of some carelessness in putting her right foot, as she did, on the toilet roll, and that she should bear one quarter of the blame.

Appeal allowed. Case remitted for assessment of damages.

Solicitors: *Bailey, Breeze & Wyles* (for the plaintiff); *Van Sommer, Chillcott, Kitcat & Clark*, agents for *Trotter, Chapman & Whisker*, Epping (for the defendants).

[*Reported by F. GUTTMAN, Esq., Barrister-at-Law.*]

A NOTE.

Re AN APPLICATION OF THE NATIONAL COAL BOARD.

[CHANCERY DIVISION (Roxburgh, J.), May 6, 1958.]

*Coal Mining—Working facilities—Interim order—Mines (Working Facilities and Support) Act, 1923 (13 & 14 Geo. 5 c. 20)—R.S.C., Ord. 54.o, r. 12.*B **Adjourned Summons.**

Pending the determination by the court of an application made by the applicants, the National Coal Board, by an originating summons dated Sept. 13, 1957, the applicants now applied by an originating summons, dated Feb. 25, 1958, for an interim order under the Mines (Working Facilities and Support) Acts, 1923 and 1925, and the Mining Industry Act, 1926, for the grant of a right to search for and work, by underground workings only, so much of the coal in certain seams as lay under areas shown on a plan attached to the summons and for the grant of the right to let down the surface of certain land so shown to such extent as was necessary for the working of the coal.

Sir Andrew Clark, Q.C., and J. C. Leonard for the applicants, the National Coal Board.

D **ROXBURGH, J.:** This is an application for an interim order under the Mines (Working Facilities and Support) Act, 1923, and it is such a straightforward case that I should not have given any reasons for my judgment if I had not understood that it is the first case, at any rate since the matter was transferred to the Chancery Division*, in which there has been a separate application for an interim order. That there is jurisdiction to entertain such an application seems to me to be quite clear. There is no specific reference to interim applications in the Act or, indeed, in the rules, which are to be found in R.S.C., Ord. 54.o, but r. 12 of Ord. 54.o reads:

“The ordinary practice and rules of the Chancery Division so far as they are not inconsistent with this order shall apply to proceedings under this order.”

F That seems to me plainly to imply that there is jurisdiction to make interim orders where the circumstances so require.

The facts in this case are very simple and clear, and I am not going to state them at length. There is an application, which I will call the original application, for an extensive order—extensive, I mean, in area—in regard to which some sixty or seventy people consider themselves to be affected, mainly in connexion with compensation. The present application relates only to a minute portion of that area, and the urgency of the matter is that, having regard to the multiplicity of the objections and the weight of the evidence, which is still being filed, the original application clearly cannot be determined for many months, and meanwhile the workings have come so near to these two particular areas—they are not contiguous, but they are two small areas—that it is quite plain that not only would it cause the National Coal Board a great deal of expense to suspend working but it would be contrary to the national interest that working should be suspended merely because of the difficulty of getting the case heard at an earlier date than is practicable.

H The two areas affected, minute as they are, have been very carefully considered not only by the applicants but by the master, and everybody who appears to have any conceivable interest in resisting the application has been notified and been given an opportunity of appearing to oppose it. The numbers of persons, or bodies

* Until 1949, an application of this kind was referred to the Railway and Canal Commission. On the abolition of the commission by the Railway and Canal Commission (Abolition) Act, 1949, s. 1 (1), the functions of the commission (so far as they extended to England and Wales) were transferred by s. 1 (1) (a) to the High Court, and by R.S.C., Ord. 54.o, r. 1, applications referred to the High Court under s. 1 (1) (a) are to be made in the Chancery Division by ex parte originating summons. For R.S.C., Ord. 54.o, see the ANNUAL PRACTICE, 1958, p. 1466.

of persons, who were thought to be possibly affected—and, indeed, some of them clearly are affected—were seven. The applicants thought there were five, and the master added two more, making seven. Of those seven, six have consented, in letters which I have read, to the making of the order which I propose to make. The seventh (I think it is a body) has not availed itself of the opportunity of either appearing before me or writing a letter, and obviously is, therefore, in effect acquiescing. Even if it did not acquiesce, I should have no hesitation in granting the application on the evidence which I have read. I would not have given my reasons for my judgment but for this application being, apparently, the first of its kind. The matter is clearly urgent, it is in the national interest that the order sought should be made, and every possible person concerned has had an opportunity of objecting. I do not know what more could be expected to have been done.

The form of the order may be of some interest, as this is the first one. I propose to make the order scheduled to the summons with one modification, which leading counsel for the applicants has himself drafted, and I will read the order:

“Upon hearing . . . and upon reading . . . This court doth order that pending the determination by the court of an application made by the above-named applicants the National Coal Board pursuant to an originating summons dated Sept. 13, 1957, the short title whereof is 1957 N. 1056 or further order the applicants be granted upon such terms and conditions as shall be determined by the court upon the determination of the said application to be just [and those words are important] the following rights . . .”

These, of course, are not unusual:

“(1) the right so far as such right is not already vested in the applicants to search for and work by underground operations only and in a skilful and workmanlike manner so much of the coal in the Ten Feet Seam as lies under the area coloured brown on the plan attached hereto. (2) the right so far as such right is not already vested in the applicants to let down the surface of the said area coloured brown and of the lands adjacent thereto coloured green on the said plan to such extent as is necessary for the working of the said coal in the Ten Feet Seam.”

Now comes another pair of rights (in respect of a different area), which are, *mutatis mutandis*, the same as those I have just read:

“(3) the right so far as such right is not already vested in the applicants to search for and work by underground operations only and in a skilful and workmanlike manner so much of the coal in (i) the Chalkey Mine Seam and (ii) the Moss Seam as lies under the area coloured yellow on the said plan. (4) the right so far as such right is not already vested in the applicants to let down the surface of the said area coloured yellow and of the lands adjacent thereto coloured green on the said plan to such extent as is necessary for the working of the said coal in the Chalkey Mine Seam and the Moss Seam.”

Then come the words which leading counsel drafted and which I approve:

“And the applicants and any of the objectors or other owners of surface rights affected by the workings authorised by this interim order are to be at liberty to apply as they may be advised.”

Those words are not normally in a final order. The variation is because this is an interim order and the first of its kind, and it requires that slight modification.

Order accordingly.

Solicitors: *Legal Adviser and Solicitor, National Coal Board*, agent for *Divisional Legal Adviser, National Coal Board* (West Midland Division).

[Reported by R. D. H. OSBORNE, ESQ., *Barrister-at-Law.*]

A

CLEAR v. CLEAR.

[COURT OF APPEAL (Hodson, Morris and Pearce, L.J.J.), February 26, 27, 1958.]

B

Divorce—Practice—Pleading—Answer—Amendment—Petition for divorce on ground of cruelty and for exercise of court's discretion and disclosing petitioner's adultery—Application at trial to amend so as to include allegation of adultery in answer and to adjourn trial for service of amended answer—No previous steps to obtain proof of adultery—Refusal of leave to amend. Divorce—Maintenance of wife—Conduct of parties—Discretion.

C

In her petition for divorce the wife alleged that the husband had treated her with cruelty and asked for the court to exercise its discretion in her favour notwithstanding her adultery. In his answer the husband denied the cruelty and sought a decree on the ground that the wife had treated him with cruelty. He made no allegation of adultery since he knew nothing of his wife's adultery apart from what was revealed in the petition. He took no steps to inquire whether she was associating with other men or otherwise to obtain evidence of adultery (e.g., by asking her solicitors if she was prepared to give any information). At the trial he learned for the first time in the opening statement of counsel for the wife that the adultery had been committed with an Iraqi officer who was stationed in England but who might be going or have gone abroad, and that the wife had borne a child who must have been conceived before the parties separated. The husband applied for leave to amend his answer by including an allegation of the adultery, and for an adjournment for that purpose. The application was refused on the ground of the delay which the need to serve the Iraqi officer might occasion if he were abroad. The husband's charge of cruelty was dismissed and the wife was granted a decree on the ground of the husband's cruelty, the court exercising its discretion in her favour. On appeal,

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E

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Held: (i) leave to amend was in the discretion of the court and it had not been wrong to refuse it at this late stage in this case, because the husband had had notice in the wife's petition of her having committed adultery and had not pursued any inquiries to establish the basis of such a charge before trial.

G

Dictum of DAVIES, J., in *Chueit v. Chueit* ([1958] 1 All E.R. 417) approved, but decision distinguished on the facts.

H

Burford v. Burford ([1955] 3 All E.R. 664) and *B. v. B. & G.* ([1936] 2 All E.R. 1254) considered.

I

(ii) the possibility of delay in serving the intended co-respondent in this case was not, however, of itself a sufficient ground for refusing leave to amend and the consequential adjournment; and, though on any subsequent application for maintenance the conduct of both parties would be material to the exercise of the statutory discretion over maintenance (the wife having forfeited any common law right by her adultery), yet the husband's application ought not to be dismissed as a triviality, for adultery was a matrimonial offence and the husband should not lightly be deprived of an opportunity to obtain a judgment embodying the declaration that he had suffered such an injury.

Observations on the exercise of discretion over maintenance (see p. 357, letter D, to p. 358, letter B, post).

Appeal dismissed.

[As to amendment of pleadings in a suit for divorce, see 12 HALSBURY'S LAWS (3rd Edn.) 323, para. 653.]

Cases referred to:

(1) *Sage v. Sage*, *Stockbridge v. Stockbridge*, [1947] 1 All E.R. 492; [1947] P. 71; [1948] L.J.R. 124; 176 L.T. 420; 2nd Digest Supp.

- (2) *Clueit v. Clueit*, [1958] 1 All E.R. 417. A
- (3) *Burford v. Burford*, [1955] 3 All E.R. 664; 3rd Digest Supp.
- (4) *B. v. B. & G.*, [1936] 2 All E.R. 1254; [1937] P. 1; 105 L.J.P. 90; 155 L.T. 322; 27 Digest (Repl.) 479, 4175.
- (5) *Bevis v. Bevis*, [1935] P. 86; 104 L.J.P. 41; 152 L.T. 545; 27 Digest (Repl.) 324, 2696.
- (6) *Sydenham v. Sydenham & Illingworth*, [1949] 2 All E.R. 196; [1949] B L.J.R. 1424; 2nd Digest Supp. B

Appeal.

By her petition the wife sought a decree nisi of divorce on the ground that the husband had treated her with cruelty and prayed for the exercise of the court's discretion in her favour. By his answer the husband denied that he had treated the wife with cruelty and asked for a decree on the ground that the wife had treated him with cruelty. On July 18, 1957, Mr. Commissioner BLANCO WHITE, Q.C., made an order pronouncing that the marriage between the parties be dissolved on the ground that the husband had treated the wife with cruelty. The husband appealed on the ground, inter alia, that the commissioner's findings that he had treated the wife with cruelty and that she had not treated him with cruelty were against the weight of the evidence, that his finding that the wife had not condoned the cruelty of the husband, if any, was against the weight of the evidence and wrong in law; and that the commissioner did not act judicially in refusing to allow the husband to amend his answer in order to allege adultery. Before the trial the husband had known of the adultery only by reason of the petition and counsel for the husband had applied for leave to amend immediately after the opening statement for the wife, and the application had been refused. E

Ifor Lloyd, Q.C., and C. H. Beaumont for the wife.

K. B. Campbell and Miss Elaine Jones for the husband.

HODSON, L.J.: This is an appeal from an order of Mr. Commissioner BLANCO WHITE, Q.C., who was sitting in these courts in July, 1957, for seven full days and part of another, trying a suit for divorce instituted by the wife on the ground of cruelty, in which the husband by his answer denied the cruelty alleged against him and said that the wife had been cruel to him and that he was entitled to a divorce. In her petition the wife said that she sought a divorce notwithstanding her adultery, viz., she asked for the discretion of the court to be exercised in her favour. The learned commissioner found in her favour that she had been treated with cruelty by her husband, and he found that the husband had not proved cruelty against the wife. On the petitioner's evidence given in the witness-box about her adultery he exercised his discretion in her favour, and pronounced a decree. In making an order for costs he took into account the fact that the wife was by no means without blame for the break-up of this marriage, although he attributed the original fault in the destruction of the marriage to the husband's conduct. Accordingly, he made a limited order for costs. He did not make what he otherwise would have done, a full order for costs against the husband. The husband has appealed. F

[His LORDSHIP referred to the husband's allegations of his wife's cruelty towards him and of the condonation of any cruelty on his part towards his wife, which he did not admit, and continued:] The third question under appeal is whether the husband ought to have been granted an adjournment in order that justice should be done between the parties, the position being that the pleadings disclosed that the wife was going to say in the witness-box that she had committed adultery, but the allegations related only to cruelty. In this state of affairs the husband, who was deceived by his wife throughout as to her infidelity, did not know anything of the adultery (except that she was going to ask for the discretion of the court) until after he entered the court. He then learned for the first time, when counsel was opening the case against him, that his wife not only had committed adultery with an Iraqi officer (whom she named), who was G I

A stationed in this country and who turned out to be known to the husband, but also very shortly before the trial had given birth to a child, who must have been conceived in or about August, 1956, before the parties had actually separated.

The application for an adjournment was made by counsel for the husband after the opening statement had been made on the other side, and before evidence had been given on this matter, in anticipation of that evidence being given, B in order that he might have time before the Iraqi disappeared from this country to serve him, if need be, and give him an opportunity of defending the case. The application was refused. Counsel for the husband made it plain that he was anticipating the proper moment when the application should be made, and I do not think that it ought to be taken against him that he did not repeat the application at the proper moment, viz., when the wife gave evidence of her C adultery (which she subsequently did), because, as he had the material in paper form at any rate in his hand, it was obviously convenient that he should get the amendment in train as soon as possible. He explained to the commissioner that he was making the application then because he would have to act quickly in serving the man. He said:

D "My information is that at this moment he may be in this country but we think it more likely that he is in Iraq. As this case is expected to go on for the rest of the week it is just possible that service may be effected on him during that time and thus avoid delay at the end."

Realising the practical difficulties involved, the learned commissioner said, and I respectfully agree with him, that if the amendment were granted the man E would have to be served because he was entitled to hear the allegation against him. The allegation made is not like those in *Sage v. Sage*, *Stockbridge v. Stockbridge* (1) ([1947] 1 All E.R. 492) before WILLMER, J., each an admission made by a wife outside the court implicating another man, but a sworn statement not yet made but later made in the case, implicating that man as the adulterer. The commissioner refused to consider any device by which the regular practice laid F down by statute of instituting service on the co-respondent could be avoided, and he eventually expressed his opinion in these words:

"I see no advantage in acceding to the application. I do not even know that this Captain Tikriti is in this country, and if he is not in this country a lot of delay would be caused by serving him."

G It was pointed out by counsel for the wife, after the commissioner had expressed this opinion, which, I think, was not necessarily a final decision in the matter, that if such a charge were made it would be at least open to the wife to plead in answer to the charge conduct conducing. The application was never renewed, and I am treating this case as if it had been made at the proper time.

H The mere fact that delay would be caused by serving him is not of itself, in my judgment, a sufficient ground for not granting an adjournment in order that an amendment may be made and the necessary steps taken. On the other hand I am not prepared to say that in every case where the parties come to trial, one knowing nothing of the circumstances in which the other side is asking for discretion and finding the evidence for the first time at the hearing, leave to amend must be given *ex debito justitiae*.

I It is true that the courts have gone a long way in civil actions in saying that leave to amend will always be granted where injustice will not thereby be done and where any injustice which is temporarily done can be remedied by costs. But it must always be remembered that a discretion has to be exercised judicially in the case, and in this matrimonial jurisdiction very often the exercise of the discretion is peculiarly difficult. I think that it would be wrong to say that, where a party had merely lain by and waited so to speak for the evidence to fall into his or her lap at the trial, leave to make the amendment must necessarily be given.

This situation was dealt with recently by DAVIES, J., at Birmingham Assizes

in *Clueit v. Clueit* (2) ([1958] 1 All E.R. 417). I agree with the learned judge's observations in which he said that, on the facts of the case before him, it was right that leave to amend should be given in order to enable one of the parties before him to make an allegation of adultery on the facts in the admission made by the other side in asking for discretion. He had in mind what was said by this court in *Burford v. Burford* (3) ([1955] 3 All E.R. 664), where this court in considering that situation by no means sought to lay down that in all such cases must leave to amend be given. I agree with DAVIES, J., in so far as he implied that it was very often the right thing to do, so that justice could be done between the parties appearing before the court.

The parties are not entirely helpless in these matters. When the petition is served on them by the other side, they are told that discretion is being asked for notwithstanding the adultery committed. If they want to raise the issue of adultery as a live issue and fight it, and not merely accept the finding of adultery which they are reasonably sure they will get against the other side at the hearing, if they want proof of it themselves, I think that it is *prima facie* incumbent on them to take steps so to obtain proof. The husband was not penniless. He was not without the means by which he could have taken steps to inquire whether his wife was then associating with this or any other man. He knew she had committed adultery before the presentation of the petition, but he did not know that she was pregnant. If he had found out that she was pregnant, that would have put him on inquiry because, whatever the physical relationship between him and his wife had been at the time of the conception, if she did not disclose her pregnancy to him, it would at least tend to show that she was doubtful whether he in truth was the father. He could have made inquiries at Bath, for he knew at least as soon as February, 1957, three months after the parting in November, 1956, that she was there. There was nothing in the world to prevent his solicitors making inquiry of the opposite party, and saying: "We see your client is asking for the discretion of the court notwithstanding her adultery. Are you prepared to give us any information which may save expense in proving our case?" No step at all was taken, and it was left in this way, that the husband came to trial without on his side any allegation of adultery made against his wife.

The commissioner refused him leave to amend. Although I am not upholding the particular reason for refusing leave to amend, viz., delay, and substituting our discretion for his (if that be the right way of dealing with the matter), I do not think that leave ought to be given to amend in this case so as to enable the husband at this late hour to make a positive charge of adultery against his wife.

We were referred in passing to a decision, which has stood since 1936, of LANGTON, J., in *B. v. B. & G.* (4) ([1936] 2 All E.R. 1254). It was a case of an attempt by the respondent wife to frame a charge of adultery in answer to a petition, on the language of the prayer which in that case did not refer to adultery but merely asked for discretion, which the court took as inferring that discretion would be asked for in respect of adultery. LANGTON, J., came to the conclusion that a pleading of that kind in answer to the petition would not stand, and I agree with him, notwithstanding the distinction which emerges in this case that the prayer does contain a reference to the matrimonial offence of adultery. When dealing with the admissibility of evidence in *Bevis v. Bevis* (5) ([1935] P. 86), MAUGHAM, L.J., said (*ibid.*, at p. 97):

"It may be observed that the petitioner, the husband, in the previous proceedings, according to the usual practice, stated in his petition that he would ask for the exercise of the discretion of the court in his favour, which was notice that he had been guilty of adultery and was notice to the wife that, complying with the direction, he had filed or lodged with the application for the registrar's certificate a statement of the matters in respect whereof the exercise of the discretion was prayed."

- A The present position is that the statement which is lodged with the court is not open to inspection by the opposite party until it is put in, and all that has happened in this case is that the husband has had notice by the wife that at some future date she was going to make an admission which she has not yet made. I do not think that it could be said in those circumstances that there was material on which the husband could have put in an answer of alleged adultery by reason
- B merely of the existence of that prayer. However, he did have an opportunity to take his own steps to establish that charge if he thought it right so to do, and he did not avail himself of it.

- We have been pressed with the argument that leave to amend in any case is futile because it is merely a question of amour propre. Once adultery is established against the wife, so far as maintenance is concerned, it does not in the least matter
- C in whose favour the decree is pronounced. I do not think that it can be quite so lightly dismissed. Although it is common nowadays for the discretion to be exercised, and indeed it is not easy to say in every case that the blame rests on the party who has been unsuccessful in the suit rather than on the one who has been successful, nevertheless proceedings in these courts are still proceedings for remedies for injuries suffered. If a husband has been injured by a matrimonial
- D offence committed by the wife, he is entitled at any rate to be heard to say that he wishes to have a judgment which embodies the declaration that he has suffered such an injury. I do not treat this application casually, as if it was a matter of mere triviality. So far as maintenance is concerned, as DAVIES, J., pointed out in *Clueit v. Clueit* (2) whatever happens in the result of this case, in any applica-
- E tion for maintenance the whole of the wife's conduct will be investigated and will be determined by the registrar. I entirely agree with that. My recollection is that observations to that effect have been made in this court from time to time.

In *Sydenham v. Sydenham & Illingworth* (6) ([1949] 2 All E.R. 196), in the Court of Appeal, DENNING, L.J., said, sufficiently clearly as I should have thought (*ibid.*, at p. 198):

- F "There is nothing in the statute to say that a wife against whom a decree has been made cannot be awarded maintenance, and there is nothing in it about discretion being exercised 'in favour of' one side or the other or about a 'compassionate allowance'. All it says is that on a decree of divorce the court may award maintenance to the wife. This includes a guilty wife as well as an innocent one, but in awarding maintenance the court must have regard,
- G of course, to the conduct of the parties . . . the registrar must do the best he can, not merely from the form of the decree but also from the short-hand note of the judgment."

- As it stands now, the record of the court shows that the wife has committed adultery. It shows that she has by that action at any rate forfeited her common
- H law right to be maintained, because her adultery was not condoned or connived at, and that she could not get any maintenance in a court of summary jurisdiction. It is only by virtue of divorce legislation that she is enabled to get maintenance at all, and in such cases the court will consider whether she ought to have maintenance. It could hardly be said here that she was entitled to nothing, because she has to make a home for the child of the marriage, of whom she has the custody, and it would not presumably be right to leave her without provision, if
- I she has to make a home for this child. It seems to be wrong to say that, because she is in fact the petitioner and because she has obtained a decree, therefore she is automatically in a stronger position than if the decree had been pronounced the other way round, where matrimonial offences are proved on both sides.

It is for the court, in practice in the first place the registrar, to consider the conduct of the parties. It is quite true that the registrar may be limited in his investigation to facts which have been proved, matters which have been established in the court; and, though this does not arise in this case, I think, in many

cases it may not be open to one party to raise matters which he had the opportunity of raising at the trial. In regard to a claim for maintenance, to say that the wife or the husband starts with a handicap in the registry because of the form of decree seems to me to be wrong. The vital thing is to consider what the facts are, and I do not think that it is right to say that a court in exercising its discretion in favour of the wife must necessarily be saying that her adultery, in the ordinary sense of the word, is excusable. Discretion is exercised nowadays for a variety of reasons, and it does not, I think, necessarily involve a palliation of the offence which has been committed and in respect of which discretion is sought. I have said this because of the plea addressed to this court by counsel for the husband to the effect that, if he did not get a decree in his favour, it might be a handicap in subsequent proceedings for maintenance.

One other argument was put forward by counsel for the husband. He said that justice demanded that he should have a decree, and that he was entitled to it because the commissioner had said at the end of the case in effect that, if only the pleadings had been in order and the charge of adultery had been before him, he would have pronounced a decree to both sides. On reading the interlocutory observations of the learned commissioner, I do not think that what he said in that respect can be treated without qualification. He said finally that, in pronouncing a decree, he would have to consider who was to blame, that he would not necessarily have pronounced a decree in favour of the husband in the exercise of discretion. The matter was, therefore, left at large.

[HIS LORDSHIP held that there was no ground for interfering with the decision of the commissioner on the issues of cruelty and condonation and concluded:] On all points, therefore, the appeal fails and ought to be dismissed.

MORRIS, L.J.: I agree. When the learned commissioner had before him the application for leave to amend the answer, I think that he had quite a difficult decision to make. The situation then was not the same as in a civil action when a defendant asks for leave to amend so as to present a cross claim. In a civil action in all probability such a cross claim can be presented at some later date. Nor do I think that it is enough to say that the circumstance that the wife has had to acknowledge her misconduct, and to seek to obtain the discretion of the court, will form part of the matter that can be considered on a claim for maintenance and can be referred to when the conduct of the parties is borne in mind. Nor is it sufficient answer to the application to say that the circumstance that the wife has to make her admission can be considered on any question as to costs. The point of view of the husband cannot be dismissed as being a manifestation of amour propre. He may feel that he desires to have on the record his complaint in regard to what he considers to have been grievous matrimonial misconduct on the part of his spouse. However, making allowance for all those considerations, I am not prepared to say that in this case the learned commissioner came to a wrong conclusion, and that he ought to have exercised his discretion in a different way.

[HIS LORDSHIP held that the commissioner was entitled to hold that there was no condonation of the husband's cruelty and said:] I therefore agree that the appeal fails.

PEARCE, L.J.: I also agree.

Appeal dismissed.

Solicitors: *Shield & Son* (for the wife); *Marcy & Co.* (for the husband).

[*Reported by F. A. AMIES, Esq., Barrister-at-Law.*]

NOTE.

R. v. MARLEY.

[COURT OF CRIMINAL APPEAL (Lord Goddard, C.J., Cassels and Diplock, JJ.), May 14, 1958.]

- B *Criminal Law—Evidence—Statutory declaration—Need to comply with exact terms of the statute—Criminal Justice Act, 1948 (11 & 12 Geo. 6 c. 58), s. 41 (3).*

[As to evidence by statutory declaration in the case of stealing goods in the possession of the British Transport Commission or others, see 10 HALSBURY'S LAWS (3rd Edn.) 784, 785, para. 1517.

- C For the Criminal Justice Act, 1948, s. 41 (3), see 28 HALSBURY'S STATUTES (2nd Edn.) 381.]

Appeal.

The appellant, Edward George Marley, was convicted at Surrey Quarter Sessions of the larceny of a quantity of clothing. At his trial it was proved that on Nov. 7, 1957, he took two chests to Bricklayers Arms Station to be sent to Morden or Mitcham Station to be called for. He stated that the chests contained leather goods. The chests arrived at Mitcham Station and on Nov. 9, 1957, the appellant collected them. He was stopped by two police officers, who opened the chests and found they contained articles of stolen property, which must have been put in by a confederate at Bricklayers Arms Station. The prosecution sought to prove the dispatch and non-receipt of the stolen property by a number of statutory declarations tendered as complying with the provisions of s. 41 (3) of the Criminal Justice Act, 1948. The statutory declarations as to dispatch were made by the packers of the goods and in five cases out of six were, so far as is material, in the following terms:

"On . . . I packed into a parcel . . ."

- F "This parcel was addressed by means of a . . . label to . . . It was handed to British Railways the same day for conveyance by rail to destination."

At the trial objection was taken to the declarations and, after argument in the jury's absence, the declarations were admitted.

- G The appellant appealed against his conviction on the ground that the declarations were wrongly admitted in evidence at this trial.

S. L. Langdon for the appellant.

M. Corkrey for the Crown.

- H LORD GODDARD, C.J., delivered the judgment of the court: The only point really in the case is one taken by counsel for the appellant concerning a most useful provision contained in the Criminal Justice Act, 1948, to prevent the necessity of having to call witnesses from all over the country to trace goods which have been stolen in the course of transit or at the place of destination, where the dispatch and course of travel has to be proved. Section 41 (3) of the Criminal Justice Act, 1948, provides:

- I "In the particulars of the goods which were stated at this point in the declaration the aggregate value of the goods was also stated. No reference is made in s. 41 (3) of the Criminal Justice Act, 1948, to the value of the goods. That enactment provides that a declaration shall be evidence "of the facts stated in the declaration", not merely of the facts mentioned in the sub-section. The judgment of the Court of Criminal Appeal, which finds against the validity of the statutory declaration in point of form, though the appeal is dismissed as there was no miscarriage of justice, is not directed to this aspect of the form of the declaration. Accordingly the description of the goods and the statement of value are not included in the outline of the form indicated above. The statutory declarations were admitted and the declarations were read to the jury at the trial at quarter sessions; the deputy chairman ruled that the declarations did not go beyond what was contemplated by s. 41 (3).

" In any proceedings for an offence consisting of the stealing of goods in the possession of the British Transport Commission or any Executive (other than the Hotels Executive) constituted under s. 5 of the Transport Act, 1947, or of receiving goods so stolen knowing them to have been stolen, or for an offence under s. 12 or s. 18 or s. 33 (2) of the Larceny Act, 1916, or s. 50 to s. 56 of the Post Office Act, 1908, a statutory declaration made by any person—(a) that he dispatched or received or failed to receive any goods or postal packet or that any goods or postal packet when dispatched or received by him were in a particular state or condition; or (b) that a vessel, vehicle or aircraft was at any time employed by or under the Post Office for the transmission of postal packets under contract, shall be admissible as evidence of the facts stated in the declaration."

In this case the statutory declarations are most of them in the same handwriting and are practically word for word the same in all material parts and have obviously been prepared and quite properly prepared by the railway police. I will refer to one of these to show what is the point counsel for the appellant has very properly called to the attention of the court. The people who make the declarations are for the most part packers who prove the preparation of the parcel. That is a preliminary point to the dispatch; the parcel has to be packed and that is part of the dispatching. They describe the packing up of the parcel, the addressing, labelling and the contents and the value which they set in each case. Then they say that the parcel was handed to British Railways for conveyance. In one case the declarant says: "I handed", and that is sufficient. If he handed it, that is enough, but otherwise the declarant ought to say "I saw it handed to the British Transport Commission" or the person who actually handed it to the British Transport Commission ought also to make a declaration. It is almost an unnecessary formality because the thing is packed for dispatch. It is proved to have got into the possession of the British Transport Commission because evidence is given, as in this case, that the goods were collected at the commission's station. If, however, documentary evidence by statutory declaration instead of by oral evidence is given, it is most important that there should be compliance with the exact terms of the statute that enables the evidence to be received. Therefore, the right course is for somebody to say that the goods were handed to the British Transport Commission; the declarant should say of his own knowledge that the goods were so handed either by him or by some person in his presence.

[HIS LORDSHIP then said that there was a hiatus in the declarations which were before the court in the present case, but that it was not one which justified setting aside the convictions. The court would apply the proviso to s. 4 (1) of the Criminal Appeal Act, 1907, which allowed the court to decide the point in the appeal in favour of the appellant but to dismiss the appeal as no substantial miscarriage of justice had occurred. Accordingly the appeal would be dismissed.]

Appeal dismissed.

Solicitors: *Registrar, Court of Criminal Appeal* (for the appellant); *Solicitor, British Transport Commission* (for the Crown).

[Reported by E. COCKBURN MILLAR, *Barrister-at-Law.*]

A CUSACK-SMITH AND OTHERS v. GOLD AND OTHERS.

[QUEEN'S BENCH DIVISION (Filcher, J.), May 6, 7, 8, 9, 1958.]

Landlord and Tenant—Repair—Breach of covenant—Defence of want of notice specifying breaches and of leave to proceed—Defendant a former assignee who had assigned his leasehold interest before action—Meaning of “lessee”—
 B *Law of Property Act, 1925 (15 & 16 Geo. 5 c. 20), s. 146—Leasehold Property (Repairs) Act, 1938 (1 & 2 Geo. 6 c. 34), s. 1 (3).*

In December, 1955, S.D., who had been an assignee of leasehold house property but had assigned his leasehold interest to E.P. Ltd., was an under-lessee of the premises. The landlords, the freeholders, served notices of breach of repairing covenant on the lessees, but not S.D., and affixed one such
 C notice to the door of the premises. E.P. Ltd. duly served a counter-notice under s. 1 (1) of the Leasehold Property (Repairs) Act, 1938*. In September, 1956, S.D. assigned his interest as underlessee. In November, 1956, the landlords obtained leave in proceedings to which E.P. Ltd. was a party to bring proceedings for forfeiture and for damages for breach of covenant. In
 D December, 1956, the landlords issued a writ against ten defendants including S.D., claiming against him damages for breach of repairing covenant. S.D. contended that the action did not lie against him on the grounds that leave of the court had not been obtained against him with the consequence that the action was not maintainable by reason of s. 1 (3) of the Act of 1938, and that he had not been served with notice of breach of covenant (as required by s. 1 (2) of the Act of 1938).

Held: (i) S.D. was not entitled to the benefit of s. 1 (3) of the Act of 1938 since the word “lessee” in that enactment had the same meaning as in s. 146 of the Law of Property Act, 1925, and meant a lessee who was in possession or who had a subsisting lease at the time when proceedings were taken, and S.D. had no subsisting tenancy at the date of the issue of the writ: accordingly the action was maintainable by the landlords against S.D.

F (ii) notice of breach of covenant had been served on S.D. by affixing it to the door of the premises.

[**Editorial Note.** The provisions of s. 196 of the Law of Property Act, 1925, apply to the service of notices and counter-notices under the Leasehold Property (Repairs) Act, 1938 (see *ibid.*, s. 7 (2)) and accordingly service of a notice required to be served on the lessee can be effected by affixing it to any house or building
 G comprised in the lease (see s. 196 (3) of the Act of 1925).

As to the effect of a counter-notice under the Act of 1938, see 23 HALSBURY'S LAWS (3rd Edn.) 588, para. 1272.

For the Leasehold Property (Repairs) Act, 1938, s. 1, see 13 HALSBURY'S STATUTES (2nd Edn.) 914.

For the Law of Property Act, 1925, s. 146, see 20 HALSBURY'S STATUTES (2nd
 H Edn.) 739.]

Case referred to:

(1) *Church Comrs. for England v. Kanda*, [1957] 2 All E.R. 815.

Preliminary Issue.

The plaintiffs in the present action were the landlords of house premises at
 I No. 113, Holland Road and Nos. 42 and 43, Elsham Road, Kensington, in the county of London. There were ten defendants of whom the first eight were in

* The terms of s. 1 (1) and s. 1 (2) of the Leasehold Property (Repairs) Act, 1938, as amended are printed at p. 364, letter F, post, and the terms of s. 1 (3) of that Act are as follows:—“Where a counter-notice is served by a lessee under this section, then, notwithstanding anything in any enactment or rule of law, no proceedings, by action or otherwise, shall be taken by the lessor for the enforcement of any right of re-entry or forfeiture under any proviso or stipulation in the lease for breach of the covenant or agreement in question, or for damages for breach thereof, otherwise than with the leave of the court.”

occupation of the premises and were within the protection of the Rent Restriction Acts. The ninth defendant was a company which at the time of the issue of the writ hereinafter mentioned was assignee of the leasehold estates in the premises, which were terms of ninety-six years from June 24, 1865. The tenth defendant, Mr. William Leslie Steele-Davies, had been assignee of the term of years in Nos. 42 and 43, Elsham Road between Mar. 26, 1946, and June 24, 1954, on which latter date he had assigned his leasehold interest in Nos. 42 and 43, Elsham Road to the ninth defendant, Elgin Properties, Ltd. which granted to him on July 12, 1954, an underlease of No. 43, Elsham Road. The tenth defendant assigned the underlease to Cronfield Estates, Ltd. on Sept. 6, 1956. On Dec. 5, 1955, the landlords served on the ninth defendant notice specifying breaches of repairing covenants in the leases of each of the premises and caused such notices to be affixed to the doors of the premises. The notice complied with s. 146 of the Law of Property Act, 1925, and s. 1 of the Leasehold Property (Repairs) Act, 1938, as amended by s. 51 of the Landlord and Tenant Act, 1954. The ninth defendant duly served on the landlords a counter-notice claiming the benefit of the Leasehold Property (Repairs) Act, 1938. On Nov. 30, 1956, the Divisional Court granted the landlords, on motion by them to which only the ninth defendant was respondent, leave in general terms to bring proceedings for forfeiture of the leases and for damages for breach of covenants. By writ dated Dec. 12, 1956, the landlords commenced this action in which they claimed against the tenth defendant, who alone defended the action, damages for breach of repairing covenants in the leases of Nos. 42 and 43, Elsham Road. By his defence the tenth defendant denied, in addition to other denials not material to the present issue, that notice had been served on him complying with the provisions of the Act of 1938, and that any leave to take proceedings against him had been obtained; the tenth defendant contended, therefore, that the landlords' claim against him for damages for breach of repairing covenant was not maintainable. On Feb. 4, 1958, Master HARWOOD ordered that the issue so raised should be determined as a preliminary issue.

H. Heathcote-Williams, Q.C., and Francis Coningsby for the plaintiffs.

R. E. Megarry, Q.C., and J. D. May for the tenth defendant.

Cur. adv. vult.

May 9. **PILCHER, J.**, read the following judgment: The plaintiffs in this action are the freeholders of three houses in Kensington, No. 113, Holland Road and Nos. 42 and 43, Elsham Road. In these proceedings the plaintiffs claim on the writ and the statement of claim possession of each of these three houses, mesne profits against certain of the defendants, and damages for breach of covenant to repair under the leases of the respective premises. In particular, they claim against the tenth defendant damages for breaches of covenant to repair in relation to No. 43, Elsham Road.

There are in all ten defendants to the action. The first eight defendants are apparently the present occupiers of the three houses I have mentioned. The tenth defendant, Mr. Steele-Davies, was between the years 1946 and 1954 the assignee of a long lease of No. 43, Elsham Road. This lease was dated Oct. 9, 1871, and was for ninety-six years from June 24, 1865. Accordingly it expires in mid-summer of 1961. On June 24, 1954, the tenth defendant assigned the remainder of the lease of No. 43, Elsham Road to the ninth defendant, Elgin Properties, Ltd. On July 12, 1954, the ninth defendant granted to the tenth defendant an underlease of these premises. He remained the underlessee of the premises until Sept. 6, 1956, on which date he in his turn assigned his underlease to Cronfield Estates, Ltd. Accordingly, since Sept. 6, 1956, the tenth defendant has had no present estate or interest in the house in question.

It seems that over the years the house with which I am concerned has been allowed to get into disrepair in breach of the repairing covenant in the lease. Accordingly, in December, 1955, the plaintiff landlords served on the ninth

A defendant, *Eggs Properties, Ltd.*, who were at that time the assignees of the lease, a notice in the appropriate form under s. 145 of the Law of Property Act, 1925, together with a schedule of dilapidations. At about the same time the landlords caused to be affixed to the front door of the premises a similar notice and schedule of dilapidations. I am satisfied that this notice, so affixed, constituted proper notice to the tenth defendant of all terms and it is with the tenth defendant alone that I am concerned.

The landlords have, by appropriate action, obtained orders for possession or forfeiture against the first eight defendants, the occupants of the three premises. The ninth defendant is now in liquidation. On Apr. 30, 1956, the ninth defendant apparently assigned the lease of the premises to one Rowe, who was a bankrupt; and on July 29, 1956, the official receiver gave notice to the landlords disclaiming Rowe's interest in the lease, but I am concerned only with the rights of the landlords against the tenth defendant. Within the twenty-eight days envisaged by the provisions of s. 1 (2) of the Leasehold Property (Repairs) Act, 1938, the ninth defendant served on the landlords a counter-notice as provided for in the subsection, claiming "the benefit" of the Act. The effect of the service of such a counter-notice is to require the landlord to obtain the leave of the court before he can institute any proceedings for forfeiture or recovery or for damages for breach of covenant. No counter-notice under the section was served on the landlords by the tenth defendant. On May 30, 1956, the landlords applied by originating summons to the master, citing the ninth defendant only and seeking leave to proceed by virtue of the provisions of s. 1 (5) of the Act of 1938. The summons was adjourned, and before any step was taken it was ascertained that a change in the premises had occurred. The landlords accordingly moved the Divisional Court for leave to proceed, citing only the ninth defendant, as respondent to the motion. The Divisional Court, by order dated Nov. 30, 1956, granted to the landlords leave in general terms to take proceedings for forfeiture on the ground of breach of covenant to repair, and also for damages. While the tenth defendant was not cited to appear to the motion, an affidavit by him was read and it seems reasonably clear that he must have been aware of what was happening.

In pursuance of the leave to proceed so granted by the Divisional Court, the landlords on Dec. 12, 1956, issued the writ in the present proceedings against all the ten defendants to whom I have referred. The only defendant to put in a defence to the statement of claim was the tenth defendant. By his defence, the tenth defendant denies that any proper notice was ever served on him in accordance with the provisions of the Leasehold Property (Repairs) Act, 1938, as amended by the Landlord and Tenant Act, 1954. I have already stated that in my view such notice was properly served on him by affixing the notice and schedule of dilapidations to the door of the premises in question, and accordingly I say no more about that. The tenth defendant also put forward a defence based on the facts in regard to his liability for breaches of covenant. It was agreed by counsel that this was a matter with which I need not concern myself. The tenth defendant further contended that the present proceedings were not maintainable against him because the landlords had not obtained the necessary leave of the court to take proceedings against him in accordance with the provisions of s. 1 (3) of the Leasehold Property (Repairs) Act, 1938, as amended. On this point a number of arguments were addressed to me by counsel on either side, and it is this point only which I have to determine.

I It was not in dispute that the tenth defendant, having been an assignee of the lease from 1946 to 1954 and having been an underleasee, had before the writ was issued in the present proceedings* on Dec. 12, 1956, parted with all his estate and interest in the premises. It was also common ground that, although the ninth defendant served the landlords with a counter-notice under s. 1 (1) of the Act of 1938, the tenth defendant did not do so.

* He assigned his underlease on Sept. 6, 1956; see p. 362, letter B, ante.

On behalf of the landlords, counsel submitted that the tenth defendant did not, on the admitted facts, come within the category of persons who were entitled to receive a notice under s. 146 of the Law of Property Act, 1925, or under s. 1 (1) of the Leasehold Property (Repairs) Act, 1938. Both these sections place restrictions on the right of a landlord to take proceedings against lessees. The situation of the parties and their relationship to each other must therefore be viewed as at the date of the issue of the writ when, as in this case, a writ has been issued. Counsel for the landlords submitted that on Dec. 12, 1956, when the writ in the present proceedings was issued, the tenth defendant had parted with all his estate and interest in the house in question and was not in any sense of the word a "lessee" within the meaning of the definition of the word both in the Acts of 1925 and 1938. He further submitted that, not having issued a counter-notice, the tenth defendant was not in any case entitled to claim "the benefit" of the Act of 1938.

It is quite clear that s. 146 of the Act of 1925 deals only with the restrictions on the landlord's right to re-enter and claim forfeiture for breaches of covenant and it was not, I think, in dispute that where the word "lessee" appears in this section it can only refer to a lessee in possession or one who has a subsisting lease at the time when proceedings for forfeiture or re-entry are taken. The definition of "lessee" in s. 1 (5) (b) of the Act of 1925 must, I think, be read in this light. Re-entry and forfeiture are clearly not remedies which can be sought against anyone in the position of the tenth defendant who had at the material time divested himself of all present estate and interest in the premises. Section 1 (1) of the Act of 1938, which deals for the first time with restrictions on the landlord's right to take proceedings for damages for breaches of covenant, requires the service by a lessor on a lessee of a notice under s. 146 of the Act of 1925. Sub-sections (1) and (2) of s. 1 of the Act of 1938, as amended by the Landlord and Tenant Act, 1954, are in the following terms:

"(1) Where a lessor serves on a lessee under s. 146 (1) of the Law of Property Act, 1925, a notice that relates to a breach of a covenant or agreement to keep or put in repair during the currency of the lease all or any of the property comprised in the lease, and at the date of the service of the notice three years or more of the term of the lease remain unexpired, the lessee may within twenty-eight days from that date serve on the lessor a counter-notice to the effect that he claims the benefit of this Act.

"(2) A right to damages for a breach of such a covenant as aforesaid shall not be enforceable by action commenced at any time at which three years or more of the term of the lease remain unexpired unless the lessor has served on the lessee not less than one month before the commencement of the action such a notice as is specified in s. 146 (1) of the Law of Property Act, 1925, and where a notice is served under this sub-section, the lessee may, within twenty-eight days from the date of the service thereof, serve on the lessor a counter-notice to the effect that he claims the benefit of this Act."

I do not propose to read the remainder of the section; but, in my view, a reading of the whole of s. 1 of the Act of 1938 leads to the conclusion that throughout the section wherever the words "a lessee" or "the lessee" are used, they must be given the same meaning as they have in s. 146 of the Act of 1925. The effect of s. 1 of the Act of 1938 is, in my view, to require that the leave of the court be obtained before proceedings for re-entry, forfeiture or for damages for breach of covenant are brought by a landlord against the same category of person on whom the appropriate notice had to be served by the landlord before he took proceedings for re-entry or forfeiture under s. 146 of the Act of 1925. Section 7 (1) of the Act of 1938 provides that the expression "lessee" in that Act shall have the same meaning as in the Act of 1925. If one looks at s. 1 (5) of the Act of 1938, one finds set out what the landlord has to prove before he is granted leave to proceed against a lessee for forfeiture or re-entry or damages. The matters

- A there set out seem to me to be consistent with the view that the protection afforded by the Act of 1938 was intended to be confined to lessees in possession or lessees having a present estate or interest in the premises. It is quite true that the matters which the court has to take into consideration may also be important when considering persons who are not lessees in possession or lessees with a present estate or interest in the premises; but it seems to me that they are all matters which are
- B important when one is dealing with the lessee in possession or the lessee with a present estate or interest in the premises.

On behalf of the tenth defendant counsel submitted that the definition of the word "lessee" in s. 146 (5) (b) of the Act of 1925 as including "the persons deriving title under a lessee" was wide enough to cover an assignee in the position of the tenth defendant who had parted with all his estate and interest before the

C material date. Such a person would not, however, in my view, have been entitled to receive a notice under the Act of 1925 where re-entry or forfeiture only was in question. The notice required by the Act of 1938, where damages are also in question, is the very notice under the Act of 1925 and must, in my view, be confined to such persons as would have been entitled to receive a notice under the Act of 1925.

- D I therefore conclude that the tenth defendant was not entitled to receive a notice in this case. He does not, in my opinion, come within the category of persons to whom the landlord is required to give a notice under the Act of 1925 before taking proceedings for re-entry or forfeiture, and is thus not within the category of persons on whom "the benefit" of the Act of 1938 is conferred.

- This finding is sufficient to dispose of the only point in the case which I have been
- E asked to determine. A number of interesting arguments were addressed to me by counsel on either side on the basis that the tenth defendant was within the category of persons on whom the landlords were entitled to serve a notice under s. 146 of the Act of 1925 and under s. 1 of the Act of 1938. Counsel for the defendant submitted with some force that if the tenth defendant was entitled to such a notice and was properly served, s. 1 (3) of the Act of 1938 had the effect of pre-
- F venting the landlords from instituting proceedings against all other persons within the category without the leave of the court, whether they had served a counter-notice or not. It would seem from the recent decision of the Court of Appeal in *Church Comrs. for England v. Kanda* (1) ([1957] 2 All E.R. 815), that this argument is probably well founded. Arguments were also addressed to me on either side as to the effect of the order of the Divisional Court dated Nov. 30, 1956,
- G granting to the landlords leave to proceed in general terms, although only the ninth defendant had been cited as respondent to the motion. I am inclined to the view that the intention of the Divisional Court, in spite of the form of the order, was only to grant to the landlords leave to proceed against the ninth defendant, which was the only party cited. However, taking the view which I do, for the reasons which I have stated, namely, that the tenth defendant is
- H not within the category of persons to whom protection is given by the Act of 1925 against a landlord's claim to forfeiture or re-entry or by the Act of 1938 against a landlord's claim for damages for breaches of covenant, the other points to which I have referred and which were argued before me do not arise.

- I determine the point of law submitted to me in favour of the landlords. In my view, the landlords are entitled to recover in the present action against the
- I tenth defendant such damages for breaches of covenant to repair as they can prove to be properly payable by him.

Judgment for the plaintiffs, the landlords.

Solicitors: *Boxall & Boxall* (for the plaintiffs); *Geo. H. Gibson & Co.* (for the tenth defendant).

[Reported by E. COCKBURN MILLAR, Barrister-at-Law.]

HUGHES v. HUGHES.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Wrangham, J.), April 23, 1958.]

Solicitor—Lien—Retaining lien—Divorce suit—Petitioner's solicitor entitled only to qualified lien as parties other than petitioner interested in the petition.

A solicitor who, while acting for a petitioner in a divorce suit, is discharged by his client has a qualified, not an absolute, lien over such papers in the cause as are in the solicitor's possession; this is because a divorce petition is not a matter in which the petitioner alone is interested, but raises a question of status and is a matter in which there is an overriding public interest in there being full investigation.

[As to delivery up of papers in possession of solicitor required for conduct of suit, see 31 HALSBURY'S LAWS (2nd Edn.) 244, para. 268, note (1); and for cases on the subject, see 42 DIGEST 305, 306, 3400-3407.]

Cases referred to:

- (1) *Re Rapid Road Transit Co.* [1909] 1 Ch. 96; 78 L.J.Ch. 132; 99 L.T. 774; 10 Digest (Repl.) 1004, 6902.
- (2) *Re Boughton, Boughton v. Boughton*, (1883), 23 Ch.D. 169; 48 L.T. 413; 42 Digest 306, 3404.
- (3) *Boden v. Hensby*, [1892] 1 Ch. 101; 61 L.J.Ch. 174; 65 L.T. 744; 42 Digest 306, 3406.
- (4) *Dessau v. Peters, Rushton & Co., Ltd.*, [1922] 1 Ch. 1; 91 L.J.Ch. 254; 126 L.T. 648; 42 Digest 306, 3407.

Summons.

This was an appeal against an order of Mr. Registrar COMPTON MILLER dated Mar. 31, 1958.

The facts, as stated by WRANGHAM, J., were as follows. On Oct. 10, 1956, the husband presented a petition for divorce (which was later amended) alleging desertion by the wife. On Dec. 11, 1957, the husband discharged the solicitors who had until then been acting for him and they handed over the papers to his new solicitor, one Isaacs, subject to his respecting their lien for costs. On Mar. 26, 1958, the husband discharged Mr. Isaacs. On Mar. 31, 1958, Mr. Registrar COMPTON MILLER made an order directing Mr. Isaacs to deliver up within fourteen days all papers in his possession to the husband's present solicitors, on the undertaking of those solicitors to respect both the lien of the first firm of solicitors who acted for the husband and also the lien of Mr. Isaacs, and that the lien of the first firm should take precedence over the lien of Mr. Isaacs and that Mr. Isaacs should be relieved of his undertaking to respect the first firm's lien. Mr. Isaacs now appealed, contending that he had a lien on those papers for his costs which he was entitled to assert without qualification. The case was adjourned into court for judgment.

S. E. Brodie for Mr. Isaacs.

Miss A. M. Ryan for the husband.

Cur. adv. vult.

Apr. 23. WRANGHAM, J., read the following judgment in which, after stating the facts, he continued: The general rule is that a solicitor who is discharged by his client during an action (otherwise than for misconduct) can retain any papers in the cause in his possession until his costs have been paid: *Re Rapid Road Transit Co.* (1) ([1909] 1 Ch. 96). That rule, however, is subject to this qualification, that this absolute lien cannot be asserted where the cause is one in which other parties are interested and where those other parties would be embarrassed by the assertion of the lien. In such a case the solicitor must deliver up the papers subject to his lien, that is to say, subject to his right to have the papers returned to him at the conclusion of the proceedings for which they are needed, and to such undertakings as may be required to make his lien effective

- A against his former client: *Re Boughton, Boughton v. Boughton* (2) ((1883), 23 Ch.D. 169). This qualification has been applied in the cases of a partition action (*Boden v. Hensby* (3), [1892] 1 Ch. 101) and of an action for the dissolution of a partnership (*Dessau v. Peters, Rushton & Co., Ltd.* (4), [1922] 1 Ch. 1). The question now arises whether a petition for divorce should be regarded as a matter in which parties other than the petitioner are interested, and one in which the withholding of relevant documents might embarrass those parties, or as being analogous to a civil action in which the plaintiff alone has a beneficial interest. In the latter case, as SARGANT, J., points out in *Dessau v. Peters, Rushton & Co., Ltd.* (4) (*ibid.*, at p. 4), the plaintiff's former solicitor would be entitled to enforce an absolute lien, however much it might embarrass the plaintiff, whereas in the former case only the qualified lien could be asserted.
- C In my judgment a petition for divorce can never properly be described as a matter in which the petitioner alone is interested. Divorce affects status, the status not merely of the petitioner, but of one or more other parties. In many petitions (though not in this one) the interests of children of the marriage are concerned; and it would be odd if the right of a solicitor in a divorce case to assert an unqualified lien depended on the question whether or not there were children of the marriage in issue.
- D A respondent may have an interest in a divorce petition of quite a different character from that of a defendant in a civil action; for there are many respondents whose welfare depends very much on the success of uncontested petitions. That does not, indeed, apply to this particular case, where the respondent denies the petitioner's charge of desertion and has presented a cross-prayer based on desertion by him; but it is none the less, I think, a potent argument to show that a divorce petition is, by its very nature, a proceeding in which others than the petitioner are interested. Finally, there is an overriding public interest in a full and complete investigation of the facts of any divorce case. Divorce cases cannot be disposed of by agreement, like civil litigation. The Matrimonial Causes Act, 1950, imposes on the court a duty to inquire into matters and to refuse to grant decrees unless satisfied of certain facts, irrespective of the wishes of the parties; and there is provision for the intervention in divorce proceedings in certain circumstances of the Queen's Proctor, representing the public, and, indeed, of any individual member of the public. It seems to me that the assertion of an absolute right to refuse to deliver up material papers must be calculated to embarrass that full investigation of the matter which the public interest requires in divorce proceedings. I therefore
- G hold that Mr. Isaacs does not possess the absolute lien which he claims and that the order of Mr. Registrar COMPTON MILLER, which gave effect to his qualified lien, was correct.

There remains a subsidiary question on that part of the registrar's order which directed that Mr. Isaacs be relieved from his undertaking to the first firm of solicitors. It is contended that Mr. Isaacs personally undertook to pay the costs of that firm, and that the registrar had no jurisdiction to deal with that undertaking. In my opinion Mr. Isaacs did no more, in his transaction with the first firm of solicitors, than to undertake to do everything to make their lien for costs effective against the petitioner; and if he complies with the registrar's order he will be fulfilling that undertaking. I am disposed to think that that part of the registrar's order which in terms relieves Mr. Isaacs from his undertaking is mere surplusage, the true view being that the undertaking has been fully complied with; but the point appears to be of no practical importance.

The application will therefore be dismissed.

Order accordingly.

Solicitors: *Edward Isaacs; Adams & Co.* (for the husband).

[*Reported by A. T. HOOLAHAN, Esq., Barrister-at-Law.*]

BALDWIN & FRANCIS, LTD. v. PATENTS APPEAL TRIBUNAL AND OTHERS.

[COURT OF APPEAL (Jenkins, Parker and Pearce, L.JJ.), April 29, 30, May 1, 2, 1958.]

Certiorari—Error on face of record—Construction of documents—Technical scientific terms—Evidence necessary to inform court of meaning of terms—Patent specifications—Whether part of record—Whether certiorari would lie to Patents Appeal Tribunal if expert evidence needed to explain technicalities—Patents Act, 1949 (12, 13 & 14 Geo. 6 c. 87), s. 9, s. 85 (10).

Patent—Appeal tribunal—*Certiorari*.

If a document is part of the record of an inferior court and the decision shows on its face that the document has been misconstrued, certiorari may lie (see p. 371, letter D, post).

Certiorari will lie to quash a decision of the Patents Appeal Tribunal (*R. v. Patents Appeal Tribunal, Ex p. Champion Paper & Fibre Co.*, [1957] 1 All E.R. 227, approved; see p. 370, letters G and H, post).

The superintending examiner ordered that the patent for which the respondents had applied should be sealed with a reference to the appellants' prior patent on the ground that the respondents' invention could not be performed without substantial risk of infringing the appellants' patent (s. 9 of the Patents Act, 1949). The Patents Appeal Tribunal reversed this decision, and the tribunal's decision set out an extract of the appellants' specification. No appeal lay in this instance from the tribunal's decision. The appellants applied for certiorari to quash the tribunal's decision on the ground that the tribunal had misconstrued the specifications. The specifications used technical scientific terms.

Held: (i) both specifications formed part of the record, in the case of the appellants' specification because an extract of it was embodied in the tribunal's decision (*Re Gilmore's Application*, [1957] 1 All E.R. 796, applied) and, in the case of the respondents' specification, because their application initiated the proceedings (dictum of DENNING, L.J., in *R. v. Northumberland Compensation Appeal Tribunal, Ex p. Shaw*, [1952] 1 All E.R. at p. 130, applied).

(ii) the specifications could not be construed without the court's being informed by evidence concerning the meaning of technical scientific terms and, as the court could not on such an application as this (which did not go to jurisdiction) receive evidence or look at evidence given in the patent proceedings, the court could not determine whether the specifications had been misconstrued, and, therefore, the application for certiorari failed.

Appeal dismissed.

[As to error on the face of the proceedings as a ground for certiorari, see 11 HALSBURY'S LAWS (3rd Edn.) 61, para. 118, and for cases on the subject, see 16 DIGEST 108-113, 79-134.

As to certiorari to quash decisions of bodies exercising judicial or quasi-judicial functions, see 11 HALSBURY'S LAWS (3rd Edn.) 128, para. 239, note (c); and for cases on the subject, see 16 DIGEST 387-389, 2282-2312.

As to appeals to the Patents Appeal Tribunal, see 24 HALSBURY'S LAWS (2nd Edn.) 573, para. 1090, note (k); and as to insufficiency of description as a ground of opposition to a patent, see *ibid.*, 565, para. 1076.

For the Patents Act, 1949, s. 9 and s. 85 (10), see 17 HALSBURY'S STATUTES (2nd Edn.) 638, 708, and p. 370, letters C and H, post.]

A Cases referred to:

- (1) *R. v. Patents Appeal Tribunal, Ex p. Champion Paper & Fibre Co.*, [1957] 1 All E.R. 227; 56 R.P.C. 323.
- (2) *R. v. Nat Bell Liquors, Ltd.*, [1922] 2 A.C. 128; 91 L.J.P.C. 146; 127 L.T. 437; 16 Digest 419, 2795.
- (3) *Re Gilmore's Application*, [1957] 1 All E.R. 796; sub nom. *R. v. Medical Appeal Tribunal, Ex p. Gilmore*, [1957] 1 Q.B. 574.
- (4) *R. v. Northumberland Compensation Appeal Tribunal, Ex p. Shaw*, [1952] 1 All E.R. 122; [1952] 1 K.B. 338; 116 J.P. 54; 3rd Digest Supp.
- (5) *Shore v. Wilson*, (1842), 9 Cl. & Fin. 355; 4 State Tr. N.S. App. 1370; 8 E.R. 450; *subsequent proceedings*, sub nom. *A.-G. v. Shore*, (1843), 11 Sim. 592; sub nom. *A.-G. v. Wilson*, (1848), 16 Sim. 210; 17 Digest (Repl.) 266, 699.
- (6) *Neilson v. Harford*, (1841), 8 M. & W. 806; 1 Web. Pat. Cas. 295; 11 L.J.Ex. 20; 151 E.R. 1266; 17 Digest (Repl.) 255, 589.

Appeal.

D The appellants, the owners of a patent, appealed from the decision of the Queen's Bench Divisional Court (LORD GODDARD, C.J., and DONOVAN, J.), given on Oct. 14, 1957, refusing their application for certiorari to quash a decision of the Patents Appeal Tribunal (LLOYD-JACOB, J.), dated Jan. 17, 1957, reversing a decision of the superintending examiner (E. T. VINCENT, Esq.), dated June 15, 1956, and made in pursuance of s. 9 of the Patents Act, 1949. In support of the application for certiorari the appellants had filed an affidavit which, with four exhibits thereto, made explanation of the relevant electrical system; the affidavit also exhibited a copy of the specification of the appellants' patent and a copy of the interim decision of the superintending examiner dated June 15, 1956. The facts appear in the judgment of PARKER, L.J.

F *J. P. Graham, Q.C., Anthony Cripps, Q.C., and M. Heald* for the appellants, the applicants for certiorari and owners of the earlier patent.

G. W. Tookey, Q.C., S. I. Levy, Q.C., and J. A. S. Hall for the respondents, the applicants for the later patent.

G JENKINS, L.J.: I will ask PARKER, L.J., to deliver the first judgment in this case.

H PARKER, L.J.: This is an appeal from a decision of the Divisional Court, consisting of LORD GODDARD, C.J., and DONOVAN, J., refusing an application for an order of certiorari to quash an order made by the Patents Appeal Tribunal on Jan. 17, 1957. That decision reversed a decision of the superintending examiner made in pursuance of s. 9 of the Patents Act, 1949.

I The facts, so far as material, are in a very short compass. On Nov. 23, 1950, the respondents to this appeal, Anderson Boyes & Co., Ltd., made application for patent No. 703630, and in due course filed and published (as they were bound to do) a complete specification, entitled "Improvements in or relating to Protective Systems for Polyphase Alternating Current Loads". Whereas there already (as I understand it) existed inventions ensuring that the development of an earth fault in a circuit would automatically break the circuit, the improvement in question was designed to prevent the re-closing of the circuit while the earth fault remained unrepaired. The appellants, Baldwin & Francis, Ltd., were owners of a prior patent, No. 658823, the complete specification of which was entitled "Improvements in and relating to Earth Leakage Protection Systems for Electric Motors, Cables and Other Apparatus". Like the respondents' improvements, the appellants' improvements were designed also to

prevent the re-closing of a circuit in which an earth fault had developed until that fault was repaired. A

In due course the appellants opposed the grant of the patent applied for, on a number of different grounds, the only ground material now being the ground provided for in s. 14 (1) (g) of the Patents Act, 1949—

“ that the complete specification does not sufficiently and fairly describe the invention or the method by which it is to be performed.” B

Their contention was that the specification could not fairly describe the invention or the method by which it was to be performed without referring to the appellants' patent No. 658823, and that such a reference should be directed under s. 9 of the Patents Act, 1949. Section 9 (1) provides: C

“ If, in consequence of the investigations required by the foregoing provisions of this Act or of proceedings under s. 14 or s. 33 of this Act, it appears to the comptroller that an invention in respect of which application for a patent has been made cannot be performed without substantial risk of infringement of a claim of any other patent, he may direct that a reference to that other patent shall be inserted in the applicant's complete specification by way of notice to the public unless within such time as may be prescribed either—(a) the applicant shows to the satisfaction of the comptroller that there are reasonable grounds for contesting the validity of the said claim of the other patent; or (b) the complete specification is amended to the satisfaction of the comptroller.” D

In due course the matter was investigated by Mr. Vincent, the superintending examiner on behalf of the comptroller, and by an interim decision dated June 15, 1956, he decided that the invention could not be performed without substantial risk of infringement of the appellants' patent. He allowed one month to enable the respondents to submit proposals for amending the specification. No such proposals were forthcoming, and accordingly the superintending examiner, by a final decision dated Aug. 31, 1956, ordered that the patent applied for be sealed with a reference to the appellants' patent No. 658823. The present respondents thereon appealed (as is provided for in the Act) to the Patents Appeal Tribunal, which, on Jan. 17, 1957, gave a written decision reversing the decision of the superintending examiner. From that decision of the Patents Appeal Tribunal there can be no further appeal, none being provided for by statute, and the appellants' only remedy accordingly is by way of an order of certiorari to quash the decision for an error of law on the face of the record. E

That an order of certiorari will lie, in a proper case, to quash a decision of that tribunal is, I think, clear. Though the tribunal consists of a judge of the High Court, the Act specifically provides, by s. 85 (10), that F

“ An appeal to the Appeal Tribunal under this Act shall not be deemed to be a proceeding in the High Court.” G

Accordingly, the decision of the tribunal is a decision of an inferior tribunal of a kind to which an order of certiorari will issue; and indeed that was decided by the Divisional Court in *R. v. Patents Appeal Tribunal, Ex p. Champion Paper & Fibre Co.* (1) ([1957] 1 All E.R. 227). H

The appellants, being dissatisfied with the decision of the tribunal, accordingly applied to the Divisional Court for an order of certiorari. There was, of course, no question of lack of jurisdiction; but it was said before that court that there were two errors of law appearing on the face of the record. First, it was said that the tribunal had misconstrued s. 9 of the Patents Act, 1949. As to that, the Divisional Court could find no such error; and there is indeed no appeal to this court from that part of the decision. Secondly, it was said that the tribunal had erred in misconstruing the rival specifications, or one of them. As to that, I

- A the Divisional Court refused to consider the meaning of the specifications, holding that they were unable to do so without being instructed in the technicalities of electrical engineering. It is from this part of the decision that the appellants appeal to this court. Counsel, on their behalf, puts his contention in this way. Before the tribunal can decide whether there is a substantial risk of infringement, it must construe the rival specifications. The construction
- B of a written document is a matter of law. Reading the decision of the tribunal (so he says) it is clear that the tribunal must have misconstrued the specifications, and accordingly there is an error of law on the face of the record.

- Now it is clear that proceedings such as these are in no sense by way of appeal. The court can look, and look only, at the reasoned decision, and at such other documents as can fairly be said to form part of the record. If no reasoned
- C decision is given, the error of law, if error there be, will not be detected. The face of the record (as LORD SUMNER put it in *R. v. Nat Bell Liquors, Ltd.* (2), [1922] 2 A.C. 128 at p. 159) was then* "the inscrutable face of a sphinx". In the ordinary case, where, as here, what is called a "speaking order" is made, the error, if error there be, takes the form of the misconstruction or misapplication of a statute or regulation. This case, so far as I know, is the first case
- D where it is said that the error consists of the misconstruction of some other document. Logically, however, if that document does form part of the record and the decision on its face shows that the tribunal has misconstrued it, I do not see why certiorari will not lie. It is an error of law, albeit one different from that sometimes found.

- The first question, therefore, is whether these specifications form part of the
- E record. As regards the appellants' specification, an extract from this is set out in the tribunal's decision, and, following the decision of this court in *Re Gilmore's Application* (3) ([1957] 1 All E.R. 796), I think that the effect of this is to make the whole specification part of the record. As regards the respondents' specification, it is true that specific extracts are not set out, but it is their application (as the title to the decision shows) which is the document initiating the proceedings,
- F and, looked at in that way, again I should have thought formed part of the record. Indeed, DENNING, L.J., in *R. v. Northumberland Compensation Appeal Tribunal, Ex p. Shaw* (4) ([1952] 1 All E.R. 122) said this (*ibid.*, at p. 130):

- "It appears that the Court of King's Bench always insisted that the record should contain, or recite, the document or information which initiated the
- G proceedings and thus gave the tribunal its jurisdiction . . ."

- Accordingly, in my judgment both these documents (as counsel for the appellants contends) form part of the record. Whether (as he also contends) the decision of the superintending examiner forms part of the record I find it unnecessary (for reasons which will appear hereafter) to determine. So far, therefore, I
- H agree with the argument of counsel for the appellants.

- The next question is whether either of these documents has been misconstrued. This, of course, means that the court must itself decide what the right construction is. The documents in this case, by their very nature, are dealing with technical matters of science, and technical terms are used. Where technical words are used in a document, *prima facie* they are used in their technical sense;
- I and, where the words are technical words of science as opposed to technical legal terms, evidence of experts or of books dealing with the subject is admissible, to inform the court of their meaning. Thus, when the language of the instrument is such as the court does not understand, it is competent to receive evidence of the proper meaning of that language, and this is so whether it is written (for instance) in a foreign tongue or contains technical terms of science or art. I

* By reason of the change in the nature of the "record" of summary convictions effected by the Summary Jurisdiction Act, 1848.

need only refer to two passages in *Shore v. Wilson* (5) ((1842), 9 Cl. & Fin. 355). A
The first passage is from the judgment of PARKE, B. (*ibid.*, at p. 555). He said this:

"This being assumed, as a matter which cannot be controverted, I apprehend that there are two descriptions of evidence (the only two which bear upon the subject of the present inquiry), and which are clearly admissible in every case for the purpose of enabling a court to construe any written instrument, and to apply it practically. In the first place, there is no doubt that not only where the language of the instrument is such as the court does not understand, it is competent to receive evidence of the proper meaning of that language, as when it is written in a foreign tongue; but it is also competent, where technical words or peculiar terms, or indeed any expressions are used, which at the time the instrument was written had acquired an appropriate meaning, either generally or by local usage, or amongst particular classes."

TINDAL, C.J., said (*ibid.*, at p. 566):

"Such investigation does of necessity take place in the interpretation of instruments written in a foreign language; in the case of ancient instruments, where, by the lapse of time and change of manners, the words have acquired in the present age a different meaning from that which they bore when originally employed; in cases where terms of art or science occur; in mercantile contracts, which in many instances use a peculiar language employed by those only who are conversant in trade and commerce; and in other instances in which the words, besides their general common meaning, have acquired, by custom or otherwise, a well-known peculiar idiomatic meaning in the particular country in which the party using them was dwelling, or in the particular society of which he formed a member, and in which he passed his life. In all these cases evidence is admitted to expound the real meaning of the language used in the instrument, in order to enable the court or judge to construe the instrument, and to carry such real meaning into effect. But whilst evidence is admissible in these instances for the purpose of making the written instrument speak for itself, which without such evidence would be either a dead letter, or would use a doubtful tongue, or convey a false impression of the meaning of the party, I conceive the exception to be strictly limited to cases of the description above given..."

Those judgments were dealing with the admissibility of evidence. In my judgment, however, not only is the court competent to receive such evidence, but it must do so, to understand the language used. One judge may, by reason of his training or by reason of experience, have more knowledge of technical terms of science than another, but both must inform themselves by evidence of the meaning of the language used—unless the matter involved is one of which judicial notice can be taken. Now without in any way seeking to limit the matters of which judicial notice may be taken, I am quite clear that in this case the court must be informed by evidence, be it only the evidence derived from books dealing with the matter. A case might, of course, arise (as JENKINS, L.J., mentioned in argument) where the two rival specifications are expressed in identical language. In such a case, infringement must arise, whatever the construction. In such a case, however, as this case, where similar improvements are the subject of rival specifications expressed in different words, the exact meaning of the technical words used must be a matter of evidence. To take an example in the present case: the appellants' specification uses the expression "current injected . . . by means of a . . . resistance". It is clear that evidence is necessary, and indeed as I understand it evidence was given in the proceedings, as to the exact meaning and implication of that expression. One can perhaps test the matter by imagining that these were infringement proceedings, tried by

A a judge and jury. In that case it is clear that, while the construction of the documents would be for the judge, it would be for the jury to determine on the evidence the exact meaning of the terms used. Thus, in *Neilson v. Harford* (6) ((1841), 1 Web. Pat. Cas. 295), PARKE, B., said this (*ibid.*, at p. 370):

B “Then we come to the question itself, which depends on the proper construction to be put on the specification itself. It was contended, that of this construction the jury were to judge. We are clearly of a different opinion. The construction of all written instruments belongs to the court alone, whose duty it is to construe all written instruments, as soon as the true meaning of the words in which they are couched, and the surrounding circumstances, if any, have been ascertained by the jury; and it is the duty of the jury to take the construction from the court, either absolutely, if there be no words to be construed as words of art, or phrases used in commerce, and the surrounding circumstances to be ascertained, or conditionally, where those words or circumstances are necessarily referred to them.”

D Accordingly, I am satisfied that we cannot construe the specifications without being informed by evidence, and, that being so, the application for an order of certiorari must fail in limine. On such an application, not being one going to jurisdiction, this court cannot look at the evidence given in the proceedings or receive new evidence on affidavit.

E In these circumstances, I find it unnecessary to consider further the specifications, the decision of the superintending examiner, or the decision of the tribunal itself.

F In my judgment, the Divisional Court were right, and this appeal should be dismissed.

PEARCE, L.J.: I agree.

F JENKINS, L.J.: I also agree.

Appeal dismissed. Leave to appeal to the House of Lords refused.

Solicitors: *Parker, Garrett & Co.*, agents for *Benson, Burdekin & Co.*, Sheffield (for the appellants, the applicants for certiorari and owners of the earlier patent); *Bristows, Cooke & Carpmael* (for the respondents, the applicants for the later patent).

[*Reported by* HENRY SUMMERFIELD, ESQ., *Barrister-at-Law.*]

A

R. v. MEDICAL APPEAL TRIBUNAL (NORTH MIDLAND REGION), *Ex parte* HUBBLE.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Cassels and Diplock, JJ.), May 6, 7, 16, 1958.]

Industrial Injury—Medical appeal tribunal—Jurisdiction—Appeal by claimant against final assessment of disability as too small—Tribunal's right and duty to use their own expert knowledge—Whether tribunal had jurisdiction to set aside assessment on the ground that there was then no loss of faculty resulting from the industrial injury—National Insurance (Industrial Injuries) Act, 1946 (9 & 10 Geo. 6 c. 62), s. 39 (2).

B

C

On an appeal to a medical appeal tribunal under s. 39 (2) of the National Insurance (Industrial Injuries) Act, 1946, the tribunal, as an expert investigating body, have the right and duty to reach their own determination and to substitute that for the conclusions of the medical board, whether the tribunal's determination is more favourable or less favourable to the claimant than were the conclusions of the medical board.

D

In July, 1955, the applicant, a coal miner, sustained injury in the course of his employment. He claimed injury benefit and disablement benefit. On Apr. 24, 1957, the medical board made a final assessment of five per cent. loss of faculty as from May 13, 1957, for life. The applicant appealed under s. 39 (2) of the National Insurance (Industrial Injuries) Act, 1946*, on the ground that this assessment was too small. It was not contended against him that the assessment was too large. On July 4, 1957, the applicant underwent an operation. On July 15, 1957, the medical appeal tribunal found that no loss of faculty resulted to the applicant after May 13, 1957, from his industrial injury, but that his state was due to the aggravation of a pre-existing condition. The tribunal set aside the assessment of five per cent. loss of faculty. The applicant applied for certiorari to quash the tribunal's determination.

E

F

Held: a reference to a medical board and an appeal to a medical appeal tribunal under s. 39 of the National Insurance (Industrial Injuries) Act, 1946, were proceedings for the determination by expert investigating bodies of matters of medical fact and opinion relevant to a claim for insurance benefit, which was not analogous to a *lis inter partes*; on such an appeal, therefore, the tribunal's unfettered power under s. 39 to determine disablement questions ought not to be limited by applying rules of practice adopted by appellate courts in litigation between adverse parties, the tribunal had jurisdiction to make a new determination and certiorari did not lie.

G

H

Observations on the scheme of the National Insurance (Industrial Injuries) Act, 1946, regarding the determination of medical questions of disablement (see p. 383, letter F, to p. 384, letter A, post).

Industrial Injury—Review of decision—Medical appeal tribunal's determination setting aside an assessment of loss of faculty—"Fresh evidence"—Non-disclosure—National Insurance (Industrial Injuries) Act, 1946 (9 & 10 Geo. 6 c. 62), s. 40 (1).

I

Non-disclosure of fact, within the meaning of s. 40 (1) of the National Insurance (Industrial Injuries) Act, 1946, is the failure to disclose a fact known to the person who does not disclose it (see p. 382, letter D, post).

* The terms of s. 39 (2) are printed at p. 377, letter H, post.

A A party failing to disclose or misrepresenting a material fact known to him cannot thereafter maintain an application for review under s. 40 (1) based on his own non-disclosure or misrepresentation (see p. 383, letter C, post).

B On June 5, 1957, the applicant appealed against a final assessment of five per cent. loss of faculty for industrial injury benefit as too small. On June 17, 1957, he was admitted to hospital. On July 4, 1957, an operation was performed on him. On July 15 his appeal was heard by the medical appeal tribunal, when the report of a surgeon who had examined him was tendered to the tribunal; the report was to the effect that a disc injury was suspected but that it was too early to assess final disablement. The tribunal set aside the assessment on the ground that any loss of faculty resulting from the industrial accident was an aggravation of a pre-existing condition and that there was no relevant loss of faculty at that time. On Aug. 2, 1957, the applicant was again examined in hospital and the surgeon reported a disc injury and expressed the opinion that the permanent disablement would be more than five per cent. On Aug. 14, 1957, the applicant applied for a review of the tribunal's decision of July 15. The medical board allowed the application. The Minister caused the insurance officer to refer the case under s. 39 (3) of the Act of 1946 to the medical appeal tribunal. The tribunal decided that there was no fresh evidence to show that their determination was given in consequence of non-disclosure by the applicant or any other person of material facts within s. 40 (1) of the Act of 1946. The tribunal, therefore, set aside the decision of the medical board. On application by the applicant for certiorari to quash the tribunal's decision,

E **Held:** the medical appeal tribunal had rightly set aside the decision of the medical board because there had been no "fresh evidence" before the board and no "non-disclosure" in the relevant sense of the term, viz., the sense that it bore in insurance law, and thus there had been no jurisdiction under s. 40 (1) of the Act of 1946 to review the decision of July 15; accordingly certiorari would not be granted.

F Dictum of SIR F. H. JEUNE, P., in *Johnson v. Johnson* ([1900] P. at p. 21) on the meaning of "fresh evidence" adopted.

G [For the National Insurance (Industrial Injuries) Act, 1946, s. 39, s. 40 (1), see 16 HALSBURY'S STATUTES (2nd Edn.) 848, 849.]

Cases referred to:

- (1) *Stepney Borough Council v. Joffe*, *Stepney Borough Council v. Diamond*, *Stepney Borough Council v. White*, [1949] 1 All E.R. 256; [1949] 1 K.B. 599; [1949] L.J.R. 561; 113 J.P. 124; 2nd Digest Supp.
- H (2) *Johnson v. Johnson*, [1900] P. 19; 69 L.J.P. 13; 81 L.T. 791; 64 J.P. 72; 27 Digest (Repl.) 727, 6940.

Motions for certiorari.

I The applicant, Horace Hubble, a coal miner, who had sustained an injury to his back in an accident while at work, moved for orders of certiorari to quash two decisions of the Medical Appeal Tribunal (North Midland Region) dated July 15 and Oct. 28, 1957, respectively, and made pursuant to the National Insurance (Industrial Injuries) Act, 1946, on the grounds (i) that the tribunal on July 15, 1957, when determining an appeal by the applicant under s. 39 (2) of the Act against the decision of the medical board dated Apr. 24, 1957, assessing his disablement at five per cent. final for life, had no jurisdiction to set aside such assessment by holding that there was no relevant disability, and (ii) the

tribunal, on Oct. 28, 1957, was wrong in law on the face of its award in holding and so directing itself that fresh evidence under s. 40 (1) of the Act meant some evidence which the applicant was unable to produce before the decision of July 15, 1957, was given, or which he could not reasonably be expected to have produced in the circumstances of the case. The facts appear in the judgment of the court at p. 378, letter A, to p. 379, letter D, post, and p. 381, letters A to F, post.

F. W. Beney, Q.C., and H. S. Ruttle for the applicant.

Rodger Winn for the respondents, the Medical Appeal Tribunal (North Midland Region).

Cur. adv. vult.

May 16. **LORD GODDARD, C.J.:** DIPLOCK, J., will give the judgment of the court.

DIPLOCK, J., read the following judgment: These applications are for orders of certiorari to remove into this court two decisions dated respectively July 15 and Oct. 28, 1957, of the respondents, the Medical Appeal Tribunal (North Midland Region) made pursuant to the National Insurance (Industrial Injuries) Act, 1946.

As its long title states, that Act substituted for the Workmen's Compensation Acts, 1925 to 1945, a system of insurance against personal injury caused by accident arising out of and in the course of a person's employment. Part 1 of the Act makes provision for the funds required for paying benefits under the Act to be raised from contributions by employers and insured persons and from moneys provided by Parliament. Part 2 provides for the various classes of benefit to be paid to insured persons who suffer personal injury caused by accident arising out of and in the course of their employment. Such a person is entitled in the first instance to daily "injury benefit" while he is incapable of doing work, up to a maximum period of some six months from the date of the accident*. Thereafter he is entitled to "disablement benefit" if he suffers as a result of the injury from loss of physical or mental faculty†. It is with the applicant's right to disablement benefit that the present cases are concerned. The amount of disablement benefit to which an insured person is entitled depends on the extent of his disablement which is required to be assessed in accordance with the principles laid down in s. 12 of the Act. It is sufficient for the purpose of the present cases to draw attention to the facts:—

First, that the disablement is not to be treated as resulting from the injury if the loss of physical or mental faculty from which the insured person suffers is one to which he would in any case have been subject as a result of a congenital defect or of an injury or disease received or contracted before the relevant accident.

Secondly, that the extent of disablement is to be assessed on a percentage basis adopting as a standard certain prescribed loss of faculty which is to be taken as amounting to one hundred per cent. disablement.

Thirdly, that the extent of disablement is in no way dependent on loss of earning power or additional expense. Other provisions of the Act provide for increase of benefit in respect of these matters. And, finally, the assessment may be either final (that is, taking into account the whole of the

* See s. 11 of the National Insurance (Industrial Injuries) Act, 1946; 16 HALSBURY'S STATUTES (2nd Edn.) 818.

† See s. 12 of the Act, as amended by the National Insurance (Industrial Injuries) Act, 1953; 33 HALSBURY'S STATUTES (2nd Edn.) 441.

A period for which the loss of faculty may be expected to continue) or provisional (that is, taking into account some shorter period) according to whether or not the possibility of changes in the insured person's condition allow of a final assessment being made.

B It is to be observed that all the issues which arise on the determination of the existence, and the assessment of the extent, of the disablement depend on matters of medical fact and opinion. It is not, therefore, surprising when one turns to Part 3 of the National Insurance (Industrial Injuries) Act, 1946, which deals with the determination of questions and claims, to find it provided by s. 36 (1) (c) that

C "any question—(i) whether the relevant accident has resulted in a loss of faculty; (ii) whether a loss of faculty is likely to be permanent; (iii) at what degree the extent of disablement resulting from a loss of faculty is to be assessed, and what period is to be taken into account by the assessment; shall be determined by a medical board or medical appeal tribunal constituted in accordance with the following provisions of this Act."

D By sub-s. (3), any decision of any of such questions (referred to thereafter in the Act as "disablement questions") by a medical board or medical appeal tribunal is to be final, except as provided by Part 3 of the Act.

E By s. 38, medical boards are to consist of two or more medical practitioners, and medical appeal tribunals are to consist of a chairman (who, in practice, is generally a Queen's Counsel) and two medical practitioners. All claims for benefit, including claims for disablement benefit, are, by s. 45 of the Act, to be submitted by the claimant in the first instance to an insurance officer. Any claim for disablement benefit necessarily involves one or more "disablement questions".

F FIRST CASE

Section 39 of the National Insurance (Industrial Injuries) Act, 1946, on the true construction of which the first of the cases now under consideration turns, lays down the procedure to be adopted once a claim for disablement benefit has been submitted to the insurance officer. It is in the following terms:

G " (1) The case of any claimant for disablement benefit shall be referred by the insurance officer to a medical board for determination of the disablement questions in accordance with the following provisions of this Part of this Act relating to the determination of claims, and if, on that or any subsequent reference, the extent of the disablement is provisionally assessed, shall again be so referred not later than the end of the period taken into account by the provisional assessment.

H " (2) If the claimant is dissatisfied with the decision of a medical board, he may appeal in the prescribed manner and within the prescribed time and the case shall be referred to the medical appeal tribunal."

I Then there is a proviso which does not matter. Then sub-s. (3):

"If the Minister notifies the insurance officer within the prescribed time that he is of opinion that any decision of a medical board ought to be considered by a medical appeal tribunal, the insurance officer shall refer the case to a medical appeal tribunal for their consideration, and the tribunal may confirm, reverse or vary the decision in whole or in part as on an appeal."

On July 14, 1955, the applicant, who is a coal miner, sustained an injury to his back by accident arising out of and in the course of his employment. The injury was diagnosed as a prolapsed intervertebral disc, and he drew injury benefit for the various periods for which he was absent from work until the injury benefit period expired on Jan. 12, 1956. Thereafter the appropriate medical board at Mansfield made a number of successive provisional assessments of the extent of his disablement for relatively short periods, ultimately expiring on May 12, 1957, and on Apr. 24, 1957, the medical board made a final assessment of the extent of his disability at five per cent. from May 13, 1957, for the period of his life, and found that the loss of faculty in respect of which the assessment was made resulted from the accident of July 14, 1955. The effect of this finding was to entitle the applicant to a disablement gratuity under s. 12 (6) of the Act of an amount which we are informed works out at £67 10s.

Six days after that finding, that is on Apr. 30, 1957, the applicant was again off work owing to his back condition, and remained off work until, on June 17, he was admitted to Harlow Wood Hospital where, on July 4, 1957, he underwent an operation for removal of a prolapsed disc.

On June 5, while awaiting admission to hospital, he appealed to the Medical Appeal Tribunal against the medical board's decision of Apr. 24 assessing the extent of his disablement at five per cent. The relevant regulations* do not require a notice of appeal to be a formal document, but it must contain a statement of the grounds on which the appeal is made. The applicant's notice of appeal was in the following terms:

"Dear Sir, I wish to appeal against the final assessment of five per cent. awarded to me on 24.4.57. I have only worked four days since 24.4.57 and am now waiting admission to Harlow Wood Hospital. Yours faithfully, H. Hubble."

Although it does not expressly so state, this was obviously an appeal against the smallness of the percentage assessment of the extent of his disablement on the grounds that, on the medical facts, five per cent. was too little. Although the regulations do not provide for the Minister submitting any written statement to the Medical Appeal Tribunal, there were, in fact, submitted, in accordance with what is apparently the usual practice, some written observations by the Minister on the medical aspects of the case concluding with a submission that

"having regard to the medical evidence (a) the [applicant's] back condition is only partly attributable to the relevant accident, and (b) the relevant loss of faculty has been correctly assessed."

It is thus clear that neither the applicant nor the Minister was contending that the applicant's injury was not attributable at least in part to the accident, nor was the Minister contending that the five per cent. assessment was too high. The applicant was contending that it was too small. This was the only difference between them. Further, the applicant's case was referred to the Medical Appeal Tribunal solely as a result of the applicant appealing from the decision of the medical board, under s. 39 (2). It was never referred to the tribunal by the insurance officer on the direction of the Minister under s. 39 (3).

The applicant's case was heard by the Medical Appeal Tribunal on July 15, 1957. By that date, the applicant had already undergone the operation of

* The National Insurance (Industrial Injuries) (Determination of Claims and Questions) Regulations, 1948 (S.I. 1948 No. 1299), reg. 11 (2).

A July 4, and was still in hospital. He was represented before the tribunal by a trade union official, who tendered a report by Mr. Malkin, a surgeon who had examined the applicant in hospital on June 28 before the operation, and expressed the view that it was too early to give an estimate of what the final assessment of the extent of his disablement should be. It appears from Mr. Malkin's report that the applicant had, in fact, suffered from pain in his back as
B early as December, 1954, some seven months before the relevant accident of July 15, 1955. At the hearing before the tribunal, the respective contentions of the applicant and of the Minister, the substance of which have already been referred to, were advanced. On July 24, 1957, the tribunal notified the applicant of their decision in the following terms:

C "Dear Sir, With reference to your claim for disablement benefit the Medical Appeal Tribunal which considered your case on 15.7.57 decided that (i) From 13.5.57 there is no loss of faculty resulting from industrial
D accident on 14.7.55. The findings of the tribunal are summarised as follows: Mr. Hubble is in hospital but we heard Mr. Clarke of the [National Union of Mineworkers] with the medical report of 28.6.57 by Mr. Malkin. It is clear from the medical evidence before us including the hospital notes that any loss of faculty which may have resulted from the relevant accident was only an aggravation of a pre-existing condition, which aggravation had ceased by 12.5.57. We set aside the assessment of the medical board of 24.4.57."

E It is thus seen that, so far from allowing the appeal, they set aside even the assessment of five per cent. disability, a finding for which neither the applicant nor the Minister, through the insurance officer, had contended.

F Counsel for the applicant submits that, in so doing, the tribunal acted without jurisdiction. Their jurisdiction, he says, on a reference under s. 39 (2), is limited to either acceding in whole or in part to the contentions of the appellant claimant and allowing the appeal, or dismissing the appeal, with the consequence that the decision of the medical board appealed from stands. The tribunal have no jurisdiction to reduce or set aside the medical board's assessment unless the Minister has, in effect, cross-appealed by himself directing the insurance officer
G to refer the case to the tribunal under s. 39 (3). Alternatively, counsel says that the tribunal have no jurisdiction to reduce or set aside the medical board's assessment where, as in this case, on an appeal by the claimant the Minister or insurance officer does not put forward to the tribunal any contention that the assessment should be reduced or set aside. In other words, he seeks to apply
H to the reference of a case to a medical appeal tribunal on an appeal by a claimant under s. 39 (2), the rules and practice adopted by the Court of Appeal in ordinary civil litigation.

I We think that this submission is based on a misapprehension of the purpose of the Act and the functions of medical boards and medical appeal tribunals. A claim by an insured person to benefit under the Act is not truly analogous to a *lis inter partes*. A claim to benefit is a claim to receive money out of the insurance funds fed by contributions from all employers, insured persons and the Exchequer. Any such claim requires investigation to determine whether any, and if so what, amount of benefit is payable out of the fund. In such an investigation, the Minister or the insurance officer is not a party adverse to the claimant. If analogy be sought in the other branches of the law, it is to be found in an inquest rather than in an action. Where the claim is for disablement benefit, a necessary step in the investigation is the determination of one or

more questions of medical fact and opinion, and, accordingly, where such a claim is made, s. 39 (1) makes it mandatory on the insurance officer to refer "the case" of the claimant to a medical board for the determination, not of the claim, but of the disablement questions which require to be investigated. As an expert investigating body, it is the right and duty of the medical board to use their own expertise in deciding the medical questions referred to them. They may, if they think fit, make their own examination of the claimant and consider any other facts and material to enable them to reach their expert conclusion as doctors do in diagnosis and prognosis of the case of an ordinary patient. Just as it is "the case" of the claimant which is to be referred to the medical board by s. 39 (1), so also it is "the case" of the claimant which is to be referred to the Medical Appeal Tribunal under s. 39 (2) and (3).

The effect of these sub-sections is, in our view, to substitute in the cases to which they apply another and presumably more highly qualified expert investigating body for the medical board, and we see no grounds for holding that their function is any different from that of the medical board, namely, to use their own expertise to reach their own expert conclusions on the matters of medical fact and opinion involved in "the case" of the claimant.

Counsel for the applicant does not, indeed, contend that, if the case is referred to the Medical Appeal Tribunal by the insurance officer under s. 39 (3), the tribunal has not an unrestricted right and duty to reach its own conclusions de novo, whatever may have been the decision of the medical board. The words "the tribunal may confirm, reverse or vary the decision in whole or in part" are too compelling (cf. *Stepney Borough Council v. Joffe* (1), [1949] 1 All E.R. 256). That those words in sub-s. (3) are followed by the words "as on an appeal", point strongly to the conclusion that the tribunal have a similar power when "the case" is transferred to the tribunal consequent on an appeal by a dissatisfied claimant under sub-s. (2). It would, we think, indeed be a strange conclusion if the Medical Appeal Tribunal, an expert investigating body, was bound to substitute its opinion on technical medical matters for that of the medical board when its opinion was more favourable to the claimant, and was not entitled to do so when its opinion was less favourable. So to circumscribe the powers of the Medical Appeal Tribunal would be to take away from them the function of determining "disablement questions" expressly conferred on them by s. 36 (3) of the Act. As there is no lis inter partes in such a determination, we see no grounds for limiting the unfettered powers conferred on them by the terms of the Act to determine disablement questions when the case is referred to them under s. 39 (2) by applying rules of practice adopted by appellate courts in ordinary litigation between adverse parties to an inquiry or investigation to which such litigation bears no true analogy.

The application for certiorari in respect of the decision of July 15, 1957, is accordingly dismissed.

SECOND CASE

Section 40 (1) of the National Insurance (Industrial Injuries) Act, 1946, on the true construction of which the second case largely turns, is in the following terms:

"Any decision under this Act of a medical board or a medical appeal tribunal may be reviewed at any time by a medical board if satisfied by fresh evidence that the decision was given in consequence of the non-disclosure or misrepresentation by the claimant or any other person of a

- A material fact (whether the non-disclosure or misrepresentation was or was not fraudulent)."

After the tribunal's decision of July 15, 1957, which was notified to the applicant on July 31, the applicant remained in hospital and was, on Aug. 2, examined again by his surgeon, Mr. Malkin, who reported that the operation had disclosed that a disc injury was present. He expressed his opinion that the applicant's disability was the result of an injury, and that his permanent disability would be more than five per cent. This report does not differ substantially from his previous report of June 28, except that he had now obtained positive confirmation of his previous suspicions that a disc injury was present, and he was now prepared to say that the permanent disability would be more than five per cent.

- C Armed with this report, the applicant, on Aug. 14, 1957, asked for a review under s. 40 (1) of the Act by the medical board of the tribunal's decision of July 15, on the grounds that fresh evidence showed that the tribunal's decision was given in consequence of non-disclosure or misrepresentation. On Aug. 28, 1957, the medical board decided that there was such fresh evidence the nature of which they stated in the following terms:

- E "The claimant Mr. Hubble was admitted to Harlow Wood on June 17, 1957. Operation July 4, 1957, for [prolapsed intervertebral disc]. Bone graft from left ilium followed by plaster of Paris—now confined to strict bed and still a patient at Harlow Wood. Also a further report confirming the above from Mr. Malkin's letter Aug. 2, 1957."

They made provisional assessments of the extent of the disablement from May 13 to June 16, 1957, of ten per cent., and from July 17 to Oct. 17, 1957, of one hundred per cent.

- F The Minister then directed the insurance officer to refer the case to the Medical Appeal Tribunal under s. 39 (3) of the Act. It was heard by the tribunal on Oct. 28, 1957, who decided that there was no "fresh evidence" to show that their decision of July 15 was given in consequence of the non-disclosure or misrepresentation by the applicant or any other person of a material fact. G They, therefore, set aside the decision of the medical board of Aug. 28. In their reasons for their decision, they purport to follow a decision of the Industrial Injuries Commissioner* under s. 50 of the Act that

- H "'Fresh evidence' means some evidence which the claimant was unable to produce before the decision was given or which he could not reasonably be expected to have produced in the circumstances of the case."

- I As the operation took place on July 4, eleven days before the hearing of the original appeal, the tribunal took the view that there was sufficient time for the applicant to have obtained a further report from Mr. Malkin on the results of the operation and the conclusions to be drawn from it before the applicant's case was heard by them on July 15.

For a decision to be reviewed under s. 40 (1) of the Act, two conditions must be fulfilled: First, the board or the tribunal must be satisfied that the decision to be reviewed was given in consequence of the non-disclosure or misrepresentation of the claimant or any other person of a material fact (whether the non-disclosure or misrepresentation was or was not fraudulent), and, secondly, the board or tribunal must be so satisfied by fresh evidence.

* Decision No. R (I) 16/57.

As regards the first condition, counsel for the applicant submits that it is fulfilled if there is any omission by the claimant or any other person to put before the board or tribunal any material fact, whether known to the claimant or such other person at the time of the hearing of the decision under review or not. As regards the second condition, he contends that "fresh evidence" simply means further evidence whether it was, or could with reasonable diligence have been, available at the time of the original hearing or not.

If counsel were right, it would mean that any claimant—or presumably any insurance officer—if dissatisfied by a decision of a medical appeal tribunal could go and get an opinion from another doctor, and, relying on this or anything contained in it as a material fact, apply for a review. If unsuccessful, the process could be repeated any number of times by obtaining fresh opinions from fresh medical men.

We think that both submissions are wrong. "Non-disclosure" in the context of the sub-section, where it is coupled with misrepresentation, means a failure to disclose a fact known to the person who does not disclose it. The term "non-disclosure" is a familiar term in insurance law*. It may be either innocent if the person failing to disclose the fact does not appreciate its materiality, or fraudulent if he does; but there can be no non-disclosure of a fact which is not known. That the draftsman of the Act appreciated the distinction between non-disclosure of facts and ignorance of them is evident from the provisions of s. 50 (1) (a) of the National Insurance (Industrial Injuries) Act, 1946†, which provides for a review of decisions (on matters other than medical matters) of an insurance officer, a local appeal tribunal or the commissioner if

"he or they is or are satisfied and, in the case of a decision of the commissioner, satisfied by fresh evidence that the decision was given in ignorance of, or was based on a mistake as to, some material fact."

It does not appear from the material before us whether there were any material facts relating to the operation of July 4 or the applicant's condition thereafter which were known to the applicant or the union official who represented him at the time of the hearing of July 15, 1957, and were not disclosed to the tribunal then. As the tribunal based their decision of Oct. 28 on their view of the meaning of "fresh evidence", there is no express finding as to this. If, therefore, we were of opinion that they were wrong as to the meaning of "fresh evidence", further facts might be necessary to enable us to come to a conclusion.

The Act requires the board or tribunal to be satisfied not by "further evidence"—a familiar and, it may be a, non-committal term—but by "fresh evidence", an expression used in analogous circumstances in the Summary Jurisdiction (Married Women) Act, 1895, which has been the subject of well-established and consistent judicial interpretation. We cannot do better than adopt the words of the President (SIR HENRY JEUNE) in *Johnson v. Johnson* (2) ([1900] P. 19 at p. 21):

"It means practically the same sort of evidence as that upon which a new trial would, in the ordinary course, be granted: it must relate to something

* For a consideration of non-disclosure and the duty of disclosure in insurance law, see 22 HALSBURY'S LAWS (3rd Edn.) 185 et seq.

† Printed above as amended by the National Insurance (Industrial Injuries) Act, 1953, s. 4 (4); 33 HALSBURY'S STATUTES (2nd Edn.) 443.

- A which has happened since the former hearing or trial, or it must be evidence which has come to the knowledge of the party applying since that hearing or trial, and which could not by reasonable means have come to his knowledge before that time. It must amount to what was called in the old forms of pleading *res noviter ad notitiam perventa*. It is altogether a mistake to suppose that 'fresh evidence', within the meaning of the Act of 1895, means or includes evidence which could have been called, but which was not in fact adduced, at the first hearing. It would be monstrous to suppose that a party could abstain from calling evidence, and could thereafter proceed to make application upon application, based on evidence which might have been tendered in the first instance."
- B
- C

In the context of the present sub-section, it would be even more monstrous to suppose that a party could fail to disclose or misrepresent (even fraudulently) a material fact known to him, and could thereafter proceed to make application on application for a review based on successive corrections of non-disclosures or misrepresentations of which he was guilty in the first instance.

- D
- It is not contended by counsel for the applicant that, even if the material before us had shown a "non-disclosure" (in the sense which we have given to that expression) of a material fact at the hearing by the tribunal on July 15, there was any "fresh evidence" in the above sense before the medical board on Aug. 28 or before the Medical Appeal Tribunal on Oct. 28, 1957. The decision of the tribunal of Oct. 28, 1957, was, therefore, so far as appears on its face correct in law, although there may have been an additional reason for arriving at the same conclusion owing to the absence of any evidence, either fresh or otherwise, of any "non-disclosure or misrepresentation by the claimant or any other person" at the original hearing on July 15, 1957.
- E
- F

The application for certiorari in respect of the decision of Oct. 28, 1957, is, therefore, dismissed.

- The conclusions that we have reached in these two cases illustrate what we think is a consistent scheme in the Act as regards the determination of "disablement questions". These are purely matters of medical fact and opinion to be decided by expert investigating bodies, either the medical board or, if the claimant or the Minister is not content with the decision of the medical board, by the Medical Appeal Tribunal which substitutes its expert opinion for that of the medical board. *Prima facie*, the decision of the Medical Appeal Tribunal is final; but it may be re-opened in three circumstances: First, under s. 40 (1) if the decision has been induced by non-disclosure or misrepresentation of a medical fact by any person, not necessarily the claimant, being a material fact which was not known and could not by reasonable means have been known at the time of the original hearing to the person seeking to re-open the matter.
- G
- H
- I
- It follows, therefore, that a person guilty of non-disclosure or misrepresentation can never seek to re-open the matter on these grounds. Secondly, it may be re-opened under s. 40 (2), as amended by the National Insurance (Industrial Injuries) Act, 1953, if, since the date of the decision, there has been an unforeseen aggravation of the results of the relevant injury. Thirdly, under s. 4 (3) of the Act of 1953, there can be re-opened in like manner and in similar circumstances a decision, such as that in the first of the present cases, that the relevant accident has not resulted in a loss of faculty. It was not, however, on this

ground that the applicant applied for a review. Nothing in our decision today affects his right to do so if he should be so advised; but that depends on matters of medical fact and opinion which are outside our competence. A

Applications dismissed.

Solicitors: *Taylor, Jelf & Co.*, agents for *Hopkin & Sons*, Mansfield (for the applicant); *Solicitor, Ministry of Pensions*. B

[*Reported by G. A. KIDNER, Esq., Barrister-at-Law.*]

PRACTICE DIRECTIONS.

Mortgage—Possession of mortgaged property—Originating summons—Service of certain notices—Default of appearance—Notice to proceed after a year's delay—R.S.C., Ord. 55, r. 5A—R.S.C., Ord. 64, r. 13—R.S.C., Ord. 67, r. 4. D

These Practice Directions are supplemental to those* issued by the judges of the Chancery Division in relation to R.S.C., Ord. 55, r. 5A.

1. Where a defendant is in default of appearance to an originating summons whereby a mortgagee is seeking an order for possession of the mortgaged property, service of the following notices shall, instead of being filed in default under R.S.C., Ord. 67, r. 4, be effected by sending the same by prepaid letter post addressed to the defendant at his last known address:— E

- (i) Notice of an appointment for the further hearing of a summons which stands adjourned generally, and F
- (ii) Notice under R.S.C., Ord. 64, r. 13, of intention to proceed (when applicable).

2. Service of any such notices shall, unless the court or judge in any particular instance shall otherwise direct, be evidenced by a certificate of the plaintiff's solicitor indorsed on any further affidavit intended to be used on the further hearing, or if there is no such affidavit, then by a separate certificate entitled in the proceedings. The certificate shall, with any necessary variations, be in the form specified in the existing Practice Directions under R.S.C., Ord. 55, r. 5A, in relation to default cases. G

MAURICE WILLMOTT,
Chief Master, Chancery Division.

May 23, 1958.

* See ANNUAL PRACTICE, 1958, pp. 1504 et seq.

A

RACECOURSE BETTING CONTROL BOARD v. YOUNG
(INSPECTOR OF TAXES).

RACECOURSE BETTING CONTROL BOARD v. INLAND
REVENUE COMMISSIONERS.

B

YOUNG (INSPECTOR OF TAXES) v. RACECOURSE BETTING
CONTROL BOARD.

INLAND REVENUE COMMISSIONERS v. RACECOURSE
BETTING CONTROL BOARD.

[COURT OF APPEAL (Lord Evershed, M.R., Morris and Ormerod, L.JJ.), April 21,
22, 23, 24, May 7, 1958.]

C

*Income Tax—Deduction in computing profits—Distribution by statutory body—
Distribution pursuant to statute from funds after deduction of working
expenses—Distribution benefiting body's trading activity—Whether deductible
as expense for income tax purposes—Racecourse Betting Act, 1928 (18 & 19
Geo. 5 c. 41), s. 3 (6)—Income Tax Act, 1952 (15 & 16 Geo. 6 & 1 Eliz. 2
c. 10), s. 137 (a).*

D

The Racecourse Betting Control Board constituted by the Racecourse
Betting Act, 1928, carried on the trade of running totalisators at racecourses.
By s. 3 (4) of the Act the board was required to set up a totalisator fund into
which it was to pay a percentage of the moneys staked by means of the
totalisator and any other moneys which it received. By s. 3 (6), subject

E

to the payment out of the fund of all taxes, rates, charges and working
expenses, to the retention of sums to meet contingencies and to the payment
of sums as it thought fit to charitable purposes, the board was to apply the
moneys comprised in the totalisator fund in accordance with a scheme to be
prepared by it and approved by the Home Secretary for purposes conducive

F

to the improvement of breeds of horses or the sport of horse racing. Over
£500,000 a year was available for application in this way and the following
payments were made under this power; (i) runners' allowances, £1 per
runner being paid to racecourse owners who ran horses in any race at race-
courses with which the board was concerned; (ii) sums paid to racecourse
owners for use by them in improvements on the structures, amenities, etc.,
of racecourses used for horse races and approved by the board; (iii) contri-

G

butions towards the expenses of owners and trainers in bringing racehorses to
racecourses as an encouragement to them to bring them (the business done
by the board was shown to vary in direct proportion to the number of
runners in the races); (iv) contributions towards the expenses of the Jockey
Club and of the National Hunt Committee, etc.; (v) payments for assistance
of point-to-point meetings, and (vi) sums paid to assist and encourage racing

H

under the rules of the Pony Turf Club. The Special Commissioners of Income
Tax found that all the payments were made with the object of increasing
the receipts of the board's totalisators, although they all improved the
breed of horses or the sport of horse racing, and were sums paid wholly and
exclusively for the purposes of the board's trade and they therefore allowed
them as a deduction from the board's income for income tax and the profits

I

tax purposes. On appeal,

Held: in computing the board's profits for the purposes of income tax
and the profits tax no deduction should be made in respect of the six classes
of payments made by the board because:—

(i) the payments under heads (ii)-(vi) were made to some extent for purposes
such as improvement of breeds of horses or the assistance of racehorse
owners and thus were not wholly and exclusively expended for the purposes
of the board's trade, which was the operation of totalisators; moreover
they were applications of the surplus after paying working expenses of the

board and were, on the facts, moneys distributed for independent statutory purposes under s. 3 (6) of the Racecourse Betting Act, 1928, not expenditure for the purposes of the board's trade,

(ii) the commissioners having treated all the expenses in question as having been incurred for like purposes, and their findings being open to challenge as regards all expenses other than the runners' allowances (head (i)), the findings must also be open to challenge in respect of the runners' allowances, and

(iii) the payments of runners' allowances were made for like purposes and thus also were not exclusively expended for the purposes of the board's trade, though they were made as working expenses under s. 3 (6) of the Act of 1928.

Appeals dismissed.

[Editorial Note. Working expenses under s. 3 (6) of the Racecourse Betting Act, 1928, were not necessarily limited to such expenditure as was wholly and exclusively expended for the purposes of the board's trade within s. 137 (a) of the Income Tax Act, 1952, but might extend to expenditure not within that enactment (see p. 391, letter D, post); nor was a distribution of surplus under s. 3 (6) necessarily not a trade expenditure within s. 137 (a) (see p. 392, letter B, post). It may also be noted that the Court of Appeal did not decide whether the payment of runners' allowances as working expenses was or was not *ultra vires*, but left that question open, negating the decision of *ultra vires* in the court below (see p. 392, letter C, post).

As to deducting expenditure to earn future profits and not deducting expenses unconnected with trade for income tax purposes, see 20 HALSBURY'S LAWS (3rd Edn.) 169, 170, paras. 290, 291; and, as regards expenses not incurred for commercial reasons, see *ibid.*, p. 170, para. 292; for cases on the subject of the deduction of expenses for income tax purposes, see 28 DIGEST 42-45, 215-226.

For the Income Tax Act, 1952, s. 137, see 31 HALSBURY'S STATUTES (2nd Edn.) 134.

For the Racecourse Betting Act, 1928, s. 3, see 10 HALSBURY'S STATUTES (2nd Edn.) 783, 784.]

Cases referred to:

- (1) *A.-G. v. Racecourse Betting Control Board*, [1935] Ch. 34; 104 L.J.Ch. 13; 152 L.T. 146; Digest Supp.
- (2) *Wenlock (Baroness) v. River Dee Co.*, (1885), 10 App. Cas. 354; *subsequent proceedings*, (1887), 19 Q.B.D. 155; (1887), 36 Ch.D. 674; *affd.* (1888), 38 Ch.D. 534; 13 Digest 367, 1002.
- (3) *A.-G. v. Great Eastern Ry. Co.*, (1880), 5 App. Cas. 473; 49 L.J.Ch. 545; 42 L.T. 810; 44 J.P. 648; 13 Digest 356, 932.

Appeals.

The Racecourse Betting Control Board appealed against an order of UPJOHN, J., made on Dec. 6, 1957, and reported [1958] 1 All E.R. 274, allowing two appeals by the Crown and dismissing two cross-appeals by the board by way of Case Stated by the Special Commissioners of Income Tax. There were two cross-appeals by the Crown. The two appeals and cross-appeals related to assessments to income tax and the profits tax in respect of the trade of the board as totalisator operator for the years 1953-54 and 1954-55. The two appeals raised the same point, and the two cross-appeals raised one point,

The question for determination by the commissioners was whether, in computing its profits as totalisator operator, the board was entitled to deduct certain payments as being wholly and exclusively laid out or expended for the purposes of its trade within the meaning of s. 137 (a) of the Income Tax Act, 1952, and whether such payments were of a capital nature whose deduction would be prohibited by s. 137 (f) and (g). The facts found, the relevant contentions before the commissioners and their decision, are stated in [1958] 1 All E.R. at pp. 276-280; a summary for the purposes of the decision of the appeal is in the judgment

A of LORD EVERSHERD, M.R., post. On appeal, UPJOHN, J., held that none of the payments was deductible. The board appealed to the Court of Appeal.

Heyworth Talbot, Q.C., and *D. C. Miller* for the board.

F. N. Bucher, Q.C., *A. S. Orr* and *Hubert H. Monroe* for the Crown.

Cur. adv. vult.

B May 7. LORD EVERSHERD, M.R.: Two appeals by the Racecourse Betting Control Board (which I shall hereafter refer to as "the board") and corresponding cross-appeals on the part of the Crown have been heard together. One appeal and the corresponding cross-appeal are concerned with the board's liability to income tax; the second appeal and the cross-appeal relate to profits tax. It has been agreed before us that identical principles apply to both income tax and profits tax so far as is relevant to these appeals, so that the answer as regards the one necessarily involves the answer also as regards the other. In the circumstances I shall confine myself in this judgment to income tax.

C The board has been assessed to income tax under Sch. D to the Income Tax Act, 1952, for the income tax years 1953-54 and 1954-55, in reference to its trade as a totalisator operator. Although counsel for the board was not prepared unreservedly so to admit, in my judgment it is clear that the board is in fact carrying on such a "trade". In respect of these tax years, the board has claimed that certain payments made by it ought to be deducted from its taxable profits or gains as having been "wholly and exclusively laid out or expended for the purposes of" its "trade" within s. 137, para. (a) of the Act. The facts as regards these payments have been fully recited in the Case Stated. They were summarised also in the judgment appealed from of UPJOHN, J. So far as necessary, I shall treat the Case Stated as incorporated in this judgment. It is a sufficient recapitulation for me to state that the sums in question have fallen under six heads, namely—(i) runners' allowances, i.e., sums paid to racehorse owners who run horses in any race at racecourses with which the board is concerned, at the rate of £1 for every runner. (ii) sums paid to "racecourse executives", i.e., sums paid to racecourse owners for use by them in improvements on the structures and amenities, etc., on racecourses (being racecourses used for horse races, and approved as such by the board). I need not state the details of these payments, but the expenditure is in fact subject to a substantial measure of control or supervision by the board in each case. (iii) sums paid to owners and trainers towards their expenses in bringing racehorses to the racecourses, and therefore an encouragement to them so to do. It was clearly proved that the business done by the board varies in direct proportion to the number of runners in the races with which they are concerned, and that without assistance the owners and trainers in modern times have found the burden of these travelling expenses to be a serious financial strain. (iv) sums paid to assist in meeting the administrative expenses of the Jockey Club, the National Hunt Committee and the like, which need no further exposition. (v) sums paid to assist those responsible in discharging the expenses of point-to-point meetings. (vi) sums paid to assist and encourage racing under the rules of the Pony Turf Club.

I The sums involved are large, amounting in each year to something over half a million pounds, but that figure is, in truth, only about 2½ per cent. of the total receipts of the board. Of these six heads, there is a distinction for the purposes of the appeal between the first and the other five. The first, the runners' allowances, was made by the board as being a working expense, i.e., part of the financial obligations to be discharged by the board under the relevant Act regulating its activities, before arriving at what is called in the Act the surplus totalisator fund. The remaining five heads are applications of that surplus totalisator fund. There is evidence before us of correspondence between the board and the Home Secretary as regards this first head of payment, but in my judgment the correspondence is not relevant to the problem before us, and I do not further refer to it.

The board was constituted under the Racecourse Betting Act, 1928, but, as the terms of the Act are conveniently and sufficiently summarised in the judgment in *A.-G. v. Racecourse Betting Control Board* (1) ([1935] Ch. 34), which I shall refer to, it will be sufficient now to make a somewhat fuller reference to s. 3 than is found in that summary.

Section 3 sets out the powers and duties of the board. The first sub-section, for example, provides for the giving of certificates of approval by the board, and the second sub-section relates to conditions of the grant of certificates. The section then provides that the board

"(3) shall distribute or cause to be distributed the whole of the moneys staked by means of a totalisator on any race among the persons winning bets made by means of the totalisator on that race, after deducting or causing to be deducted such percentage of those moneys as the board may from time to time determine either generally or with respect to any particular racecourse;

"(4) shall establish a fund known as the totalisator fund, into which shall be paid the percentage deducted as aforesaid of moneys staked by means of the totalisator, and any other moneys received by the board;

"(5) may, for the purposes of this Act, borrow money upon the security of such fund or otherwise, and lend money for the purpose of setting up or operating totalisators in accordance with the provisions of this Act;

"(6) shall (subject to the payment out of the totalisator fund of all taxes, rates, charges, and working expenses, and to the retention of such sums as they think fit to meet contingencies, and to the payment out of the said fund of such sums as they think fit to charitable purposes) apply the moneys from time to time comprised in the totalisator fund in accordance with a scheme prepared by the board and approved by the Secretary of State for purposes conducive to the improvement of breeds of horses or the sport of horse racing."

The Secretary of State is the Secretary of State for Home Affairs. Those purposes have been extended by s. 18 (5) of the Betting and Lotteries Act, 1934, to include purposes conducive to the advancement and encouragement of veterinary science and education. Section 3 of the Act of 1928 further provides that the board:

"(7) may do all such things as are incidental to the foregoing matters;

"(8) shall submit annually to the Secretary of State a report of their proceedings, together with an account [etc.] . . . such report and account shall be laid by the Secretary of State before both Houses of Parliament."

The problem presented in the appeal is: Were the payments in question wholly and exclusively laid out for the purposes of the business of the board within s. 137 of the Income Tax Act, 1952? The authorities relating to the meaning of that phrase were considered by UPJOHN, J., and will be found at [1958] 1 All E.R. at p. 283, letter I, to p. 285, letter F. I think I need not add to what the learned judge said, because there was no doubt before us that the phrase means what the words indeed imply, that, to qualify as proper deductions, all the payments in question must have been laid out exclusively for the purposes of the board's business.

There are thus two categories of payment, the runners' allowances under the first head, which the board has said were part of its working expenses within s. 3 (6) of the Racecourse Betting Act, 1928; and the remaining items, which were applications of the surplus of the totalisator fund after the discharge of rates, taxes, working expenses, etc., pursuant to the same sub-section.

The case of the board has been that all these six heads of payment were found in para. 7, and again in para. 12 (4), of the Case Stated to have been wholly and exclusively laid out for the purposes of the board's business, and that that

A finding being a finding of fact is now conclusive. Paragraph 7 of the Case Stated is in the following terms:

B “We were satisfied on the evidence that all the payments set out in [the exhibits mentioned] were made by the board with the object of increasing the receipts of its totalisators, although such payments might and in all cases did (in the words of s. 3 (6) of the Act of 1928) improve the breed of horses or the sport of horse-racing and although the increase in such receipts was not in all cases expected to be exactly proportionate to the expenditure.”

The other reference, in para. 12 (4), reads:

C “We consider that in this as in other cases we have to determine whether the disputed payments were made wholly and exclusively for the purposes of the board’s trade upon the evidence of the witnesses called before us, and an examination of the documents placed before us. Upon a full consideration of such evidence and documents we find that all the items set out in exhibits 2, 2 (a) and 2 (b) were paid wholly and exclusively for the purposes of such trade.”

D It will be noticed that in the second paragraph the commissioners adhere to the language of the section, whereas in the first paragraph they do not. This is a point to which I shall later again allude.

E The board, however, has also said that, if the board were regarded as an ordinary trader, then all these payments would necessarily have been or be so allowable in the light of the findings which I have mentioned. In my judgment, however, this submission really carries the matter no further; for the fact is that the board’s trade and the board’s powers are defined by or are to be derived from the terms of the Act of 1928, on which, in the end, the answer to the question must depend. In any event, as will be seen, the case of the board hangs on the sanctity of the findings of the Special Commissioners.

F The case of the Crown, on the other hand, is that, on the face of it, the finding on the items other than the runners’ allowances is not sacrosanct. The question whether payments were wholly and exclusively laid out for the purposes of the business of the board is not a mere question of fact. The Crown say that the purposes of the payments cannot be judged in disregard of the purposes imposed by s. 3 (6), which are real and independent objectives. They say that, in any case, the terms of para. 7 of the Case, which, in the light of the whole document, ought to be read as expository of para. 12 (4), do not come up to the standard of the phrase “wholly and exclusively laid out”, etc. That matter was put in the form of a dilemma by junior counsel for the Crown: either, looking at para. 7, the language used by the commissioners means what it says, in which case it is not a finding of fact of sufficient precision; or, if para. 7 has to be expounded and explained, it is necessarily open in some degree to review.

H As regards the first head of payment, the runners’ allowances, the Crown have supported UPJOHN, J.’s view, and have said that the payment was *ultra vires*: but they say that, even if the payment was *intra vires*, still in essential quality the purposes of that payment are the same as the purposes of the other payments, particularly the payment of travelling allowances. Indeed, so much was admitted by the board, and, therefore, if the finding of the commissioners cannot stand as to the five heads relating to the surplus, the Crown say that it cannot stand either as to the first head, the runners’ allowances.

I The two questions for the court, therefore, may be formulated as follows: First, what is, in truth, the scope of the board’s business, and what are its powers? Put more precisely, what is the scope of the phrase “working expenses” in sub-s. (6), and what otherwise is the effect of that sub-section? Secondly, and in the light of the answer to the first question, is the finding of the Special Commissioners conclusive, and, if it is not conclusive, is it right?

The scope and powers of the board are to be found in the first three sections of the Act. They are conveniently summarised in *A.-G. v. Racecourse Betting Control Board* (1) ([1935] Ch. 34), mentioned *supra*. In that case the question was whether certain payments were *intra vires* the board. In his judgment (which has a bearing on the like question relating to runners' expenses), ROMER, L.J., said (*ibid.*, at p. 54):

"It is sufficient to say that the test to be applied is whether the acts in question of the board, which are nowhere expressly prohibited, can fairly be regarded as incidental to or consequential upon the exercise of the powers that the legislature has in express terms conferred upon the board. In these circumstances the first thing to be ascertained is what those powers are. Here again there is no room for dispute. They are to be found expressed in unambiguous terms in the Racecourse Betting Act, 1928. By s. 1 (2), the board is given power (amongst other things) to set up and keep a totalisator on any approved racecourse (as defined in sub-s. (3)), and there to operate the totalisator for the purpose of effecting betting transactions on horse races only on days when horse races, but no other races, take place on such racecourses. By s. 3 (3), it is provided that the board shall distribute or cause to be distributed the whole of the moneys staked by means of a totalisator on any race among the persons winning bets made by means of the totalisator on that race after deducting a percentage, as therein mentioned, which we are told is in fact ten per cent. Such percentage, as well as any other moneys received by the board, are to be paid into a totalisator fund. This fund is to be applied by the board in payment of all taxes, rates",

etc. Then the lord justice summarises the other sub-sections of s. 3, which I have thought it right to read more fully.

On the question of *vires* also, MAUGHAM, L.J., said (*ibid.*, at p. 59):

"It follows therefore from the decisions of the House of Lords in *Wenlock (Baroness) v. River Dee Co.* (2) ((1885), 10 App. Cas. 354), and *A.-G. v. Great Eastern Ry. Co.* (3) ((1880), 5 App. Cas. 473) that, on the one hand, the powers of the corporation must either be expressly conferred by or be derived by reasonable implication from provisions of the Act of Parliament, while, on the other hand, the doctrine ought to be reasonably understood and applied and that whatever may fairly be regarded as incidental to or consequential upon the things which the legislature has authorised ought not in the absence of express prohibition to be held to be *ultra vires*."

The lord justice then ([1935] Ch. at pp. 60, 61) himself summarises the effect of the provisions of the Act, and I need not read that passage also.

It will be observed that, whereas the trading purposes of the board are as stated in those judgments, the operation of the totalisator, the purposes as stated in sub-s. (6) comprise, *inter alia*, the improvement of breeds of horses; and it is, no doubt, true that the two things are closely linked. If it is indeed permissible to cite from the work of a living historian, PROFESSOR BROGAN, I cite this passage from *AN INTRODUCTION TO AMERICAN POLITICS* (p. 153):

"For although it is well known that the object of horse racing is to improve the breeds of racehorses so that they may run faster in other horse races, this activity has historically been associated with wagers upon the success of the endeavours."

Yet if the purposes are closely linked it does not follow that they are the same.

The Court of Appeal in *A.-G. v. Racecourse Betting Control Board* (1) held that the payment of commissions to Tote Investors, Ltd., was reasonably incidental to the powers of the board, as being directed to increasing the number of bets, and therefore to promoting the business success of the board. The members of this court did not say that the commissions, which were held to be *intra vires*, must therefore be comprehended by the formula "working expenses" in s. 3 (6)

- A of the Act. Still less did they indicate a view whether the commissions were payments wholly and exclusively laid out for the purpose of the board's business—the point not being before them it was unnecessary that they should. In my view, however, it is inevitable that such commissions and any other expenditure properly incurred by the board in the conduct of the business (as distinct from applications of the surplus of the totalisator fund, pursuant to the latter part of s. 3 (6)) must be classed as "working expenses": for the directions contained in sub-ss. (3), (4), (5) and (6) of s. 3 appear to leave no scope for expenditure by the board (other than by way of payment to winning backers and of application of the surplus of the fund) save under one or other of the heads in the parenthesis in sub-s. (6); and of these heads "working expenses" is the only one relevant. It was therefore said that the phrase "working expenses" must be narrowly construed. I am not, however, clear what precisely is meant thereby. Having regard to the presence of sub-s. (7) of s. 3 and to the language which I have quoted from the judgments of ROMER, L.J., and MAUGHAM, L.J., the term "working expenses" must at any rate cover expenditure reasonably and properly incurred in the conduct of the business committed to the board by Parliament. I therefore prefer to attempt no further definition than to say that "working expenses" means what those two English words naturally signify, and that they cover the expenses incurred, reasonably and properly, in the "working" (i.e., the setting up, keeping and operating) of totalisators on approved racecourses; but that they are not limited to such expenditure only as is wholly and exclusively laid out for the purposes of the board's business.

- Subject to this, I accept the Crown's argument, which I have above indicated.
- E The business of the board is that of operating totalisators, and is not the promoting of the improvement of breeds of horses as such, and the like. More particularly, I accept the view of the Crown that the purposes to which the surplus can alone be applied are "independent objectives", and like UPJOHN, J., I reject the view that it is legitimate to disregard these purposes as regards any of the applications of the surplus; and that is none the less so, even though the
- F procedure which was indicated in sub-s. (6) appears to have been somewhat departed from. By the express terms of sub-s. (6), the board is bound to apply the surplus moneys

"in accordance with a scheme prepared by the board and approved by the Secretary of State for purposes conducive",

- G etc. At first sight at any rate to me, the phrasing seems to contemplate that a scheme will be drawn up at some stage, though no doubt subject to later variation, in the sense in which that word is used familiarly, e.g., for administration of a charity. What appears to have happened is that no such formal scheme operative over a period has been drawn up. The board, at the end of the year, puts before the Secretary of State proposals for the application of the surplus, and those
- H proposals are considered and approved, and then constitute the "scheme" for that year.

- Nevertheless, it seems to me that the matter cannot be put higher than this: Out of the purposes which Parliament designated as those for which alone the surplus can be applied, and which, in my view, are essentially distinct from the business purposes of the board, the board has selected those most calculated to
- I promote the board's own business interests. The result, therefore, in my judgment, is that UPJOHN, J., was right in saying that the findings in this case were, on their face, open to question, and ought not to be regarded as sacrosanct. The judge said this ([1958] 1 All E.R. at p. 286):

"The appropriations are made only for the reason that they have to be so made pursuant to s. 3 (6) of the Act. They are made not for the purposes of trade but for public purposes conducive to the improvement of breeding of horses, the sport of horse racing and the advancement of veterinary

science . . . True enough, the appropriations made coincide with the trading desires of the board. That is very fortunate for the board, but it cannot turn what is, in essence, a statutory distribution in accordance with an Act of Parliament of a surplus of a fund into a trading activity."

The only qualification that I make to what I have said earlier (it is not strictly necessary for my judgment) is that it does not seem to me that no application under s. 3 (6) could in any case be one wholly and exclusively laid out for the purposes of the board's trade. On the material before us, however, it has not been established in my judgment that any such payments were of such a very special character that they should be rightly so described.

As regards the first head of expenses, the runners' allowances, with all respect to UPJOHN, J., I am not prepared to hold that these payments were ultra vires the board. In my judgment, it is not necessary to decide whether such payments were or were not ultra vires, because, assuming they were intra vires and must therefore be treated as working expenses, it does not follow that the payments were wholly and exclusively laid out for the purposes of the board's business. In my judgment the sums paid for runners' allowances were not so wholly and exclusively laid out, notwithstanding the findings of the Special Commissioners. It is true that these sums, not having been applications of the surplus fund pursuant to the final part of the sub-section, are not therefore of necessity impressed with the quality of being applied for one or other of the purposes for which alone such surplus is applicable; but it is impossible, in my judgment, to sever the commissioners' findings. The commissioners treated all the expenses with which we are concerned as having been incurred with like intent and for like purposes; and rightly so, for it has been conceded before us that the runners' allowances cannot in these respects be distinguished from, e.g., the travelling allowances. In my judgment it follows that, if the commissioners' findings are open to challenge as to all the other expenses (as I think they are), they must inevitably be open to challenge as regards the runners' allowances, to which they directed no separate attention or conclusion. And if the findings are so open to challenge, then in my judgment the runners' allowances fail equally with the other expenses to qualify as deductions for income tax purposes, since, like certain of the other expenses and particularly the travelling allowances, they were laid out for purposes not exclusive to the board's business, but, to some real extent at least, for the purpose of assisting and promoting the interests of racehorse owners. For these reasons I would therefore prefer to leave entirely open the question of the vires of the payment of runners' allowances, and all the more so since I have no wish to add to the difficulties of the board in the discharge of its responsible statutory tasks, and since the point does not appear to have been taken before the commissioners, so that the materials before us, like the form of the proceedings itself, are not properly or sufficiently directed to the determination of the question.

In the course of presenting the case, counsel for the board propounded six propositions. They are: (i) whatever the scope of the expression "working expenses" in s. 3 (6), as a matter of law, the expression does not constitute an exclusive definition of disbursements or expenses which are deductible in computing the profits of trade. (ii) there is no reason in law why a disbursement made pursuant to a scheme prepared by the board and approved by the Home Secretary should not be a disbursement wholly and exclusively laid out for the purposes of the board's trade. (iii) if the disbursement is of such a nature that, as a matter of law, it can have been made wholly or exclusively for the purposes of the trade, the question whether or not it was so made is one of fact. (iv) where it is found that the disbursement has been made by the trade "wholly and exclusively", etc., the fact that the expense inures also for the benefit of a third party is nihil ad rem as a matter of law. (v) the payments of the runners' allowances were not ultra vires. And (vi) if these propositions are well founded, there is no ground on

A which the decision of the Special Commissioners on the main part of the case can be disturbed.

In the result, I am prepared to accept Nos. (i), (ii) (with qualification), (iv) and (v), but not No. (iii). Number (vi) does not arise. I accept proposition No. (ii) as constituting a general negative, as above indicated, but not in fact as governing this case.

B In the circumstances, the cross-appeal does not now arise, but, in case there is an appeal in this matter to the House of Lords, I am prepared to say that, as at present advised, I agree with UPJOHN, J., that none of the payments can be distinguished as creating some enduring asset in the business of the board within the meaning of the issue. In the circumstances, I would dismiss the appeals.

C **MORRIS, L.J.:** I find myself in entire agreement with the reasoning and conclusion in the judgment that my Lord has delivered, and there is nothing that I desire to add.

ORMEROD, L.J.: I agree also, and have nothing to add.

Appeals dismissed. Leave to appeal to the House of Lords granted.

D Solicitors: *Simmons & Simmons* (for the board); *Solicitor of Inland Revenue.*
[*Reported by F. A. AMIES, ESQ., Barrister-at-Law.*]

E Re ALLSOPP'S MARRIAGE SETTLEMENT TRUSTS. PUBLIC TRUSTEE v. CHERRY AND OTHERS.

[CHANCERY DIVISION (Vaisey, J.), May 20, 1958.]

Settlement—Protected life interest—Variation of settlement following divorce—Husband's interests extinguished as if he were dead—Whether discretionary trust on forfeiture capable of operation.

F By a marriage settlement made in 1916, the wife settled a fund on trust, subject to the payment of an annuity to the husband, to pay the income to herself during her life, and on further trust if the husband should survive the wife to pay the income of the fund to the husband during his life on trusts, under which, on the occurrence of certain events whereby, if the

G income had belonged to him absolutely he would have been deprived of the right to receive it, his life interest would determine and a discretionary trust of the income would arise in favour of the husband and the issue of the marriage during the remainder of the husband's life. In 1928 the marriage was dissolved by decree of the Probate, Divorce and Admiralty Division, and by an order of that division made in 1929 it was ordered that the marriage settlement be varied "by extinguishing all the rights powers and interests of the [husband] in and under the said settlement as if he were already dead and had died in the lifetime of the " wife. There was one child of the marriage. The question arose whether, notwithstanding the order of 1929, the discretionary trust of income during the husband's lifetime could arise in favour of the issue of the marriage.

H **Held:** the husband's protected life interest was extinguished for all purposes by the order of 1929, and the discretionary trust was so connected with that life interest that it also was destroyed by that order.

I [As to protective trusts, see 29 HALSBURY'S LAWS (2nd Edn.) 597-600, para. 870; and for cases on the subject, see 40 DIGEST 558-561, 987-1003.]

Cases referred to:

(1) *Webb v. Webb*, [1929] P. 159; 98 L.J.P. 72; 140 L.T. 592; 27 Digest (Repl.) 656, 6179.

- (2) *Bowles v. Bowles*, [1937] 2 All E.R. 263; [1937] P. 127; 106 L.J.P. 68; A 157 L.T. 45; 27 Digest (Repl.) 644, 6078.
- (3) *Re Carew's Trusts, Gellibrand v. Carew*, (1910), 103 L.T. 658; 40 Digest 560, 1002.

Adjourned Summons.

The plaintiff, the Public Trustee as sole trustee of a marriage settlement dated Sept. 6, 1916, applied to the court by originating summons for the determination of the following questions; whether on the true construction of the settlement and an order of the Probate, Divorce and Admiralty Division made on July 1, 1929, varying the settlement the extinguishment by virtue of that order of all rights, powers and interests of the husband referred to in the settlement (a) operated for the purposes of cl. 2 (v) thereof as a failure or determination in the lifetime of the husband of the trust therein declared for the payment to him of the income as part of the income of the trust fund in the event of his surviving the wife so that in that event the discretionary trust thereby declared took effect, or (b) was to be regarded for the purposes of the sub-clause as a failure or determination of the trust for the benefit of the husband by reason of his death in the lifetime of the wife so that the discretionary trust could not now take effect, or (c) otherwise extinguished the discretionary trust.

The settlement dated Sept. 6, 1916, made in contemplation of a marriage which was solemnised on Sept. 20, 1916, provided (so far as is material) by cl. 1 for the assignment of certain property of the intended wife to trustees to create by cl. 2 (i) to (iii) a trust fund which, after the solemnisation of the intended marriage was to be held on trust subject to an annuity payable to the intended husband, to pay the income to the intended wife. By cl. 2 (iv), if the intended husband should survive the intended wife the income of the fund was to be held on trust for the husband during his life, but if he should do or attempt to do or should suffer any act or thing or if any event should happen whereby if the said annual income were payable to him absolutely for his life he would be deprived of the right to receive the same or any part thereof then in any such cases as well as on his death the trust therein declared for payment to him of the annual income should determine. By cl. 2 (v) if the intended husband's life interest should have been determined in his lifetime then during the residue of his life there was a discretionary trust to apply the annual income of the trust fund for the maintenance and support or otherwise for the benefit of all or any one or more exclusively of the others or other of "the intended husband and the issue of the now intended marriage". By cl. 3 the intended wife was given a limited power if she should marry again to revoke the trusts declared and to appoint the same on trusts for the benefit of any husband who might survive her and any child or children or other issue of such subsequent marriages as she might think proper.

There was one child of the marriage, a son, the second defendant Michael Anthony Victor Walter who, at the date of the summons, was without issue. On Aug. 8, 1928, the marriage was dissolved. By an order dated July 1, 1929, of the Probate, Divorce and Admiralty Division it was ordered, inter alia, that:

"the ante-nuptial indenture of settlement dated Sept. 6, 1916, be varied by extinguishing all the rights powers and interests of the respondent [the husband] in and under the said settlement as if he were already dead and had died in the lifetime of the petitioner [the wife] and that the petitioner's power of appointment under cl. 3 of the said settlement in favour of any husband who may survive her and of any issue of a subsequent marriage be only exercisable during the lifetime of the respondent to the extent of three eighths parts of the said settled funds."

The first defendant married a second time on Jan. 6, 1930 and there was issue, one child, the third defendant Vivian Deana Penelope Ann Dowell.

A The question arose whether, the order of July 1, 1929, having determined the former husband's life estate, the discretionary trust contingent on such determination in favour of the former husband and the issue of that marriage was also determined.

J. A. Armstrong for the plaintiff, the Public Trustee, sole trustee of the settlement.

B H. E. Francis for the first, second and third defendants, the wife and the son of the first marriage and the daughter of the second marriage.

VAISEY, J.: This case raises a short but not easy point of construction. The documents to be construed are two. First there is a settlement dated Sept. 6, 1916, made on the marriage of Miss Winifred Violet Allsopp and Mr. Reginald Arthur Walter. The other document is an order, dated July 1, 1929, of the Probate, Divorce and Admiralty Division varying that marriage settlement, following on the divorce in the previous year of the parties to that marriage.

C The property settled by the marriage settlement was the property of the intended wife; and the trusts gave her a life interest subject to the payment of a small annual sum, £300, to the intended husband. The next trust to take effect after her death was a protected life estate to the intended husband, i.e., a forfeitable life interest followed by a discretionary trust under which no doubt the husband was intended to be the primary object. The objects were the husband himself and the "issue of the intended marriage". The discretionary trust was to pay those moneys

E "for the maintenance and support or otherwise for the benefit of all or any one or more exclusively of the others or other of the [then] intended husband and the issue of the [then] intended marriage . . ."

In point of fact, the issue of the intended marriage so far is just one person, the second defendant, Mr. Michael Anthony Victor Walter, who is of age and married, but has at present no issue.

F The order of the Divorce Court was in the usual form, confirming a report already made by the registrar of the Probate, Divorce and Admiralty Division. The registrar investigates the circumstances, makes a report, and the matter comes before the court, which either confirms or rejects or alters it. Having confirmed the registrar's report, the order goes on to say:

G "that the ante-nuptial indenture of settlement dated Sept. 6, 1916, be varied by extinguishing all the rights powers and interests of the respondent [the former husband] in and under the said settlement as if he were already dead . . ."

H There is a general principle that one document is not varied by another unless the intention to vary is reasonably plain, and it should be noted that the order does not say that the settlement is thenceforth to take effect as if the husband were dead and had died in the lifetime of the former wife. The question is: What does it mean in the circumstances? The order is peculiar in that having first said that the husband's rights were all extinguished as if he were dead, it then presupposes (when referring to cl. 3 of the settlement) that the husband will continue living, because it limits the wife's right to withdraw property and to make a subsequent settlement during the lifetime of the husband.

I There is no doubt that the husband's rights, powers and interests were extinguished by this order. The question is whether the interests under the discretionary trust of future issue of the marriage have been extinguished. I have come to the conclusion that if the husband's protected life interest is extinguished, it is extinguished for all purposes; that the subsequent trusts in favour of the issue of the marriage are, so to speak, engrafted on to his life estate, and that when the life estate itself disappears, those engrafted trusts necessarily cease to exist or are finally precluded from coming into existence.

Counsel for the Public Trustee, the present sole trustee of the settlement, has put all the points that are available to him in favour of the other view, which is that in extinguishing the rights of the former husband other rights are not extinguished, and in particular the rights of possible unborn issue of the marriage are not extinguished. That view is possible on the literal reading of these words; but, on the whole, for the reason which I have given, I do not think that that argument should prevail.

There is a certain amount of authority in these matters. I have been referred to two cases. *Webb v. Webb* (1) ([1929] P. 159), which seems to show that a remainder in this kind of case can be disregarded, and *Bowles v. Bowles* (2) ([1937] 2 All E.R. 263), which is not very helpful, partly because the judge did not give a full reasoned judgment and I have nothing to rely on except the argument of counsel with which the judge seems to have been perfectly content, though he does not say so. Looking at the matter from the common-sense point of view, however, it seems to me that it would be a rather capricious conclusion to reach that, although the husband's contingent life estate in remainder has been completely extinguished, yet the ancillary trusts and powers, which grow out of that life estate in the case of forfeiture, and other incidents survive. There is no doubt that the order of the Divorce Court can operate so as to create a forfeiture: see *Re Carew's Trusts, Gellibrand v. Carew* (3) ((1910), 103 L.T. 658), before EVE, J., but I am not sure that that is relevant here. The life estate has been extinguished, and the substituted discretionary trusts in my judgment are so closely connected with and so definitely grafted on a life estate which the Divorce Court has expressly destroyed that they can have no separate existence of their own.

I think that the proper declaration for me to make is that the effect of the settlement and of the order of the Divorce Court varying that settlement is to be regarded as causing completely to fail the husband's reversionary life estate and, together with that reversionary life estate, the contingent discretionary trusts which, on the failure or determination of that life estate, were declared for the benefit of the husband and the issue of the marriage.

Declaration accordingly.

Solicitors: *Gillhams*, agents for *George T. Richards & Morgan*, Bournemouth (for all parties).

[Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.]

A Re BIRMINGHAM (*deceased*). SAVAGE AND ANOTHER v.
STANNARD AND OTHERS.

[CHANCERY DIVISION (Upjohn, J.), May 2, 6, 8, 9, 13, 1958.]

Administration of Estates—Gift—Gift of real estate contracted to be purchased—Death of testator before completion—Unpaid balance of purchase money—
B *Costs of completion—Whether charged on real estate specifically devised—Contrary intention—Administration of Estates Act, 1925 (15 Geo. 5 c. 23), s. 35 (1).*

Sale of Land—Vendor's lien—Contractual right of resale in case of non-completion—Whether lien excluded.

The testatrix by her will dated Sept. 8, 1952, bequeathed her residuary estate to charities. By a codicil dated Jan. 2, 1953, she bequeathed £10,000 to K. On Mar. 31, 1953, the testatrix agreed to buy a freehold dwelling-house for £3,500 and paid a deposit of £350. The contract incorporated cl. 32 (1)-(3)* of the Law Society's Conditions of Sale which provided for a vendor re-selling after notice on the purchaser's default. On Apr. 10, 1953, the testatrix, replying to an inquiry from her solicitors made before the contract was signed, informed them by letter that she would like to leave the house to K. as well as the £10,000. On Apr. 17, 1953, the testatrix executed a second codicil which stated "Whereas I have entered into a contract for the purchase of [the house], I hereby give the said property free of all duties to my daughter " K. On Apr. 21, 1953, which was before the date fixed for completion of the contract, the testatrix died. By s. 35 (1) of the Administration of Estates Act, 1925†, where a person died entitled to an interest in property charged with the payment of money, including a lien for unpaid purchase-money, the charge would primarily be payable out of the interest charged, if the deceased had not by will or other document signified a contrary intention.

Held: (i) K. took the dwelling-house subject to a charge for the unpaid balance of the purchase-money, because the vendor's lien for unpaid purchase-money arose at the moment when the contract was signed (cl. 32 (1)-(3) of the conditions of sale not preventing the lien arising) and accordingly s. 35 of the Administration of Estates Act, 1925, applied, as a contrary intention excluding it was not signified either by the testatrix' letter or by her second codicil.

G Dictum of SIR GEORGE JESSEL, M.R., in *Lysaght v. Edwards* ((1876), 2 Ch.D. at p. 506) as to the effect of a contract of sale in giving rise to a vendor's lien, applied.

Kettlewell v. Watson ((1884), 26 Ch.D. 501) explained; *Re Wakefield* ([1943] 2 All E.R. 29) considered.

H (ii) the solicitors' costs of completing the purchase must be borne by the testatrix' residuary estate, the solicitors not having at her death possession of any title deeds to the property and having no lien thereon.

[As to a devise of property charged with the payment of debt, see 16 HALSBURY'S LAWS (3rd Edn.) 348-350, paras. 672, 673; and for cases on the subject, see 23 DIGEST (Repl.) 485-487, 5520-5539.

I As to a solicitor's retaining lien at common law, see 31 HALSBURY'S LAWS (2nd Edn.) 238, paras. 264 et seq.

For the Administration of Estates Act, 1925, s. 35 (1), see 9 HALSBURY'S STATUTES (2nd Edn.) 739.]

Cases referred to:

(1) *Kettlewell v. Watson*, (1884), 26 Ch.D. 501; 53 L.J.Ch. 717; 51 L.T. 135; 40 Digest 298, 2564.

* The terms of cl. 32 (1)-(3) are printed at p. 399, footnote, post.

† Section 35 (1) is printed at p. 399, letter B, post.

(2) *Lysaght v. Edwards*, (1876), 2 Ch.D. 499; 45 L.J.Ch. 554; 34 L.T. 787; 40 Digest 182, 1518.

(3) *Re Wakefield, Gordon v. Wakefield*, [1943] 2 All E.R. 29; 2nd Digest Supp.

Adjourned Summons.

By their originating summons dated Sept. 2, 1957, the plaintiffs, the present trustees of the will and codicils of Daisy Theresa Birmingham, deceased, asked for the determination of (among others) the question whether on the true construction of the said will and second codicil of the testatrix and in the events which had happened any or all of the following sums (a) the unpaid balance of the purchase money at the date of the testatrix' death, (b) the stamp duty on the purchase and (c) the legal costs and other disbursements other than the stamp duty in connexion with the purchase of a dwelling-house known as No. 9, Friar Crescent, Brighton, ought to be borne by the first defendant as devisee of the said property or ought to be paid out of the testatrix' residuary estate. So far as the question related to stamp duty, it was referred back to chambers for further evidence to be filed.

M. Browne for the plaintiffs, the trustees.

Michael Bowles for the first defendant, the specific devisee.

E. I. Goulding for the second and third defendants, the residuary legatees.

UPJOHN, J.: This summons raises an interesting point as to how the balance of purchase money unpaid at the death of the testatrix should be borne as between residue and a specific devisee of the property.

The testatrix made her will on Sept. 8, 1952. She left the residue to charities, who are represented before me by the second and third defendants. She made her first codicil on Jan. 2, 1953, and by it she gave an immediate legacy of £10,000 to her daughter, the first defendant. Shortly after that on Mar. 31, 1953, the testatrix contracted to purchase property known as "Dorelle", No. 9, Friar Crescent, Brighton, for £3,500, and a deposit of £350 was, as usual, paid on the signing of the contract. The property was sold subject to the Sussex Law Society's Conditions of Sale, which themselves incorporated the Law Society's Conditions of Sale, 1934 and 1949, except, so far as is relevant, cl. 32 (4) and (5).

Just before that, on Mar. 27, 1953, her solicitor wrote to the testatrix making certain inquiries about the purchase, and saying:

"With regard to the will, do you wish to give the house [No. 9, Friar Crescent] to Kathleen [the first defendant] in addition to the £10,000 already given to her? If so, it will be necessary to make a codicil to this effect."

On Apr. 10, 1953, the testatrix replied to that letter:

"I would like Kathleen to have the house in Friar Crescent as well as the £10,000 already arranged."

As a consequence of those instructions to her solicitor, he drafted and the testatrix executed a second codicil on Apr. 17, 1953. Clause 1 provided:

"Whereas I have entered into a contract for the purchase of No. 9, Friar Crescent, Brighton, in the said county, I hereby give the said property free of all duties to my daughter Kathleen Leah Stannard."

By cl. 4 of the contract, the purchase was to be completed on or before Apr. 27, 1953, but the testatrix, who was apparently seriously ill during all this period, died on Apr. 21. Her executors remained bound by the terms of the contract into which she had entered, and by arrangement between the parties the property was conveyed direct to the first defendant on May 21, 1953, before probate, which was granted to the executors on July 15 of that year.

The first question that arises is how the balance of the purchase money, which was paid to the vendor by the executors out of residue when the conveyance was executed, ought to be borne. The arrangement was made without prejudice to all questions, and for convenience. On that three points have been argued

A before me. It is argued on the one side that the Administration of Estates Act, 1925, s. 35, applies to this case, and it is said that that section operates to charge the property at the date of the death of the testatrix (which admittedly is the relevant date) with the unpaid balance of purchase money, and it is submitted there is nothing to prevent the operation of that section. Section 35 (1) provides:

B “Where a person dies possessed of, or entitled to, or, under a general power of appointment (including the statutory power to dispose of entailed interests) by his will disposes of, an interest in property, which at the time of his death is charged with the payment of money, whether by way of legal mortgage, equitable charge or otherwise (including a lien for unpaid purchase money), and the deceased has not by will deed or other document signified
C a contrary or other intention, the interest so charged, shall as between the different persons claiming through the deceased, be primarily liable for the payment of the charge; and every part of the said interest, according to its value, shall bear a proportionate part of the charge on the whole thereof.”

Counsel for the specific devisee submits, for the reasons that I shall mention in a moment, that s. 35 has no operation in the circumstances of this case, and if it has, he says that the testatrix has by will or other document signified a contrary or other intention.

He raises a third or subsidiary point, for he submits that cl. 32 of the Law Society's Conditions of Sale prevents any lien or charge arising in this case. Paragraph (1), para. (2) and para. (3) of cl. 32* apply to this sale, although para.
E (4) and para. (5) do not, and give a vendor certain rights if a purchaser fails to fulfil his part of the contract. The vendor may give a notice, and if he does give a notice and it is not complied with, then certain remedies are available to him. Those remedies are set out in para. (2). It is said that that ousts the equitable lien which, at any rate after the date fixed for completion, would arise under the operation of the general law. I am quite unable to accept that
F argument. The remedies provided by cl. 32, in my judgment, are additional to and not in any way in derogation of the vendor's general rights according to law. If he chooses to avail himself of the particular remedy of cl. 32, different consequences may flow; but until he does exercise that right, I can see nothing in the terms of the contract which prevents the ordinary vendor's lien for unpaid purchase money arising.

G I return then to the main point. It is submitted by counsel for the specific devisee that, as the date of the death of the testatrix was before the date fixed for completion, the vendor had no lien on the estate for the balance of the unpaid purchase money. A vendor's lien he says only arises at the date fixed for completion. He submits that the executors, in paying the balance of the purchase money shortly after the date of the testatrix' death, were not dis-
H charging a charge in any way, but were performing a contract. He relies principally on *Kettlewell v. Watson* (1) ((1884), 26 Ch.D. 501). In that case it is important to notice that vendors who had allowed purchase money to remain unpaid after actual conveyance, and apparently after certain sub-conveyances,

* Clause 32 of the Law Society's Conditions of Sale provides so far as relevant:
I “(1) If a purchaser shall fail to perform his part of the contract, the vendor may give to the purchaser or to his solicitor at least fourteen days' notice in writing specifying the default and requiring the purchaser to make good the same before the expiration of the notice.

“(2) If the purchaser does not comply with the terms of the said notice—(a) the deposit money, if any, shall be forfeited to the vendor, or, in the case of settled land, to his Settled Land Act trustees; (b) the vendor may resell the property without previously tendering a conveyance to the purchaser; (c) the contract shall, without prejudice to the vendor's right to resume possession (if given up) and recover documents belonging to him, become void, save and except that the following provisions shall apply.

“(3) Any resale may be made by auction or private contract, at such time, subject to such conditions, and in such manner generally, as the vendor may think proper.”

were seeking to enforce against the sub-purchasers the vendor's lien for unpaid purchase money. LINDLEY, L.J., said (*ibid.*, at p. 507):

"The prima facie right of an unpaid vendor of land to an equitable lien upon it for the amount of his unpaid purchase money is too well established to be disputed. The right arises whenever there is a valid contract of sale and the time for completing that contract has arrived and the purchase money is not duly paid."

On the other side, counsel for the residuary legatees relies on the well known passage in *Lysaght v. Edwards* (2) ((1876), 2 Ch.D. 499) where SIR GEORGE JESSEL, M.R., lays down the general law as between vendor and purchaser pending completion. It is in these terms (*ibid.*, at p. 506):

"It appears to me that the effect of a contract for sale has been settled for more than two centuries; certainly it was completely settled before the time of LORD HARDWICKE, who speaks of the settled doctrine of the court as to it. What is that doctrine? It is that the moment you have a valid contract for sale the vendor becomes in equity a trustee for the purchaser of the estate sold, and the beneficial ownership passes to the purchaser, the vendor having a right to the purchase money, a charge or lien on the estate for the security of that purchase money, and a right to retain possession of the estate until the purchase money is paid, in the absence of express contract as to the time of delivering possession. In other words, the position of the vendor is something between what has been called a naked or bare trustee, or a mere trustee (that is, a person without beneficial interest), and a mortgagee who is not, in equity (any more than a vendor), the owner of the estate, but is, in certain events, entitled to what the unpaid vendor is, viz., possession of the estate and a charge upon the estate for his purchase money."

Counsel for the residuary legatees submits that the vendor's charge for the purchase money arises the moment that the contract is signed. The remedies available to enforce that charge may vary according to the state of the transaction, i.e., until the date fixed for completion, the vendor cannot actively enforce his lien by action, but he has the right (subject always to the express terms of the contract) to remain in possession and to refuse to execute a conveyance until the purchase money is paid. After the date fixed for completion he has a right to enforce the charge or lien by appropriate proceedings in these courts. Counsel submits the statement of SIR GEORGE JESSEL, M.R., shows that throughout, from the moment the contract was executed, the vendor has a charge for his unpaid purchase money.

I think that that argument is quite correct. It seems to me that the explanation of *Kettlewell v. Watson* (1) is that the observations of LINDLEY, L.J., which I have read (26 Ch.D. at p. 507), were perfectly accurate in the circumstances of that case, because he was dealing with a case where unpaid vendors were seeking to enforce their remedy against sub-purchasers in respect of unpaid purchase money, and that remedy, as I have already stated, only arises after the date fixed for completion. I am fortified in the view which I have expressed by the fact that in *Re Wakefield, Gordon v. Wakefield* (3) ([1943] 2 All E.R. 29) the facts, so far as relevant to this point, were entirely indistinguishable, for the contract was signed, the date for completion was to be Aug. 12, 1941, and the testator died on Aug. 3, 1941. This point taken before me was, however, never taken by counsel and was never noticed by LORD GREENE, M.R., nor by LUXMOORE, L.J. I hardly think that the point, had it been a valid one, could have escaped their attention. Accordingly, in my judgment, s. 35 does apply unless the contrary intention is shown, for the charge for the unpaid balance of the purchase money arose on execution of the contract.

The question then arises whether a contrary intention for the purposes of s. 35 is shown, and it was submitted, first, that the terms of the second codicil

A itself showed that the testatrix intended that the balance of the purchase money was to be discharged out of residue. Secondly, reliance was placed on the two letters that I have read passing between the testatrix and her solicitor. I do not think there is really any difference between the two.

At first sight it seemed to me that the testatrix had expressed or had signified a contrary intention, because it seemed illusory to make a codicil giving the property to her daughter if indeed all she was giving was the property subject to payment of the unpaid purchase price, especially as she considered apparently that the gift would be substantial, for she directed that it was to be free of all duties. Having heard full argument, however, I am unable to come to that conclusion. She gives the property which she has contracted to purchase. B That is no doubt the property referred to in the contract she had just signed, but it says nothing, either expressly or by implication, as to the application of s. 35, and I see nothing which can exclude the operation of that section. Let me take an example. Supposing that in fact the contract had been completed in the lifetime of the testatrix, but (solely for the sake of argument, because in fact there seems to have been some dispute as to what was intended) the contract had been completed and the testatrix had borrowed on mortgage (shall we say) D £3,000 to enable her to complete the purchase, how would the codicil have operated then? I do not think that it could have been argued successfully that by the terms of the codicil, or by the terms of her letters to her solicitor, she was signifying a contrary intention for the purposes of s. 35. In such a case it seems to me clear that the daughter would have taken the property subject to the mortgage which the testatrix had entered into. So if the law implies a charge on the property for unpaid purchase money, the daughter, in my judgment, takes subject to it, because the testatrix had not signified a contrary intention. E

Accordingly, the unpaid purchase money is charged on the property, and it having been paid without prejudice to all questions out of residue, the necessary adjustment must be made in paying the legacy of £10,000 to the daughter.

F [HIS LORDSHIP referred to a subsidiary question how the stamp duty on the conveyance was to be borne. He referred the question back to chambers for further evidence to be filed. HIS LORDSHIP continued:] The last matter is with regard to the solicitors' costs incurred in completing the purchase. The scale fee seems to have been some £56, added to which there are search fees and petty disbursements, and so on. The residuary legatees can only establish a case for throwing those costs on the property if they can show that those costs were in some way equitably charged on it. No doubt had the conveyance been completed in the lifetime of the testatrix, the solicitors would have received the deeds in the normal course and would have had an equitable lien on those deeds for any costs remaining unpaid; but what was the position at the relevant time, i.e., at the date of the testatrix' death? They were then doing work. No bill of costs had been rendered. Nothing at that time was due from the testatrix to her solicitors. Furthermore they could have no lien on anything for they had no deeds in their possession. It was somehow suggested they had some form of lien on the contract. I do not follow that. It was their duty to carry through the contract to completion. I cannot see that at the relevant date this inchoate claim to costs was charged on anything. Accordingly, those costs must be borne by residue. I

Declaration accordingly.

Solicitors: *Ridsdale & Son*, agents for *Somerville, Hilton & Savage*, Torquay (for the plaintiffs); *Gibson & Weldon*, agents for *Farrington & Whiting*, Brighton (for the first defendant); *Wilde, Sapte & Co.* (for the second and third defendants).

[*Reported by F. GUTTMAN, Esq., Barrister-at-Law.*]

LONG v. LLOYD.

A

[COURT OF APPEAL (Jenkins, Parker and Pearce, L.JJ.), May 2, 5, 19, 1958.]

Misrepresentation—Innocent misrepresentation—Sale of goods—Misrepresentation as to condition of motor lorry—Acceptance of delivery—Buyer's claim to rescind contract within week of delivery.

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The defendant, a haulage contractor, advertised for sale at £850 a 1947 motor lorry which he described as in "exceptional condition". The plaintiff, also a haulage contractor, saw the lorry at the defendant's premises on a Saturday; the defendant said that it was capable of a speed of forty miles per hour. During a trial run on the following Monday, the plaintiff found that the speedometer was not working, that the spring was missing from the accelerator pedal, and that he had difficulty with the top gear. The defendant said that the lorry did eleven miles to the gallon and assured the plaintiff that he had told him all that was wrong with the vehicle. The plaintiff thereupon purchased the lorry for £750, paying £375 and agreeing to pay the balance at a later date. On the following Wednesday the plaintiff drove from Sevenoaks to Rochester to pick up a load. During the journey the dynamo ceased to function, and the plaintiff also noticed that an oil seal was leaking, that there was a crack in a wheel and that he had used eight gallons of petrol on the journey of about forty miles. That evening the plaintiff told the defendant of these defects and the defendant offered to pay half the cost of a reconstructed dynamo but denied any knowledge of a broken oil seal. The plaintiff accepted the offer. He had a dynamo fitted and on the next day, Thursday, the lorry was driven by the plaintiff's brother on a journey to Middlesbrough. On Friday night the plaintiff, having heard that the lorry had broken down on its journey, wrote to the defendant pointing out the various defects in the lorry and asking for the return of his money. The lorry was subsequently examined by an expert who was of the opinion that the lorry was not in a roadworthy condition. The lorry had in fact the defects alleged but the defendant's representations concerning it, though untrue, were honestly made. In an action for rescission of the contract on the ground of the defendant's innocent misrepresentations,

Held: any right of rescission that a purchaser of goods might have after delivery of the goods to him would be barred by his final acceptance of the goods, and, though in the present case the plaintiff might be regarded, in view of the defendant's representations (e.g., that the lorry would run eleven miles to the gallon), as not having accepted the lorry until the plaintiff had tested it, yet on the facts he had finally accepted the lorry before he purported to rescind the contract; therefore the plaintiff was not entitled to rescission of the contract.

Seddon v. North Eastern Salt Co., Ltd. ([1905] 1 Ch. 326), and *Solle v. Butcher* ([1949] 2 All E.R. 1107) considered.

Dictum of DENNING, L.J., in *Leaf v. International Galleries* ([1950] 1 All E.R. at p. 695, letter D) applied.

Per CURIAM: apart from special circumstances the place of delivery [of goods sold] is the proper place for examination and for acceptance (see p. 407, letter G, post).

Appeal dismissed.

[As to rescission of an executed contract, see 23 HALSBURY'S LAWS (2nd Edn.) 102, para. 142, text and note (b); and for cases on the subject, see 35 DIGEST 67, 68, 642-647, and 39 DIGEST 686, 2718, 2719.]

Cases referred to:

(1) *Solle v. Butcher*, [1949] 2 All E.R. 1107; [1950] 1 K.B. 671; 31 Digest (Repl.) 674, 7699.

(2) *Leaf v. International Galleries*, [1950] 1 All E.R. 693; [1950] 2 K.B. 86; 2nd Digest Supp.

- A (3) *Wilde v. Gibson*, (1843), 1 H.L. Cas. 605; 9 E.R. 897; 35 Digest 68, 649.
 (4) *Brownlie v. Campbell*, (1880), 5 App. Cas. 925; 35 Digest 9, 24.
 (5) *Seddon v. North Eastern Salt Co., Ltd.*, [1905] 1 Ch. 326; 74 L.J.Ch. 199; 91 L.T. 793; 39 Digest 686, 2719.
 (6) *Angel v. Jay*, [1911] 1 K.B. 666; 80 L.J.K.B. 458; 103 L.T. 809; 30 Digest (Repl.) 504, 1451.
- B (7) *Harrison v. Knowles & Foster*, [1918] 1 K.B. 608; 87 L.J.K.B. 680; 118 L.T. 566; 35 Digest 53, 472.
 (8) *Bell v. Lever Bros., Ltd.*, [1932] A.C. 161; 101 L.J.K.B. 129; 146 L.T. 258; *revsg. S.C. sub nom. Lever Bros., Ltd. v. Bell*, [1931] 1 K.B. 557; Digest Supp.
 (9) *L'Estrange v. F. Graucob, Ltd.*, [1934] All E.R. Rep. 16; [1934] 2 K.B. 394; 103 L.J.K.B. 730; 152 L.T. 164; Digest Supp.
- C (10) *Cooper v. Phibbs*, (1867), L.R. 2 H.L. 149; 16 L.T. 678; 35 Digest 93, 27.
 (11) *MacKenzie v. Royal Bank of Canada*, [1934] A.C. 468; 103 L.J.P.C. 81; 151 L.T. 486; Digest Supp.

Appeal.

- D The plaintiff appealed against an order of GLYN-JONES, J., dated July 15, 1957, whereby he dismissed the plaintiff's claim for rescission of a contract for the sale of a motor lorry by the defendant to the plaintiff and for the return of £375 being the part of the purchase price already paid by the plaintiff to the defendant. The facts appear in the judgment of the court.

E. J. R. Crowther for the plaintiff.

- E *Lindsay Cullen* for the defendant.

Cur. adv. vult.

May 19. **JENKINS, L.J.:** The judgment which is about to be read by PEARCE, L.J., is the judgment of the court in this case.

- F **PEARCE, L.J.:** The plaintiff appeals from a judgment of GLYN-JONES, J., dismissing the plaintiff's claim to rescission of an executed contract of sale on the ground of innocent misrepresentation. The learned judge in a clear and careful judgment made findings of fact that may be summarised as follows.

- G Both parties carry on business as haulage contractors, the plaintiff at Sevenoaks, the defendant at Hampton Court. On Friday, Oct. 19, 1956, the plaintiff read a newspaper advertisement inserted by the defendant, offering for sale at £850 a 1947 Dennis twelve/fourteen ton lorry described as in "exceptional condition". On the telephone that evening the defendant said to the plaintiff that it was "in first-class condition". The next day, Saturday, the plaintiff saw it at the defendant's premises. The defendant said that it was capable of forty miles per hour. The plaintiff said that he would be willing to pay £750 for it, if he was satisfied on a trial run, and it was agreed that on the plaintiff paying £5 the defendant would hold the vehicle for him until Monday. That night it was arranged on the telephone that the plaintiff might pay one half of the purchase price in cash and the remainder a few days later. The defendant repeated that it was a good vehicle. On Monday, Oct. 22, the plaintiff took trade plates to the defendant's premises in order to take the lorry (which was unlicensed) for a trial run on the road. The defendant made various representations as to the lorry, one of which was that it would do eleven miles to the gallon.
- H The defendant and the plaintiff drove it in turn. The speedometer was not working, there was a wire which had to be pulled in order to decelerate since the spring was missing from the accelerator pedal, and the plaintiff had difficulty with the fifth (or top) gear. The defendant having assured the plaintiff that there was nothing wrong with the vehicle about which he had not told him, the plaintiff there and then bought the lorry for £750 paying a cheque of £370 which together with the £5 already paid made up half the purchase price and left a balance of £375 to be paid later. Before leaving, the plaintiff said: "If I

find anything wrong your 'phone won't stop ringing". The defendant answered: A
"It's quite all right".

On Tuesday, Oct. 23, a receipt was posted to the plaintiff by the defendant:

"Received from Mr. S. E. Long the sum of £375 by cheque being half
payment of Dennis vehicle DDW 864 as tried and approved by the above.
Balance remaining £375."

On Wednesday, Oct. 24, the plaintiff drove the lorry to Rochester to pick up a B
small load. On the journey the dynamo ceased to function and the plaintiff
was advised that night to fit a reconstructed dynamo. He noticed also that an
oil seal was allowing oil to escape, that there was a crack in one of the wheels,
and that he had used eight gallons of fuel for about forty miles. That night he
told the defendant of these defects. The defendant said that the dynamo was C
"all right" when the lorry left him and offered to pay half the cost of the
reconstructed dynamo. This the plaintiff accepted. The defendant denied any
knowledge of the broken oil seal.

The next day, Thursday, Oct. 25, the dynamo was fitted and the lorry was
driven by the plaintiff's brother on a journey to Middlesbrough. On the night
of Friday, Oct. 26, the plaintiff heard from his brother that the lorry had broken D
down on its journey. In consequence, the plaintiff wrote to the defendant
complaining of leakage or consumption of oil from the sump, of a fuel consump-
tion of only nine miles per gallon instead of eleven, and of the fact that instead
of the lorry being a forty m.p.h. vehicle it was an effort to keep it at twenty-five
m.p.h. with the four ton load. He ended:

"The above in addition to the oil cup retainer, the rear offside spring E
retaining bolt, and also one cracked wheel (one to my knowledge) the dodgy
accelerator, has convinced me that you have wilfully and deliberately mis-
represented the state of the vehicle and under these circumstances I ask for
the return of my money, and the vehicle will be returned to you by about
Tuesday (I hope it lasts that long)."

He has not persisted in that charge of fraud. On Nov. 14 the lorry was F
examined by an expert who gave evidence of many serious defects which he
found, sufficient, in his opinion, to make it unroadworthy.

The learned judge found that the defendant honestly made the misrepresenta-
tions complained of, that the vehicle had probably deteriorated while out of use,
and that it had the defects alleged. He said this:

"The fact remains that the plaintiff was induced to buy this vehicle by G
material representations made to him by the defendant which, though
honestly made, were untrue, and I must therefore deal with [counsel for
the plaintiff's] argument that in the circumstances of this case his client
is entitled to rescind the contract."

Counsel for the plaintiff's argument is founded on the view expressed on this H
somewhat vexed question by DENNING, L.J., in the comparatively recent cases
of *Solle v. Butcher* (1) ([1949] 2 All E.R. 1107 at p. 1119) and *Leaf v. International
Galleries* (2) ([1950] 1 All E.R. 693 at p. 694).

That view, while accepting so far as it relates to matters of title the well-
established principle that rescission of a contract for the sale of land will not be
granted after completion on the ground of innocent misrepresentation (see I
Wilde v. Gibson (3) (1843), 1 H.L. Cas. 605, and *Brownlie v. Campbell* (4) (1880),
5 App. Cas. 925), rejects as no longer authoritative *Seddon v. North Eastern
Salt Co., Ltd.* (5) ([1905] 1 Ch. 326), the well-known case concerning sales of shares,
in which JOYCE, J., clearly stated the law to be that the court would not grant
rescission of an executed contract for the sale of a chattel or chose in action on
the ground of innocent misrepresentation; and involves in the like condemnation
Angel v. Jay (6) ([1911] 1 K.B. 666), in which the same principle was applied to
an executed lease. The learned lord justice's view on this question, which has

A been ably and persuasively championed before us by counsel for the plaintiff, is thus expressed in *Leaf v. International Galleries* (2) ([1950] 1 All E.R. at p. 695):

B “The observations of JOYCE, J., in *Seddon v. North Eastern Salt Co., Ltd.* (5) are, in my opinion, too widely stated. Many judges have treated it as plain that an executed contract of sale may, in a proper case, be rescinded for innocent misrepresentation: see, for instance, WARRINGTON, L.J., and SCRUTTON, L.J., in *Harrison v. Knowles & Foster* (7) ([1918] 1 K.B. 608 at pp. 609, 610); LORD ATKIN in *Bell v. Lever Bros., Ltd.* (8) ([1932] A.C. 161 at p. 224); SCRUTTON, L.J., and MAUGHAM, L.J., in *L'Estrange v. F. Graucob, Ltd.* (9) ([1934] All E.R. Rep. 16 at pp. 19, 20). Apart from that, there is now the decision of the majority of this court in *Solle v. Butcher* (1) which overrules the first ground of decision in *Angel v. Jay* (6).”

C In the earlier case of *Solle v. Butcher* (1) ([1949] 2 All E.R. at p. 1121), DENNING, L.J., had said that:

D “The fact that the lease has been executed is no bar to this relief. No distinction can in this respect be taken between rescission for innocent misrepresentation and rescission for common misapprehension, for many of the common misapprehensions are due to innocent misrepresentation, and *Cooper v. Phibbs* (10) ((1867), L.R. 2 H.L. 149) shows that rescission is available even after an agreement of tenancy has been executed and partly performed. The observations in *Seddon v. North Eastern Salt Co., Ltd.* (5), have lost all authority since SCRUTTON, L.J., threw doubt on them in *Lever Bros., Ltd. v. Bell* (8) ([1931] 1 K.B. 557 at p. 588) and the Privy Council actually set aside an executed agreement in *MacKenzie v. Royal Bank of Canada* (11) ([1934] A.C. 468). If and in so far as *Angel v. Jay* (6) decided that an executed lease could not be rescinded for an innocent misrepresentation it was, in my opinion, a wrong decision. It would mean that innocent people would be deprived of their right of rescission before they had any opportunity of knowing they had it. I am aware that in *Wilde v. Gibson* (3) LORD CAMPBELL said that an executed conveyance could be set aside only on the ground of actual fraud, but this must be taken to be confined to misrepresentations as to defects of title on the conveyance of land.”

E DENNING, L.J.'s condemnation of *Seddon v. North Eastern Salt Co., Ltd.* (5) and *Angel v. Jay* (6) was by no means fully accepted by the two other members of the court in *Leaf v. International Galleries* (2). SIR RAYMOND EVERSHED, M.R., said this ([1950] 1 All E.R. at p. 696):

H “In the circumstances it is unnecessary, as my brethren have already observed, to express any conclusion on the more general matter whether the so-called doctrine which finds expression in the headnote to *Seddon v. North Eastern Salt Co., Ltd.* (5) ought now to be treated as of full effect and validity. The doubt on that matter is the greater since the observations of the majority of this court in *Solle v. Butcher* (1), but out of respect to the argument of counsel for the buyer and because the matter is one of interest to lawyers . . . I venture to add some observations which may be relevant when the general application of this doctrine has to be further considered . . . [ibid., at p. 697] Finally, I add this. True it is that since the observations of SCRUTTON, L.J., in *Bell v. Lever Bros., Ltd.* (8) and those of this court in *Solle v. Butcher* (1) much greater doubt may be entertained about the validity of the decision of JOYCE, J., in *Seddon v. North Eastern Salt Co., Ltd.* (5) in 1905—forty-five years ago. The article in the LAW QUARTERLY REVIEW [January, 1939, p. 90] read to us by counsel for the buyer was written eleven years ago. There has been opportunity for Parliament to alter the law if it was thought inadequate. I am not saying that that is a ground on which we should conclude that the so-called doctrine of *Seddon v.*

North Eastern Salt Co., Ltd. (5) is well stated or is in all respects correct, but the fact that it has stood for such a length of time, even though qualified, is, I think, another consideration deserving of some weight when this matter has further to be debated and to be adjudicated on."

JENKINS, L.J., said (*ibid.*, at p. 695):

"So far as dealings in land are concerned there is a considerable body of authority to the effect that rescission on the ground of innocent misrepresentation will not be allowed after conveyance. For instance, there are the observations (1 H.L. Cas. at p. 632) of LORD CAMPBELL to that effect in *Wilde v. Gibson* (3), and the doctrine has also been applied to leases in *Angel v. Jay* (6). In some of the cases, on the strength of the authorities dealing with sales of land, the proposition has been stated in general terms to the effect that no executed contract can be rescinded after completion on the ground of innocent misrepresentation. As appears from the recent decision of the majority of this court in *Solle v. Butcher* (1) it seems probable that the proposition thus generally stated is unduly wide. In particular, it cannot be assumed that it necessarily holds good with respect to a sale of chattels passing by delivery. For the purposes of this case, however, I find it unnecessary to decide how far it is possible to obtain, on the ground of innocent misrepresentation, rescission of a contract for the sale of chattels passing by delivery after the contract has been completed by delivery of those chattels, and I propose to confine myself to considering whether, assuming such a claim to be open, this is a case in which it should properly be allowed."

The question was thus left open in *Leaf v. International Galleries* (2) but the court was unanimous in holding that on the assumption that the innocent misrepresentation did give rise to a right to claim rescission after the contract had been completed such right had in the circumstances of the case been lost by the time that the buyer purported to exercise it. Counsel for the plaintiff's able argument has not sufficed to resolve our doubts on the question of principle, but we think that it is unnecessary here, as it was in *Leaf's* case (2), to decide whether the innocent misrepresentation relied on by the plaintiff gave rise to a right to rescission after completion of the contract, because we are satisfied that his right to do so, if it ever existed, had been lost by the time that he purported to reject the lorry.

We should next refer to the facts of *Leaf's* case (2) and the observations made by the members of the court on those facts. The contract was a contract for the sale of a picture which the sellers innocently misrepresented to have been painted by Constable. The buyer took delivery of the picture and kept it for a matter of five years. He was then informed on attempting to sell the picture that it was not a Constable. Thereupon he brought his action for rescission on the ground that the sellers had misrepresented, albeit innocently, the identity of the artist. He could have claimed damages for breach of warranty but refrained from doing so. On these facts DENNING, L.J., after referring to s. 11 (1) (c) and s. 35 of the Sale of Goods Act, 1893, said this ([1950] 1 All E.R. at p. 695):

"In this case this buyer took the picture into his house, and five years passed before he intimated any rejection. That, I need hardly say, is much more than a reasonable time. It is far too late for him at the end of five years to reject this picture for breach of any condition. His remedy after that length of time is for damages only, a claim which he has not brought before the court . . . although rescission may in some cases be a proper remedy, nevertheless it is to be remembered that an innocent misrepresentation is much less potent than a breach of condition. A condition is a term of the contract of a most material character, and, if a claim to reject for

- A breach of condition is barred, it seems to me a fortiori that a claim to rescission on the ground of innocent misrepresentation is also barred. So, assuming that a contract for the sale of goods may be rescinded in a proper case for innocent misrepresentation, nevertheless, once the buyer has accepted, or is deemed to have accepted, the goods, the claim is barred. In this case the buyer must clearly be deemed to have accepted the picture. He had ample opportunity to examine it in the first few days after he bought it. Then was the time to see if the condition or representation was fulfilled, yet he has kept it all this time and five years have elapsed without any notice of rejection. In my judgment, he cannot now claim to rescind . . .”
- B

JENKINS, L.J., founded himself on the five years' delay as being far in excess of the reasonable time within which the right to claim rescission, if it ever existed, should have been exercised; and while expressing no dissent from, did not advert to, DENNING, L.J.'s view to the effect that the buyer's acceptance of the picture in itself barred any right there might otherwise have been to claim rescission. SIR RAYMOND EVERSHED, M.R., said (*ibid.*, at p. 696):

- “I also agree that this appeal should be dismissed, for the reasons which have already been given. On the facts of this case it seems to me that the buyer ought not now to be allowed to rescind this contract . . . [*ibid.*, at p. 697] If a man elects to buy a work of art or any other chattel on the faith of some representation, innocently made, and delivery of the article is accepted, then it seems to me that there is much to be said for the view that on acceptance there is an end of that particular transaction, and that, if it were otherwise, business dealings in these things would become hazardous, difficult, and uncertain.”
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As to the facts of the present case, counsel for the plaintiff contrasts the period of only a few days between the delivery of the lorry to the plaintiff and his purported rescission of the contract with the period of five years in *Leaf's* case (2). He says the plaintiff was entitled to a reasonable time within which to ascertain

- F the true condition of the lorry and to exercise (if so advised) the right of rescission which for the present purpose he must be assumed to have had. It is of course obvious that so far as time is concerned this case bears no resemblance to *Leaf's* case (2). Nevertheless, a strict application to the facts of the present case of DENNING, L.J.'s view to the effect that the right (if any) to rescind after completion on the ground of innocent misrepresentation is barred by acceptance of the goods must necessarily prove fatal to the plaintiff's case. Apart from special
- G circumstances, the place of delivery is the proper place for examination and for acceptance. It was open to the plaintiff to have the lorry examined by an expert before driving it away but he chose not to do so. It is true, however, that the truth of certain of the representations, for example, that the lorry would do eleven miles to the gallon could not be ascertained except by user and therefore
- H the plaintiff should have a reasonable time to test it. Until he had had such an opportunity it might well be said that he had not accepted the lorry, always assuming, of course, that he did nothing inconsistent with the ownership of the seller. An examination of the facts, however, shows that on any view he must have accepted the lorry before he purported to reject it.

- I Thus, to recapitulate the facts, after the trial run the plaintiff drove the lorry home from Hampton Court to Sevenoaks, a not inconsiderable distance. After that experience he took it into use in his business by driving it on the following day to Rochester and back to Sevenoaks with a load. By the time he returned from Rochester he knew that the dynamo was not charging, that there was an oil seal leaking, that he had used eight gallons of fuel for a journey of forty miles and that a wheel was cracked. He must also, as we think, have known by this time that the vehicle was not capable of forty miles per hour. As to oil consumption, we should have thought that, if it was so excessive that the sump was practically dry after three hundred miles, the plaintiff could have reasonably

been expected to discover that the rate of consumption was unduly high by the time he had made the journey from Hampton Court to Sevenoaks and thence to Rochester and back. On his return from Rochester the plaintiff telephoned to the defendant and complained about the dynamo, the excessive fuel consumption, the leaking oil seal and the cracked wheel. The defendant then offered to pay half the cost of the reconstructed dynamo which the plaintiff had been advised to fit, and the plaintiff accepted the defendant's offer. We find this difficult to reconcile with the continuance of any right of rescission which the plaintiff might have had down to that time.

The matter does not rest there. On the following day the plaintiff, knowing all that he did about the condition and performance of the lorry, despatched it, driven by his brother, on a business trip to Middlesbrough. That step, at all events, appears to us to have amounted, in all the circumstances of the case, to a final acceptance of the lorry by the plaintiff for better or for worse, and to have conclusively extinguished any right of rescission remaining to the plaintiff after completion of the sale. Accordingly, even if the plaintiff should be held, notwithstanding *Seddon v. North Eastern Salt Co., Ltd.* (5), to have had a right to rescission which survived the completion of the contract, we think that on the facts of this case he lost any such right before his purported exercise of it. For these reasons we would dismiss this appeal.

Appeal dismissed. Leave to appeal to the House of Lords granted.

Solicitors: *Farmer & Miller*, Sevenoaks (for the plaintiff); *Piesse & Sons*, agents for *Abbott, Sturgess & Co.*, Richmond, Surrey (for the defendant).

[Reported by HENRY SUMMERFIELD, Esq., Barrister-at-Law.]

ALLIANCE BUILDING SOCIETY v. PINWILL.

[CHANCERY DIVISION (Vaisey, J.), May 21, 23, 1958.]

Mortgage—Attornment clause—Creation of relationship of landlord and tenant—Notice to quit—Length of notice required—Whether property let as a dwelling—Rent Act, 1957 (5 & 6 Eliz. 2 c. 25), s. 16.

A legal charge, dated Nov. 1, 1950, of a dwelling-house provided that the mortgagor attorned tenant to the mortgagees "of such part of the mortgaged property as now is or shall at any time during the continuance of this security . . . be in the occupation of the [mortgagor] at the yearly rent of a peppercorn if demanded. (2) Provided as follows:—(i) that the [mortgagees] may at any time after their power of sale has become exercisable enter into and upon the mortgaged property or any part thereof and determine the tenancy hereby created after giving to the [mortgagor] at least seven days' notice to quit . . ." The mortgagor occupied the house for a period. On Jan. 7, 1958, the mortgagees gave the mortgagor notice to quit on Jan. 17, 1958. In proceedings by the mortgagees for possession the question arose whether the notice to quit contravened the Rent Act, 1957, s. 16, by which a notice giving less than four weeks' notice to quit any premises let as a dwelling was invalid.

Held: the notice to quit was valid because s. 16 of the Rent Act, 1957, was not intended to protect a mortgagor against his mortgagee but to protect a real tenant against a real landlord under a real residential letting, and did not, on the facts of this case, apply to the tenancy arising under the attornment clause in the mortgage.

SEMBLE: there might be cases to which s. 16 of the Rent Act, 1957, did apply where a mortgagor had attorned tenant of the mortgagee, e.g., where the rent reserved was a full rackrent or where the terms of the

- A mortgage obliged the mortgagor to reside personally on the premises (see p. 410, letter I, post).

[As to relationship established by an attornment clause in a mortgage, see 23 HALSBURY'S LAWS (2nd Edn.) 325, para. 489; and for cases on the subject, see 35 DIGEST 327-331, 712-737.

For s. 16 of the Rent Act, 1957, see 37 HALSBURY'S STATUTES (2nd Edn.) 567.]

- B Cases referred to:

(1) *Re Knight, Ex p. Isherwood*, (1882), 22 Ch.D. 384; 52 L.J.Ch. 370; 48 L.T. 398; 35 Digest 328, 719.

(2) *Portman Building Society v. Young*, [1951] 1 All E.R. 191; 2nd Digest Supp.

- C (3) *Steyning and Littlehampton Building Society v. Wilson*, [1951] 2 All E.R. 452; [1951] Ch. 1018; 2nd Digest Supp.

(4) *Hinckley & Country Building Society v. Henny*, [1953] 1 All E.R. 515; 3rd Digest Supp.

Adjourned Summons.

- D The plaintiffs, Alliance Building Society, issued an originating summons under R.S.C., Ord. 55, r. 5 (a), claiming possession as mortgagees from the mortgagor. The mortgagor did not appear, but the question arose whether the length of the notice to quit (which satisfied the attornment clause) being less than the four weeks' period prescribed by the Rent Act, 1957, s. 16, was invalidated by that section.

J. W. Mills for the plaintiffs, the mortgagees.

- E The mortgagor did not appear and was not represented.

Cur. adv. vult.

May 23. VAISEY, J., read the following judgment: By this summons the mortgagees, the Alliance Building Society, claim against the mortgagor, Mr. Edwin James Pinwill, delivery of possession of the mortgaged premises, which consist of a dwelling-house, No. 390, The Radleys, at Marston Green in the County of Warwick. The mortgage is in the form of a legal charge and is dated Nov. 1, 1950.

- F The only possible defence to the proceedings depends on the answer to the short question whether the attornment clause contained in the mortgage brings the case within the Rent Act, 1957, s. 16. The attornment clause, so far as material, is in the following terms:

- G “(1) The borrower hereby attorns tenant to the society of such part of the mortgaged property as now is or shall at any time during the continuance of this security (but within twenty-one years from the date of this charge) be in the occupation of the borrower at the yearly rent of a peppercorn if demanded. (2) Provided as follows:—(i) that the society may at any time after their power of sale has become exercisable enter into and upon the mortgaged property or any part thereof and determine the tenancy hereby created after giving to the borrower at least seven days' notice to quit . . .”

- H I will assume that the mortgaged property has at some time been in the occupation of the mortgagor, though that is not his address as given either in the mortgage itself, or in the notice to quit to which I will presently refer, or in the summons. It is, however, given as his address in a supplemental deed, not otherwise relevant, executed by him and dated July 8, 1952. At the moment it appears that the property is occupied by Mrs. E. J. Pinwill, his wife, who was invited to attend the proceedings, but has not done so.

I By a writing dated Jan. 7, 1958, the mortgagees gave to the mortgagor notice to quit the premises on Jan. 17, 1958; that is to say, it was a notice longer than the seven days mentioned in the attornment clause. The suggestion is that this notice to quit is invalid as contravening the Rent Act, 1957, s. 16, which provides:

"No notice by a landlord or a tenant to quit any premises let (whether before or after the commencement of this Act) as a dwelling shall be valid unless it is given not less than four weeks before the date on which it is to take effect."

The long title to the Act states that one of its purposes was to provide a minimum length for notice to terminate "residential lettings". This clearly points to s. 16.

The definition clause, s. 25, is a remarkable instance of referential legislation, but does not seem to throw any light on the present question. This may be summarised as follows: "Do I find in the attornment clause here either a 'landlord' or a 'tenant' or premises 'let as a dwelling', within the meaning of s. 16?" In my judgment I find none of these things, and on the authorities to which I am about to refer, I do not think that I can or should. It is to be observed that in the Landlord and Tenant Act, 1954, s. 69, the word "tenancy" is defined as not including

"a mortgage term or any interest arising in favour of a mortgagor by his attorning tenant to his mortgagee",

and the absence of any corresponding excepting provision from the Rent Act, 1957, may have some significance, but I confess that I do not know what it is. The draftsman of s. 16 ought obviously to have provided for the point in one way or the other, and it is regrettable that with the precedent of the Act of 1954 to guide him he did not do so.

There is, in my judgment, much authority to support the view which I hold that s. 16 is inapplicable. First there is *Re Knight, Ex p. Isherwood* (1) ((1882), 22 Ch.D. 384), from the headnote of which I read the following:

"Notwithstanding the insertion of an attornment clause in a mortgage deed, the real relation between the parties is that, not of landlord and tenant, but of mortgagee and mortgagor . . ."

In *Portman Building Society v. Young* (2) ([1951] 1 All E.R. 191), it was held that "there was no relationship of landlord and tenant between the mortgagee and mortgagor" in that case, because the Rent Acts dealt only with cases "in which the person in occupation was in the true sense a tenant of premises 'let' to him by the person who was in ordinary language the landlord and owner of the premises" and not with cases "where the real relationship . . . was that of mortgagor and mortgagee." In *Steyning and Littlehampton Building Society v. Wilson* (3) ([1951] 2 All E.R. 452) it was held that the Agricultural Holdings Act, 1948, could not have been intended to apply to anything other than true transactions between landlord and tenant and did not apply to tenancies arising by reason of an attornment clause. The provision in s. 23 (1) of that Act invalidated a notice to quit if it purported to terminate the tenancy before the expiration of twelve months from the end of the current year. It was held not to apply to a tenancy arising under an attornment clause, and I adopt the observation of DANCKWERTS, J., at the beginning of his judgment where he says (*ibid.*, at p. 453):

"The case illustrates again the undesirability of retaining in mortgages an attornment clause which is entirely obsolete, and, at the present time, serves no useful purpose."

I am of opinion that the Rent Act, 1957, s. 16, protects a real tenant against a real landlord under a real "residential letting" and is not intended to, and does not, benefit a mortgagor to the detriment of his mortgagee. I should add that although this decision may apply to many cases in which attornment clauses appear in mortgages, it may not necessarily apply to all of such cases; it might, for instance, be inapplicable to a case where the rent reserved was not a peppercorn but a full rackrent, or to a case in which the terms of the mortgage obliged the mortgagor to reside personally on the premises.

A I hold, therefore, that the mortgagees are entitled to the order which they seek in the present case. The length of notice required is seven days under the mortgage and not four weeks under s. 16. I may, in conclusion, refer to one other case, viz., *Hinckley & Country Building Society v. Henny* (4) ([1953] 1 All E.R. 515).

Order accordingly.

B Solicitors: *Boxall & Boxall*, agents for *Cardens*, Brighton (for the plaintiffs).
[Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.]

C LONDON EXPORT CORPORATION, LTD. v. JUBILEE
COFFEE ROASTING CO., LTD.

[COURT OF APPEAL (Jenkins, Parker and Pearce, L.J.J.), May 8, 1958.]

Arbitration—Setting aside award—Misconduct—Procedure of board of appeal—
D Custom of trade contrary to implied term of agreement—Approach to question
of setting aside award on grounds of irregularity in procedure or infringement
of the rules of natural justice.

E An alleged custom can be incorporated into a contract only if there is nothing in the express or necessarily implied terms of the contract to prevent such inclusion and, further, a custom will only be imported into a contract where it can be so imported consistently with the tenor of the document as a whole (see p. 420, letter H, post).

A dispute arising out of a contract for the sale of ground nuts was referred to arbitration under an arbitration clause in the contract and, the arbitrators being unable to agree, to an umpire. An appeal from the umpire's award was taken to the board of appeal constituted in accordance with the regulations of the Incorporated Oil Seed Association. Rule 6 of the rules incorporated in the contract provided that an appeal should be determined by a board consisting of four members of the association's committee of appeal and that "no member of the committee of appeal who has an interest in the matter in dispute or who has acted as arbitrator or umpire in the case and no member of the same firm or company to which either of the arbitrators or the umpire shall belong, shall vote on the question of the appointment of members of the board of appeal or shall be appointed a member of the board of appeal". Rule 7 contemplated the parties appearing before the board at a hearing of the appeal. After the conclusion of the hearing of the appeal in the present case the board requested, as was customary in the trade, the umpire to remain with them when they deliberated on their decision in the absence of the parties to the dispute. On appeal from an order setting aside the decision of the board on the ground that the presence of the umpire at the deliberations of the board was an irregularity amounting to "misconduct",

Held: the award had been rightly set aside because, apart from any question of custom or practice, the procedure of the board in giving private audience to the umpire and conferring with him in the absence of the parties would be an irregularity amounting to "misconduct" justifying the board's award being set aside, and, as it was a necessary implication from rules 6, 7, that the board were to reach their decision after a hearing at which the parties were present and that the umpire was not to have any influence on the board in reaching their decision, any custom or practice to admit him privately to attend their deliberations was impliedly excluded by the rules.

I Dicta of LORD CAMPBELL, C.J., in *Humfrey v. Dale* ((1857), 7 E. & B. at p. 273), and of LORD BLACKBURN in *Tucker v. Linger* ((1883), 8 App. Cas. at p. 511) applied.

QUAERE whether the board of appeal's practice of admitting the umpire to attend the deliberations of the board in the absence of the parties was a trade custom (see p. 421, letters C to G, post).

Decision of DIPLOCK, J. ([1958] 1 All E.R. 494) affirmed.

[As to setting aside an award on the ground of misconduct, see 2 HALSBURY'S LAWS (3rd Edn.) 57-59, para. 126; and for cases on the subject, see 2 DIGEST 548-551, 1810-1827.]

As to when a custom is repugnant to a written contract, see 11 HALSBURY'S LAWS (3rd Edn.) 193, para. 356; and for cases on the subject, see 17 DIGEST (Repl.) 44-47, 528-562.]

Cases referred to:

- (1) *Hutton v. Warren*, (1836), 1 M. & W. 466; 5 L.J.Ex. 234; 150 E.R. 517; 17 Digest (Repl.) 38, 449.
- (2) *Re Sutro (L.) & Co. & Heilbut, Symons & Co.*, [1917] 2 K.B. 348; 86 L.J.K.B. 1226; 116 L.T. 545; 17 Digest (Repl.) 45, 543.
- (3) *Produce Brokers Co., Ltd. v. Olympia Oil & Cake Co., Ltd.*, [1916] 1 A.C. 314; 85 L.J.K.B. 160; 114 L.T. 94; 2 Digest (Repl.) 602, 1289.
- (4) *Myers v. Sarl*, (1860), 3 E. & E. 306; 30 L.J.Q.B. 9; 121 E.R. 457; 17 Digest (Repl.) 42, 508.
- (5) *Metzner v. Bolton*, (1854), 9 Exch. 518; 23 L.J.Ex. 130; 156 E.R. 221; 17 Digest (Repl.) 51, 590.
- (6) *Tucker v. Linger*, (1883), 8 App. Cas. 508; 52 L.J.Ch. 941; 49 L.T. 373; 48 J.P. 4; 2 Digest (Repl.) 51, 269.
- (7) *Palgrave, Brown & Son, Ltd. v. S.S. Turid*, [1922] 1 A.C. 397; 91 L.J.P. 81; 127 L.T. 42; 17 Digest (Repl.) 46, 548.
- (8) *Humfrey v. Dale*, (1857), 7 E. & B. 266; 119 E.R. 1246; *affd.* Exch. Ch. sub nom. *Dale v. Humfrey*, (1858), E.B. & E. 1004; 120 E.R. 783; sub nom. *Humfrey v. Dale & Morgan*, 27 L.J.Q.B. 390; 31 L.T.O.S. 328; 17 Digest (Repl.) 47, 552.
- (9) *Yates v. Pym*, (1816), 6 Taunt. 446; 128 E.R. 1107; 17 Digest (Repl.) 44, 529.
- (10) *Blackett v. Royal Exchange Assurance*, (1832), 2 Cr. & J. 244; 1 L.J.Ex. 101; 149 E.R. 106; 17 Digest (Repl.) 44, 530.
- (11) *Errington v. Minister of Health*, [1934] All E.R. Rep. 154; [1935] 1 K.B. 249; 104 L.J.K.B. 49; 152 L.T. 154; 99 J.P. 15; Digest Supp.

Interlocutory Appeal.

This was an appeal by the sellers under a contract from the decision of DIPLOCK, J., dated Feb. 10, 1958, and reported [1958] 1 All E.R. 494, setting aside on the ground of misconduct an award in favour of the sellers made by the board of appeal of the Incorporated Oil Seed Association, to which both parties belonged. The board's award had been made on an appeal by the buyers from an award by the umpire to whom the dispute between the parties had been referred pursuant to an arbitration clause in the contract. The misconduct relied on was that the umpire, at the request of the board and as was usual in such arbitrations, remained with the board, despite the buyer's protests, after the parties had withdrawn at the conclusion of the hearing. The facts appear in full in the judgment of JENKINS, L.J.

J. F. Donaldson and C. S. Staughton for the sellers, the appellants.

H. A. P. Fisher for the buyers, the respondents.

JENKINS, L.J.: This is an appeal from an order of DIPLOCK, J., dated Feb. 10, 1958 [reported [1958] 1 All E.R. 494] whereby he set aside an award of the board of appeal of the Incorporated Oil Seed Association, acting as appellate arbitrators, in favour of the London Export Corporation, Ltd., who were the sellers under the relevant contract.

- A The ground on which the buyers, who were the Jubilee Coffee Roasting Company, Ltd., sought to have the award set aside, was misconduct on the part of the board of appeal of the Incorporated Oil Seed Association in the course of the arbitration. "Misconduct", is, of course, used in the technical sense in which it is familiar in the law relating to arbitrations as denoting irregularity, and not any moral turpitude or anything of that sort.
- B The present appellants, the London Export Corporation, were sellers of a quantity of Chinese ground nuts to the buyers, the Jubilee Coffee Roasting Company, Ltd. When the documents were tendered the buyers rejected them because the goods had not been shipped in accordance with the contract. The contract was made on the Incorporated Oil Seed Association's standard form and it included provisions for arbitration of a type familiar in standard contracts such
- C as this, which are well-known in many different trades. The arbitration provisions were in the form that, in the event of dispute, each party was to appoint an arbitrator, and if the arbitrators were unable to agree, they were to appoint an umpire, who was to hear and determine the matter, and in the event of either party being dissatisfied with the decision of the umpire, there was a right of appeal to the board of appeal under certain rules. The decision of the umpire in the
- D present case was that the buyers were not entitled to reject the documents. The buyers being dissatisfied appealed from that decision to the board of appeal, who affirmed the umpire's award.

- I should next refer to the relevant parts of the standard contract. The first page contains the provisions relating to the particular transaction. I do not think that there is anything which requires notice until one comes to para. 16,
- E which is the arbitration clause and is in these terms:

- "All disputes from time to time arising out of this contract, including any question of law appearing in the proceedings, whether arising between the parties hereto, or between one of the parties hereto, and the trustee in bankruptcy of the other party, shall be referred to arbitration according to the rules appended to this contract, and this stipulation may be made a rule of any of the divisions of Her Majesty's High Court of Justice in Ireland on the application of either contracting party, for the purpose of enforcing an award against a party residing or carrying on business in Ireland. Neither buyers, sellers, trustee in bankruptcy, nor any other person claiming under either of them, shall bring any action against the other of them in respect of any such dispute until such dispute has been settled by the arbitrators, umpire, or committee or board of appeal, as the case may be, and it is expressly agreed that the obtaining an award from either tribunal, as the case may be, shall be a condition precedent to the right of either contracting party to take any legal proceedings against the other in respect of any claim arising out of this contract."

- H I do not think that I need read further. It is a quite familiar form of submission.

Then I come to the rules, and r. 1 is:

- "Any dispute arising out of a contract embodying these rules shall be referred to arbitration in London, each party appointing one arbitrator, who shall be a member of the association, or a partner in a member's firm, or a director of a company represented by a member, and such arbitrators shall have the power if and when they disagree to appoint an umpire, who shall be a member of the association, or a partner in a member's firm, or a director of a company represented by a member, whose decision is to be final."

Then there is a provision about fees and a provision dealing with the event of one of the parties refusing to appoint an arbitrator, which does not arise here.

Then r. 4 is:

"All awards by arbitrators or an umpire shall be in writing on an official

form issued by the secretary of the association and the arbitrators or umpire shall have the power to award the costs of and connected with the reference, and may assess the same at a fixed sum if they or he shall think fit."

Then in r. 5 comes the right of appeal:

"In case either party shall be dissatisfied with the award a right of appeal shall lie to the committee of appeal of the Incorporated Oil Seed Association provided it be claimed by notice given to the secretary of the association not later than twelve o'clock noon on the twenty-eighth day after the date of the award (Sundays and public holidays during that period not to count) and provided also that the appellant at the same time pays to the association as a fee for the appeal [and then there is a provision as to fees]."

Rule 6 is:

"The appeal shall be determined by a board of appeal consisting of four members of the committee of appeal of the Association in accordance with the regulations of association for the time being of the Incorporated Oil Seed Association, and the rules of the executive committee for the time being in force. No member of the committee of appeal who has an interest in the matter in dispute or who has acted as arbitrator or umpire in the case and no member of the same firm or company to which either of the arbitrators or the umpire shall belong, shall vote on the question of the appointment of members of the board of appeal or shall be appointed a member of the board of appeal. Neither the arbitrators nor the umpire who have acted in a dispute on one portion of a parcel nor any member of the same firm or company to which either of the arbitrators or the umpire shall belong, shall be entitled to vote for the election of a board of appeal or be eligible for appointment on a board of appeal dealing with questions arising on the remainder of the parcel in the following cases: (a) in a dispute as to quality when there is only one sample and analysis representing the entire quantity available; (b) in a dispute as to matters other than quality when any of the questions arising is similar to any of those arising in the case in which they have already acted as arbitrators or umpire; but, save as in these rules hereinbefore provided, any member of a board of appeal which has dealt with one such case shall be eligible to vote for or serve on a board of appeal dealing with a subsequent case arising on the remainder of the parcel."

Rule 7:

"The parties to an arbitration or an appeal to the committee of appeal shall not be represented or appear by counsel or solicitor on the hearing of such arbitration or appeal unless in the sole discretion of the arbitrators, or umpire, as the case may be, or board of appeal, the case is of special importance or questions of law are likely to arise upon which the opinion of the High Court of Justice may be required."

Rule 8:

"The board of appeal shall confirm the award appealed from unless not less than three of the members of the board of appeal decide to vary such award. The board of appeal may award the payment of the costs and expenses of and incidental to the appeal but the appeal fee shall follow the award unless three of the members of the board of appeal shall direct otherwise. The board of appeal shall have the power to vary an award."

I do not think I need read the rest of that rule.

Then there is a provision in r. 9 about withdrawing an appeal. I do not think that there is anything more of importance in the remaining rules. Those are the rules set out in the standard contract, in accordance with which any arbitration is to be heard and determined.

The nature of the misconduct complained of by the buyers was this. It appears

- A that for a matter of fifty years on any appeal to the board of appeal it has been the practice for the parties or those representing them to withdraw at the end of the hearing but for the umpire to remain with the board if they request him to do so. It is said that the object of that arrangement is to enable the umpire to tell the board whether the contentions raised before the board were the same as those raised before him, and also to tell the board, as I understand, what were the reasons for his decision. In this particular case that practice was followed, and Mr. Barry, a director of the buyers, who represented them in this matter, unsuccessfully protested. It is said that the conduct of the board in conferring with the umpire, otherwise than in the presence of the parties, was, in the technical sense, "misconduct", and sufficed to invalidate the award. That contention commended itself to DIPLOCK, J.
- C I should perhaps next refer, but at no very great length, to the evidence which was given on affidavit, the first affidavit being that of Mr. Barry. He says that he is a director of the Jubilee Coffee Roasting Company, Ltd. (the buyers), and he sets out the history of the contract which gave rise to the dispute, and he refers to the fact that the contract was on the Incorporated Oil Seed Association's form. Then, after narrating the course of the matter and bringing the story of the arbitration down to the appeal, he says this in paras. 11 and 12:
- D

- "On Oct. 31, 1957, the board so chosen met to hear the appeal. I was present and called evidence and addressed the board in support of the appeal on behalf of buyers. Sellers were represented, and their representative addressed the board on behalf of sellers. I then replied on behalf of buyers. The umpire, Mr. B. J. Dixon, from whose award the appeal was being brought, was present throughout the hearing. At the close of the hearing, when the representatives of the parties were about to retire, I inquired whether the umpire was going to remain with the board of appeal after the parties had retired, and I asked that, if the umpire was going to remain, I might have permission to stay so as to hear what he said. Mr. Pearson, the chairman of the board, said: 'I do not permit that.' I replied, 'In that case I leave under protest.' Mr. Pearson said, 'A note will be taken of your protest.' I then left the room, and Mr. Dixon remained with the board. I was later informed by Mr. Dixon that, in answer to a question from the board as to his reasons for his award, he had addressed the board."
- E
- F

- Then there is an affidavit of Mr. Parkes, who was appointed arbitrator for the London Export Corporation, the sellers, and who I understand, argued the sellers' case before the board of appeal. I need only refer to paras. 6 and 7 of his affidavit. He says:
- G

- "6: Subsequent events were substantially as set out in paras. 9 to 13 (inclusive) of Mr. Barry's said affidavit. I was present at the hearing before the board of appeal and presented the seller's case. The case for the buyers was presented in the greatest detail by Mr. Barry who addressed the board for about forty-five minutes. I addressed the board for a much shorter period relying upon the contract and submitting that, in accordance with established custom of the trade, the bill of lading was a good tender. 7: Mr. Barry's protest to the board was a complete surprise to me and I did not associate myself with his protest for I know from my experience as a member of the board and from appearing before it that it is the invariable custom of the board to ask the umpire to remain. It is part of the established procedure for conducting appeals under the rules of the Incorporated Oil Seed Association and in my opinion is, or should be, well known to all members of the association and all who use its contract forms. I know that a similar practice exists in the case of appeals under the rules of the London Oil & Tallow Association. I have been for at least twelve years and am still a member of the appeal committee of that association."
- H
- I

Then Mr. Pearson, chairman of the appeal court in this case, said this in his affidavit: A

" 4: With regard to para. 12 of the said affidavit my recollection is as follows: After Mr. Barry had replied on behalf of the buyers I asked the two parties if they had concluded their respective cases. To this both Mr. Parkes and Mr. Barry replied in the affirmative. I then asked the parties to withdraw and at the same time asked the umpire to remain. This was in accordance with the custom which has prevailed in the trade for many years and which is well known to all persons in the trade. I am able to speak of this of my own personal knowledge as I have been in the trade for sixty-seven years and have been a member of the committee of appeal from 1908 to the present time. I have also acted as an arbitrator in the trade throughout the same period. 5: When I asked Mr. Dixon the umpire to remain Mr. Barry then said that he wished to remain and to be present while the board heard Mr. Dixon. As chairman of the board I informed Mr. Barry that this could not be permitted. It is the customary practice in the Incorporated Oil Seed Association to ask the umpire to remain alone with the board of appeal. Mr. Barry protested that he had a right to be present and hear the umpire and left under protest. 6: After the parties had withdrawn I asked the umpire whether the evidence and contentions put before the board differed from those which had been put before him. The umpire replied in the negative. This was the only question put to the umpire and upon hearing this answer the board of appeal proceeded to consider the case and decide upon their award. 7: I would emphasise that nothing was said by the umpire after the parties had left which raised any new matter which had not been discussed when they were present. Had the umpire raised any such new matter it would have been necessary for the board to consider whether or not the parties should be given a further opportunity of addressing the board upon such new matter. This question did not however arise in the present case." B C D E

Then there is an affidavit by the umpire who confirms the account given by Mr. Pearson and says in para. 3: F

" The only additional matter that I remember is that after I had answered the chairman's question in the negative I added of my own volition that in making my award I had taken the view that the contract as amended was simply for shipment by a named steamer. This point had been fully argued by the parties both in the course of the arbitration before me and also at the hearing before the court of appeal at which hearing I was present. I was not in the room after the parties had withdrawn for more than about five minutes." G

I do not think that I need read any further. Then there was an affidavit by Mr. Barry in reply, but I do not think that it is necessary to look at that. I should, however, mention the letter of Feb. 5, 1958, in which it is stated that Mr. Dixon did, in fact, make the further statement to which he refers. This is a letter written, I understand, on behalf of Mr. Pearson for the purpose of clearing up that point, so that it can be taken that Mr. Dixon was right in what he said in para. 3 of his affidavit. H

Those are the facts, and the question is whether on those facts the learned judge was right in holding that the award should be set aside. As to the law, one can start with the principle that in the absence of some agreement between the parties to a submission such as this, either express or implied, conduct such as the appeal board's conduct in the present case in giving private audience to the umpire and conferring with him in the absence of the parties, would undoubtedly have amounted to misconduct and would have sufficed to invalidate the award. I think that that has never been disputed. I

A The argument put for the appellant sellers is, however, to this effect. It is said that, although there is nothing in the actual printed terms of the arbitration rules to authorise conduct of the kind objected to, nevertheless, there is a custom of the trade which can and should be read into these rules, authorising the appeal board, at the conclusion of their hearing of the parties to the submission, to see the umpire, as they did, in the absence of the parties, and confer with him. That submission is alleged to be made good by the evidence, which showed that this practice, now objected to, has, in fact, been followed in all arbitrations of this kind for very many years. Mr. Pearson, with his long experience of this association, put it, I think, at fifty years. Therefore, it is said, there is an invariable practice of the board of appeal which has been followed for fifty years without objection on anyone's part. Counsel for the sellers urges that this term should be read into the printed rules, so as to make the printed rules accord with the real agreement between the parties; with the printed rules as they actually stand everyone, so he says, has allowed for the special custom.

Counsel for the buyers attacked that argument on a large number of grounds. He said in effect that the custom could not be relied on because it was contrary to natural justice, contrary to public policy and unreasonable—I am not sure that he did not also say unlawful—and tended to produce an unfair result, and was inconsistent with the contract.

The learned judge rejected all counsel for the buyers' reasons except the last one, namely, the inconsistency of the custom with the actual terms of the contract into which it was sought to import the custom, and on that ground the learned judge set aside the award. Accordingly, it is only necessary for us for the purpose of disposing of the present appeal to deal with that ground, and I find it unnecessary to express any view one way or the other on the remaining contentions put forward by counsel for the buyers.

I should next refer to the judgment of the learned judge. He says ([1958] 1 All E.R. at p. 499):

F “The umpire, says counsel for the applicants [the buyers], is at least in no better position than a disinterested stranger, for having made his award he is *functus officio*, and although not interested in any financial sense he is not free of the natural human interest in being shown to be right. In the absence of a proved custom or trade practice to the contrary, I should have no hesitation in acceding to this argument; but the real strength of the [sellers'] case lies in the ‘custom’, for by agreeing to arbitration by arbitrators and umpires who must be members of the I.O.S.A., with an appeal to a board of appeal also members of the committee of appeal of that body, there must be taken to be incorporated in the arbitration agreement an agreement to accept the association's customary procedure except in so far as such procedure is unreasonable or conflicts with the written terms of the agreement.”

H Then I pass to where the learned judge says this (*ibid.*, at p. 500):

I “Though I am not prepared to say that the practice is unreasonable, there yet remains the question whether it is inconsistent with the terms of the written agreement; and although I have evidence that the practice has gone on for very many years and has been adopted by another well-known trade association, I have no information how long the arbitration rules appended to the I.O.S.A. contract forms have been in their present form or whether the arbitration rules of the other association are in identical form. There is no express term in the arbitration agreement forbidding the practice; and [counsel for the sellers] has argued in the first instance that a proved custom can be excluded only if it is inconsistent with an express term. I think, however, that this is not the correct view, and that a custom or trade practice may be excluded by the express terms of the contract or by necessary implication from those express terms. This seems to me to be well

established. See *Hutton v. Warren* (1) ((1836), 1 M. & W. 466 at p. 475); *Re L. Sutro & Co. & Heilbut, Symons & Co.* (2) ([1917] 2 K.B. 348); and *Produce Brokers Co., Ltd. v. Olympia Oil & Cake Co., Ltd.* (3) ([1916] 1 A.C. 314 at p. 324), to which [counsel for the buyers] referred.

"It is here that r. 6 of the arbitration rules appended to the contract is important. The parties have made it clear, not only that the umpire is not to be a member of the board of appeal which hears the appeal from his decision, but also that he is to have no voice even in the selection of that board; and these prohibitions apply not only to the umpire himself but to any member of the firm or company to which he belongs. This at least suggests that it was the intention of the parties that the umpire, having made his award, had to have nothing to do with any appeal from it. There are other considerations which support this conclusion. One of the commonest types of arbitration contemplated by the arbitration agreement is a quality arbitration. In such an arbitration the umpire is not merely weighing expert evidence given before him which may be repeated before the appeal board and on which they can form their own judgment, but is entitled to exercise his own expertise; and if he communicates to the appeal board the views that he has formed as a result of such exercise this is in no different category from any other expert evidence given at the hearing before the appeal board, for the appeal board re-hears evidence de novo and does not hear the evidence given before the umpire save in so far as the parties choose to re-present it before them. By r. 6 the parties have expressly confided the decision of any appeal to an appeal board appointed in the manner there set out and to no one else. They have expressly provided that the umpire and any person closely connected with him in business shall not be a member of that board or have any voice in its selection. He, together with the arbitrators, is, of all members of the committee of appeal of the association, to be a stranger to the board of appeal's decision. I think that it is a necessary implication from this that the umpire is to have no influence, direct or indirect, on the board of appeal in reaching its decision, and that the board of appeal have no right to seek any information, whether of fact or of opinion, from him in the absence of the parties, or to allow him to attend their deliberations after the conclusion of the hearing. If they do so, that is contrary to the implied terms of the arbitration agreement, and it matters not whether the information he gives them in fact has influenced their decision, or indeed, if they allow him to attend their deliberations after the hearing, whether they in fact ask him for any information at all."

That is the view of the learned judge on the question of inconsistency and it is a view with which I would express my respectful concurrence. I think it is borne out by the various authorities to which we were referred. I might conveniently first mention the passage in SMITH'S LEADING CASES (13th Edn.), Vol. 1, p. 604, in which there is a quotation from the judgment of PARKE, B., in *Hutton v. Warren* (1) ((1836), 1 M. & W. 466 at p. 475) where he says this:

"It has long been settled, that, in commercial transactions, extrinsic evidence of custom and usage is admissible to annex incidents to written contracts, in matters with respect to which they are silent. The same rule has also been applied to contracts in other transactions of life, in which known usages have been established and prevailed; and this has been done upon the principle of presumption that, in such transactions, the parties did not mean to express in writing the whole of the contract by which they intended to be bound, but to contract with reference to those known usages."

A more important passage, I think, comes subsequently where this occurs (SMITH'S LEADING CASES (13th Edn.) p. 606):

"From the above luminous judgment of PARKE, B., it may be collected, that evidence of custom or usage will be received to annex incidents to

- A written contracts on matters with respect to which they are silent: (1) in contracts between landlord and tenant; (2) in commercial contracts; (3) in contracts in other transactions of life, in which known usages have been established and prevailed. But that such evidence is only receivable when the incident which it is sought to import into the contract is consistent with the terms of the written instrument. If inconsistent the evidence is not
- B receivable and this inconsistency may be evidenced: (1) by the express terms of the written instrument: (2) by implication therefrom."

The text continues:

- "The above rules were cited with approval by BLACKBURN, J., in *Myers v. Sarl* (4) ((1860), 3 E. & E. 306) and by BRAY, J., in *Re L. Sutro & Co. & Heilbut, Symons & Co.* (2) ([1917] 2 K.B. 348 at p. 366)."

In *Myers v. Sarl* (4), BLACKBURN, J., expressed his complete approval of the passage in SMITH'S LEADING CASES to which I have just referred. Then we were also referred to *Produce Brokers Co., Ltd. v. Olympia Oil & Cake Co., Ltd.* (3) ([1916] 1 A.C. 314). As appears from the headnote, the actual question in that case was this:

- D "Under a clause in a contract referring to arbitration any dispute arising under the contract it is competent to the arbitrator finally to determine the existence of a custom affecting the rights and obligations of the parties under the contract, where such custom is not inconsistent with the terms of the contract."

- E I would refer to the speech of LORD ATKINSON, where he says (*ibid.*, at p. 324):

"PARKE, B., in *Metzner v. Bolton* (5) ((1854), 9 Exch. 518) says (*ibid.*, at p. 521): 'It is quite certain that general usages are tacitly annexed to all contracts relating to the business with reference to which they are made, unless the terms of such contracts expressly or impliedly exclude them'. And LORD BLACKBURN, in *Tucker v. Linger* (6), ((1883), 8 App. Cas. 508), speaking of an agricultural usage in reference to a lease of land, expresses himself thus (*ibid.*, at p. 511): 'Now is this custom excluded by the terms of the agreement? The custom, when proved, is to be considered as part of the agreement; and if the agreement be in writing, though the custom is not written it is to be treated exactly as if that unwritten customary clause had been written out at length. But if upon the face of the written agreement there is some clause which expressly says, "We exclude the unwritten customary incident," of course it is excluded; and if there is any written clause which is inconsistent with it to such an extent as impliedly to exclude it, then, too, the unwritten clause must yield to and is excluded by the written one.'"

- H Counsel for the sellers places great reliance on *Tucker v. Linger* (6) ((1883), 8 App. Cas. 508) and, I think, mainly on the passage I have just read from LORD ATKINSON'S speech, as indicating that there must be some provision which is clearly inconsistent with the incorporation of the alleged custom in the contract.

LORD PARKER OF WADDINGTON in *Produce Brokers Co., Ltd. v. Olympia Oil & Cake Co., Ltd.* (3) ([1916] 1 A.C. 314) says this (*ibid.*, at p. 327):

- I "In the present case the submission covers all disputes arising out of the contract, including disputes on questions of law. Questions as to the true meaning and effect of the contract, with the possible exception of questions as to the ambit of the submission itself, are therefore left to the arbitrator. In order to ascertain the meaning and effect of the contract the arbitrator is bound to admit evidence of and consider all relevant facts. The existence or non-existence of any state of circumstances, which, if proved, would be relevant on any issue as to the true meaning and effect of the contract, must consequently be within the submission. Clearly mercantile contracts, such as

the one in question, fall to be interpreted by the light of any custom prevailing in the trade."

Then LORD PARKER quotes from PARKE, B.'s, judgment in *Hutton v. Warren* (1), the passage (1 M. & W. at p. 475) cited in SMITH'S LEADING CASES to which I have already referred. Then there is *Palgrave, Brown & Son, Ltd. v. S.S. Turid* (7) ([1922] 1 A.C. 397). I would refer to that for these passages from the speech of VISCOUNT BIRKENHEAD, L.C. (*ibid.*, at p. 406):

"In *Humfrey v. Dale* (8) ((1857), 7 E. & B. 266) LORD CAMPBELL, C.J., states the rule of law as to the admission of evidence of a custom to contradict or qualify the tenor of the terms of a written contract. He says (*ibid.*, at p. 273): 'Neither collateral evidence nor the evidence of a usage of trade is receivable to prove anything which contradicts the tenor of a written contract,' and on the next page he says: 'Whether this evidence be treated as explaining the language used, or adding a tacitly implied incident to the contract beyond those which are expressed, is not material. In either point of view, it will be admissible unless it labours under the objection of introducing something repugnant to or inconsistent with the tenor of the written instrument,'"

Counsel for the sellers referred us to *Humfrey v. Dale* (8) itself and I understood him to suggest that LORD CAMPBELL's judgment as a whole was more favourable to his case than would appear from the extracts given in LORD BIRKENHEAD's speech. However, I think that LORD BIRKENHEAD included in his quotations all that is really material for the present purpose. After the passage to which I have referred he went on to quote the following from LORD CAMPBELL (7 E. & B. at p. 275):

"To fall within the exception, therefore, of repugnancy, the incident must be such as if expressed in the written contract would make it insensible or inconsistent."

I might add the example given by LORD CAMPBELL (*ibid.*):

"Thus, to warrant bacon to be 'prime singed' adding 'that is to say slightly tainted' (*Yates v. Pym* (9) (1816), 6 Taunt. 446), or to insure all the boats of a ship and add, 'that is to say all not slung in the quarter' (*Blackett v. Royal Exchange Assurance* (10) (1832), 2 Cr. & J. 244), and other cases of the same sort scattered through the books, would be instances of contracts in which both the two parts could not have full effect given to them if written down; and therefore, when one part only is expressed, it would be unreasonable to suppose that the parties intended to include the other also. Without repeating ourselves*, it will be found that the same reasoning applies where the evidence is used to explain a latent ambiguity of language."

I do not think that there are any other authorities to which I can usefully refer. It appears to me, when all have been looked at, that the relevant principle or law cannot be stated with any greater precision than this: That an alleged custom can be incorporated into a contract only if there is nothing in the express or necessarily implied terms of the contract to prevent such inclusion and, further, that a custom will only be imported into a contract where it can be so imported consistently with the tenor of the document as a whole.

Applying those general tests to the present case, I think that the learned judge in this case came to a right conclusion. The rules as to arbitration here indicate a two-stage arbitration: first, by the arbitrators or, on the arbitrators disagreeing, by an umpire; and secondly, by the appeal board at the instance of the dissatisfied party. That is to be the course of the proceedings. The umpire having heard and determined the case is *functus officio* and if either party is dissatisfied the matter then goes to the board of appeal. The proceedings contemplated are

* LORD CAMPBELL was delivering the judgment of the court.

- A proceedings in those two stages, and it would be repugnant to introduce a third stage in the form of a conference between the appeal board and the umpire. That view is borne out, I think, by the provisions of r. 6 and r. 7, which I have already read, and on the former of which DIPLOCK, J., particularly observed in his judgment. In my view, the provisions of the standard form of contract relating to arbitration contain, on their true construction, sufficient indications to support
- B the conclusion that the arbitration in this case was to be carried out, in each of its two stages, in accordance with the ordinary manner of carrying out formal arbitrations as distinct from references of a less formal nature. The matter is not one which admits of any great elaboration: but in my view, as I have said, the learned judge was right in refusing to enforce the alleged custom by reading it into these rules. It follows, in my opinion, that this appeal should be dis-
- C missed, but I would add this. Speaking for myself, I have had considerable difficulty in regarding this case as a case of trade custom. A typical case of that sort is one in which there is an existing custom of a given trade which is commonly recognised by persons engaged in the relevant trade in making their contracts. Then it may very well be that, subject to proper limits, the existing trade custom must be read into the contract concerned. Knowing of the existence
- D of the custom, the parties may well be taken to have intended to incorporate that custom in the express terms of the contract. Here, however, the language of the document with which we are concerned, as I understand the history of this matter, was settled many years ago, and at the time when it was settled there was no question of there being any custom of the trade involved at all. The rules were simply set out as appropriate rules for the conduct of the arbitration,
- E and that is all. However, for reasons which seemed good to them, the board of appeal of this association consistently committed the irregularity now complained of. They did it as a regular practice, and, apparently, nobody objected.

- Now it is said that because this misconduct has been going on without objection for so many years a trade custom justifying that departure has grown up, and everyone who signs a contract on the association's form binds himself not merely
- F to submit to arbitration in accordance with the rules as set out in the document but also in accordance with this alleged practice. Thus the parties for whose benefit the irregularity is likely to operate, namely, the parties successful before the umpire, can rely on this alleged custom as having become a custom, as distinct from a mere abuse, by long usage. This does not seem to me to be applying a custom of the trade. It appears to me to be setting up, as it were, a
- G prescriptive right to commit this irregularity from arbitration to arbitration. It seems to me that what is really said is that the practice of seeing the umpire alone is an irregular practice but that it has gone on for so long that nobody can now complain of it, and the parties to each contract containing a submission to arbitration in accordance with the rules must be deemed to have contracted on the footing that this irregularity is to be continued. That appears to me to be
- H the true nature of this case, and I should so regard it, speaking entirely for myself, rather than as a case of trade custom in an ordinary sense. In my view, it is very difficult to accede to the contention of a party to one of these arbitrations that this irregularity ought to be supported merely because it has continued for so long. I do not see that, in signing one of these contracts, the parties should necessarily be taken to acquiesce in such irregularity. However, I need not pursue
- I that aspect of the matter further.

For the reasons which I have endeavoured to state previously, I think that this appeal fails.

PARKER, L.J.: I have come to the same conclusion. It seems to me clear that, apart from any question of practice or custom, the procedure adopted by the board of appeal in this case would amount to an irregularity, and, therefore, misconduct, justifying the setting aside of the award. The rules clearly provide for a hearing with the parties and their representatives present, but by their

conduct the board were in effect continuing that hearing in private in the absence of the parties. To that extent, the position would be not dissimilar to that which arose in *Errington v. Minister of Health* (11) ([1934] All E.R. Rep. 154). It could also be put somewhat differently: that, in fact, the decision in this case would not be a decision of the board of appeal but a decision of the board of appeal plus a stranger.

The sellers rely here on the undoubted practice which has been in force for long years, and this is the strength of their argument. They contend that any person contracting on the basis of the printed rules contracts also on the basis of that practice. It is said that the contracting parties must be presumed to have consented to that practice. I will assume that that is so, but, nevertheless, it must always be subject to this, that there is nothing in the written contract which expressly or by necessary implication excludes that custom or practice.

I need not refer to the authorities in detail, as my Lord has done that, and I will refer only to two passages. First, the passage in the judgment of LORD CAMPBELL, C.J., in *Humfrey v. Dale* (8) ((1857), 7 E. & B. 266) where he says (*ibid.*, at p. 273):

"Now neither collateral evidence nor the evidence of a usage of trade is receivable to prove anything which contradicts the tenor of a written contract."

Then, he says (*ibid.*, at p. 274):

"Whether this evidence be treated as explaining the language used, or adding a tacitly implied incident to the contract beyond those which are expressed, is not material. In either point of view, it will be admissible unless it labours under the objection of introducing something repugnant to or inconsistent with the tenor of the written instrument."

LORD BLACKBURN in *Tucker v. Linger* (6) ((1883), 8 App. Cas. 508) says this (*ibid.*, at p. 511):

"The custom, when proved, is to be considered as part of the agreement; and if the agreement be in writing, though the custom is not written it is to be treated exactly as if that unwritten customary clause had been written out at length. But if upon the face of the written agreement there is some clause which expressly says, 'We exclude the unwritten customary incident,' of course it is excluded; and if there is any written clause which is inconsistent with it to such an extent as impliedly to exclude it, then too the unwritten clause must yield to and is excluded by the written one."

There is no question in this case of there being any rule which expressly excludes this practice. The real contest between the parties is whether if one does seek to read in that practice it is inconsistent, as LORD CAMPBELL says, with the general tenor of the instrument, or, as LORD BLACKBURN says, is impliedly excluded by it. I do not think, on listening to the argument on each side, that there is any contest between the parties as to that. The real question is as to its application to the particular facts of this case. For my part, I confess I entirely agree with the learned judge when he says ([1958] 1 All E.R. at p. 501):

"I think that it is a necessary implication from this that the umpire is to have no influence, direct or indirect, on the board of appeal in reaching its decision, and that the board of appeal have no right to seek any information, whether of fact or of opinion, from him in the absence of the parties, or to allow him to attend their deliberations after the conclusion of the hearing."

Putting it in my own words, it seems to me that here you have printed rules which provide that the board of appeal is to be wholly impartial, and that they are to arrive at their award after a hearing at which the parties or their representatives are present. It appears to me that those two rules taken together must

A exclude impliedly a provision which says that they may decide the matter after an additional private hearing without the parties being present.

I agree accordingly with the learned judge and would dismiss this appeal.

PEARCE, L.J.: I agree.

Appeal dismissed.

B Solicitors: *Gaster & Turner* (for the sellers); *Coward, Chance & Co.* (for the buyers).

[*Reported by HENRY SUMMERFIELD, Esq., Barrister-at-Law.*]

C
HAVANT AND WATERLOO URBAN DISTRICT COUNCIL
v. NORUM.

[COURT OF APPEAL (Lord Evershed, M.R., Morris and Ormerod, L.J.J.), May 21, 22, 1958.]

D *Housing—Rent—Differential rent scheme—Rebate from rent varying with income of tenant—Review of tenant's income and rebate effected towards end of current year—Excess rebate—Additional weekly payments as rent for next year to recover excess rebate—Tenant quitting before excess discharged—Whether balance of excess recoverable as rent in arrear.*

E A local authority introduced a differential rent scheme. The tenant was given notice to quit and a leaflet setting out the scheme. Paragraph 4 of the leaflet was headed "Alteration of rents" and read as follows: "Any increase or decrease in the gross income . . . necessitating a reassessment of rent must be notified immediately by the tenant or his agent calling at this office to complete the appropriate forms, produce such documentary evidence as may be necessary to substantiate a revision and leave the current rent card for alteration. Alterations in rent will be operative: (a) From the first rent collecting period after notification, as above, of any change of financial circumstances requiring a decrease in rent. (b) From the first rent collecting period after a change of financial circumstances arose requiring an increase in rent." The tenant applied for and was granted a new tenancy on the basis of the scheme as from Apr. 4, 1955. His maximum net rent was 34s. 5d. per week, later reduced to 29s. 4d. He applied for and was given the maximum rebate of 12s. weekly from that rent. He paid rent accordingly during the financial year 1955-56. During the summer of 1955 he increased his earnings by working overtime. In February, 1956, he was required to make a return of his annual gross income for the year 1955-56 for the purpose of assessing his rebate for the year 1956-57. On the figures received the local authority came to the conclusion that the tenant had been from June 6, 1955, entitled to a rebate of only 2s. per week. They assessed the maximum rent for the year 1956-57 at "29s. 4d. plus 10s.". The additional 10s. was added in order to recoup the local authority for the underpayment of rent for the year 1955-56 after June 6; thus they in fact increased the actual rent by £1 per week. The tenant paid that rent until he determined his tenancy on Oct. 7, 1956. When he left, £10 3s. 2d. was outstanding on account of excess rebates for the year 1955-56. The tenant's rent card showed no arrears of rent. The local authority sued the tenant for £10 3s. 2d. as arrears of rent from June 6, 1955, to Apr. 1, 1956.

I **Held:** no arrears of rent were due to the local authority because (i) the agreement between the parties was that in lieu of any repayment of rebates the tenant would pay an increase of rent of 10s. per week until he had discharged a sum equal to the excess rebate, and the termination of the

tenancy in October, 1956, put an end to that obligation and (ii) there had been no reassessment of rent as contemplated by para. 4 of the scheme.

Appeal dismissed.

[As to differentiating rents of local authority houses, see 19 HALSBURY'S LAWS (3rd Edn.) 696, para. 1118, note (u); and as to rebates and periodical review of rents, see *ibid.*, 697, para. 1120, notes (k), (l).]

Appeal.

This was an appeal by a local authority, the Havant and Waterloo Urban District Council, against a decision of His Honour JUDGE TYLOR on Feb. 20, 1958, in the Portsmouth County Court.

At the beginning of 1955 the defendant, one Arne Norum, was a tenant of a house known as 61, Elizabeth Road, Waterlooville, owned by the local authority to whom he was paying an inclusive weekly rent of £1 10s. 7d. In that year the local authority decided to inaugurate a "differential rents scheme" whereby the benefit of subsidised houses would be enjoyed only by those whose means did not enable them to pay an economic rent. Accordingly, on Feb. 5, 1955, the local authority sent to the tenant a notice to quit the premises on Apr. 4, 1955, and in an accompanying letter written to the tenant by the clerk to the council it was stated:

"The council have recently revised the terms on which they are willing to let council houses. Particulars of the new arrangements are set out in the enclosed leaflet. The information contained in the leaflet, together with the conditions of tenancy which, for the sake of convenience, are already set out on the backs of rent cards, will be made widely known, and all new tenancies will be understood to be granted on this basis without any formal tenancy agreement being entered into.

"In order to bring the new arrangements into being it is necessary to bring to an end existing tenancies and for this reason a notice to quit is enclosed with this letter, but I am authorised to offer you a new tenancy at a net weekly rent of 34s. 5d. from which, however, there may be deducted such amounts by way of rebate as you may from time to time be eligible for under the subsidy adjustment rents scheme set out in the leaflet. To the net rent, calculated in the way just explained, there will be added an appropriate amount for rates.

"If you accept this offer there is no need for you to give up possession of the house, and if you are still in occupation of the house after the notice to quit has become operative, it will be assumed that you have accepted the tenancy on the revised terms and you will be chargeable with rent on the new basis as from Apr. 4, 1955."

In the leaflet it was stated:

"The council have decided to operate, as from Apr. 4, 1955, a subsidy adjustment rent scheme which entails the payment of a rent calculated by reference to the following provisions."

Paragraph 1 then set out in tabular form the relevant weekly rent payable by "tenants in receipt of a gross income during the current financial year amounting to" sums ranging between a yearly salary of £620 and above down to a yearly salary of below £520, and showing that if the tenant's yearly salary was less than £620 he could obtain a rebate varying between 2s. and 12s. per week (depending on the amount of his salary). Paragraph 2 stated:

"Gross income is the combined income of the tenants . . . and includes salary, wage, overtime . . . and emoluments received in the current financial year (Apr. 6 to Apr. 5) before any deduction is made for income tax, national insurance, pension or superannuation contributions. Family allowances . . . are excluded."

A Paragraph 3 instructed tenants to apply personally to the clerk's department if they wished to claim a rebate. Paragraph 4 reads as follows:

" Claims for alteration. Any increase or decrease in the gross income (see para. 2 above) necessitating a reassessment of rent must be notified immediately by the tenant or his agent calling at this office to complete the appropriate forms, produce such documentary evidence as may be necessary to substantiate a revision and leave the current rent card for alteration. Alterations in rent will be operative: (a) From the first rent collecting period after notification, as above, of any change of financial circumstances requiring a decrease in rent. (b) From the first rent collecting period after a change of financial circumstances arose requiring an increase in rent."

C The tenant claimed and was granted the full rebate of 12s. per week; and he was given a rent card for the year 1955-56 which showed that on and after Apr. 4, 1955, his maximum net rent was 34s. 5d., and that after deduction of the rebate his rent was £1 2s. 5d., which with rates of 7s. 9d. made a total sum payable of £1 10s. 2d. At a later date the local authority reduced all rents by 5s. 1d. per week, so that the tenant's maximum net rent became 29s. 4d., and the total sum payable by him became £1 5s. 1d. per week. During the summer of 1955 the tenant increased his earnings by working overtime. In January, 1956, the local authority wrote to all their tenants informing them that any claim for rebate for the year 1956-57 must be submitted during February accompanied by a certificate of income relating to the year 1955-56. On the figures submitted by the tenant the local authority came to the conclusion that as from June 6, 1955, the tenant was entitled to a rebate of only 2s. and that he had not been entitled to the full rebate of 12s.; and they contended that they were entitled to reassess his actual rent as from that date. For the year 1956-57, therefore, the local authority issued a rent card which showed the maximum net rent as " 29s. 4d.+10s.—1955-56." The sum of 10s. was added to the maximum rent of 29s. 4d. as a means of recoupment for what was alleged to have been an under-payment of actual rent during the previous year (by reason of the tenant's increased earnings); and the rebate was reduced to 2s. Thus the resultant figure for rent was shown as £1 17s. 4d. which with rates at 8s. 8d. made a total sum payable of £2 6s.

G In October, 1956, the tenant left the premises in question and ceased to be a tenant of the local authority. Up to the date of leaving the premises he had paid the weekly rent demanded, i.e., £2 6s., but there remained outstanding, according to the local authority, the sum of £10 3s. 2d. in respect of the alleged under-payments during the year 1955. The local authority now claimed £10 3s. 2d. as arrears of rent. The local authority had also by their amended particulars of claim alleged that a further sum of £4 11s. 9d. was due and owing as arrears of rent under the tenancy which had been determined by the notice to quit dated Feb. 5, 1955, but the learned judge found that any such arrears had been extinguished; this particular point was not pressed in the Court of Appeal and is not referred to in this report.

R. E. Megarry, Q.C., and A. J. Jenkins for the local authority.

The tenant did not appear.

I LORD EVERSHERD, M.R., referred to the notice to quit and the letter and the leaflet sent to the tenant and continued: It will be observed that in para. 4 of the leaflet there is a differential between cases for decrease, and cases for increase, and the differential may be justified as being a stimulus to tenants to make prompt disclosure of changes. However that may be, if a tenant is qualified to have a decrease, then he gets the decrease only from the time that he gives the necessary notification. If, on the other hand, his case requires an increase, then that increase operates from the time of change of circumstances, which may plainly be a past date at the time of the notification.

The first question that arises, and on which the learned judge expressed a view, was as regards the meaning of the formula "gross income during the current financial year". It was the view of the judge that that formula could only mean, sensibly, gross income for a year already completed, since if you were calculating anything by reference to a year's income, then you would have to wait until the year was over before you knew what the income in total was. But counsel for the local authority has put forward formidable arguments for the view that, in its context, "gross income during the current financial year", which, I should add, was in para. 1 divided into a weekly rate, was intended to be something which would be calculated, and may be recalculated, during the progress of any given financial year, so that it would at any point of time be in part an estimate only. I do not feel it necessary, in the view that I take, to express a final conclusion; but in fairness to the local authority, I ought, I think, to say that I must not be taken to be accepting the view which the learned judge took that "gross income for the current year" meant (and could only mean) gross income for a year already completed.

The significance of the other view put forward by counsel emphasises the local authority's wish for perfection; for the point was that if during any year a man's income went substantially up or substantially down, then the change should be reflected virtually at once in his rent—that is, his actual payable rent—so that from time to time his net rent would be properly related to his capacity to pay it. In an ideal world that, I should think, would be the fairest thing. There can be no doubt, however, that in practice it is capable of creating very grave difficulties. It will be recalled that para. 4 uses the phrase:

"Any increase or decrease in the gross income... necessitating a reassessment..."

I emphasise the first word, "any". Now many of the occupants of these houses are men or women whose wages or emoluments may vary quite appreciably. They may vary according to the season. They may (and this was the tenant's case) vary considerably if over a period a large amount of overtime is done; and, as ORMEROD, L.J., pointed out during the argument, this phrase requires that a man should reach a conclusion (which may be difficult) whether the increase or decrease which he is enjoying or suffering is, looking ahead, one which can be said to necessitate a reassessment. I do not, however, propose to pursue that aspect of the matter further, save only to add this. It may be that as a result of these proceedings, and the attention which has been given to them, there will be some change in the formulation of this scheme. I would, if I may properly do so, venture to suggest for consideration the advantages of simplicity which might be linked with a system correlating the payable rent to some past period; you could have, perhaps, three-monthly or six-monthly periods, and let the rent for the next period be related to the experience of the past, with a general power, of course, to the council to deal always with hard cases. It is, perhaps, going outside my proper sphere to say more; but I do venture to make that suggestion because, having considered this case, I cannot conceal that I have found very grave difficulty in construing some of the passages in these documents; and some of those who are tenants, I am sure, would find at any rate not less difficulty in construing them than I have.

[HIS LORDSHIP then considered the rent card that was given to the tenant in respect of his continuing to occupy the premises after Apr. 4, 1955, and continued:] During the summer of the year in question (1955-56) the tenant did a good deal of overtime; and ultimately the question arose whether his gross income for that "current year", within the meaning of the formula mentioned, had increased to such an extent as necessitated a reassessment, because, as will be recalled, he had enjoyed the full abatement. The local authority claims that by virtue of para. 4 of the leaflet (treating it as part of the contract) they were entitled to reassess the actual rent which the tenant should have paid from

A the date of his change of circumstances; and, to put it into figures, that he should, according to the local authority's view, have for some twenty-five weeks or so paid 10s. more per week than he had paid in fact.

The learned judge considered whether the local authority was in any case competent so to arrange with the tenant. He drew attention to the fact that the "maximum net rent" (namely, 29s. 4d. plus 10s.) is stated at a figure appreciably
B above the real maximum net rent; and, furthermore, it is pointed out that the tenant was paying 8s. a week more than the 29s. 4d. The judge's view, in addition to that which he had expressed on the meaning of "gross income", was that the local authority had exceeded any powers that they had or might have, not having determined the tenant's tenancy, to impose or put forward those terms. Again I do not think that I need express any concluded view,
C because in truth the tenant accepted what was suggested. He continued in occupation. He paid the added rent, and certainly (unless he raised some claim for recoupment, which he has not done) I do not think that we can be asked to express any view other than that the new rent card* recorded in truth a bargain to which the tenant had, by necessary inference, become a party. It is for that reason, therefore, that I have not thought it necessary to express
D a view of my own on these matters of the meaning of "gross income for the current year", and so forth. All might have gone quite well had it not been for the fact that in October, 1956, the tenant—whose financial circumstances, so the learned judge said, no doubt quite rightly, had by no means flourished—made up his mind to, and did, leave the premises, and that put an end to his tenancy of No. 61, Elizabeth Road. He did that at a time when he had not, by
E means of these additional sums of 10s. per week, discharged all that the local authority said constituted the sum of his under-payments during the previous year. The difference was £10 3s. 2d., and it is the claim of the local authority in the action to recover that as a debt, being rent in arrears.

In my judgment, the local authority are quite unable so to do; and, indeed, it seems to me that the argument to the contrary is wholly untenable. I doubt
F myself whether the terms of the contract at the time when the tenant left can be sought elsewhere than in his rent card, which states in terms the conditions of his tenancy. Even if regard can be had to the leaflet and the letter, I am quite unable to agree that in the circumstances at the date when the tenant left, there was anything due from him to the local authority by way of money due for unpaid rent. There is no warrant whatever for such a proposition in the rent
G cards, which show that he paid the rent regularly, and was up to date in the end with all the payments due under the current arrangement. I am inclined to think that whatever the local authority might have done, or say that they could have done (as to which I express no view), what they did or purported to do in fact or in law was this. They made an arrangement with the tenant, to which he assented, that in lieu of any payment back by him of any overpaid
H rebates (if that is the right phrase) he should, for the then ensuing year, pay an added 10s. a week by way of net rent until he had discharged a sum equivalent to the excess rebates. That, of course, would have been all right had he gone on during the requisite time; but since he determined the tenancy (as he was entitled to do) that automatically, as it seems to me, ended the obligation. In any case, in my judgment, the true, short and clear answer to the local authority's
I claim is that there were no arrears at the relevant date, and are not now any arrears of rent. I have referred to the cards, which show that there were none. There was in truth no reassessment of the rent as contemplated by para. 4 of the scheme. That paragraph, it will be recalled, contemplated that in the event happening of a relevant increase or decrease in gross income, the rent card would be altered, and the alterations in rent would be as there indicated. The rent cards were never altered.

* I.e., the rent card for 1956-57.

I, for my part, share the judge's view that it would at best need extremely clear and strong language to enable a landlord *ex post facto*, and without the tenant's assent, to alter the rent or contractual sum in consideration of which the tenant was entitled to enjoy the premises. I am not satisfied—to put it no higher—that there is in these documents any sufficient warrant for such a power. Most certainly I do not find any warrant for any such power having been exercised; and therefore, I conclude without any hesitation that the local authority are unable to establish that at the relevant date when this summons was issued, or when the tenant left, there was anything due to them for rent in respect of these premises. If that is so, then the action rightly failed, and was dismissed. I would accordingly dismiss the appeal.

MORRIS, L.J.: I agree so fully with all that my Lord has said that there is nothing that I desire to add.

ORMEROD, L.J.: I agree, and there is nothing I wish to add.

Appeal dismissed. Leave to appeal to the House of Lords refused.

Solicitors: *A. F. & R. W. Tweedie, agents for Clerk to Havant and Waterloo Urban District Council.*

[*Reported by F. GUTTMAN, Esq., Barrister-at-Law.*]

GREY AND ANOTHER *v.* INLAND REVENUE COMMISSIONERS.

[COURT OF APPEAL (Lord Evershed, M.R., Morris and Ormerod, L.JJ.), April 15, 16, 17, 18, May 15, 1958.]

Stamp Duty—Voluntary disposition—Inter vivos—Disposition by declaring new trusts—Transfer of shares—Transfer by settlor to trustees of settlement—Subsequent oral direction to trustees on what trusts shares to be held—Deed of declaration by trustees subsequently confirming trusts—Whether direction a “disposition” of settlor’s interest—Whether deed liable to ad valorem stamp duty—Stamp Act, 1891 (54 & 55 Vict. c. 39), Sch. 1—Finance (1909-10) Act, 1910 (10 Edw. 7 & 1 Geo. 5 c. 8), s. 74 (1)—Law of Property Act, 1925 (15 & 16 Geo. 5 c. 20), s. 53 (1) (c), s. 205 (1) (ii).

Trust and Trustees—Declaration of trust—Transfer by way of declaration of new trust and determination of subsisting equitable interest—Personalty—Whether a “disposition” for which writing needed—Law of Property Act, 1925 (15 & 16 Geo. 5 c. 20), s. 53 (1) (c).

On Feb. 1, 1955, H. transferred eighteen thousand shares in a company to trustees to hold to his order, and on Feb. 18, 1955, he orally and irrevocably directed the trustees to divide the shares into six groups of three thousand shares each and to hold one such group on the trusts contained in each of six settlements made by him in 1949 and 1950 in favour of his grandchildren. The directions were given to the intent that they should result in the entire exclusion of H. from all future right, title and benefit to or in the shares. On Mar. 25, 1955, the trustees, who were also the trustees of the six settlements, executed six deeds, called declarations of trust, each of which recited H.’s directions of Feb. 18, 1955, and the trustees’ acceptance of them; in each case the trustees declared that they had been holding the shares since Feb. 18 and were then holding them on the trusts of the relevant settlement of 1949 or of 1950. H. also executed each deed to testify the nature of the directions that he had previously given. The six deeds were charged with ad valorem stamp duty as voluntary dispositions within s. 74 of the Finance (1909-10) Act, 1910.

- A** **Held** (LORD EVERSHED, M.R., dissenting): H.'s oral direction to the trustees on Feb. 18, 1955, though not a direct assignment or transfer of his equitable interest in the shares, was a purported disposition of that interest, within the meaning of the word "disposition" in s. 205 (1) (ii) and s. 53 (1) (c) of the Law of Property Act, 1925, and, being oral, was rendered ineffective by s. 53 (1) (c); the deeds of Mar. 25, 1955, operated, in the circumstances,
- B** as effective declarations of trust and attracted ad valorem stamp duty.

Dictum of SARGANT, J., in *Re Chrimes* ([1917] 1 Ch. at pp. 36, 37) considered.

Decision of UPJOHN, J. ([1958] 1 All E. R. 246) reversed.

- [Editorial Note.** All members of the Court of Appeal agreed that the directions given on Feb. 18, 1955, did not constitute an assignment of a subsisting equitable interest; and MORRIS, L.J., as well as LORD EVERSHED, M.R., held that the directions were not a declaration of trust of a subsisting equitable interest (see p. 440, letter B, post). LORD EVERSHED took the view that a declaration creating new trusts (such as the directions of Feb. 18 were expressed to be) did not become a "disposition" of a subsisting equitable interest merely because the subsisting equitable interest was determined by the creation of the new trusts (see p. 434, letter I, and p. 437, letters G and H, post). The majority of the court, however, regarded the determination of the subsisting interest as making the transaction a "disposition" of an existing beneficial interest (see p. 441, letter C, and p. 442, letter I, post). It seems, therefore, that if a man, being both legally and beneficially entitled to personalty, declares a trust of it, writing is not necessary (see p. 432, letter I, to p. 433, letter A, and p. 440, letter C, post), but, if he is entitled only in equity, a declaration of new trusts, which in effect replace his beneficial interest, must be in writing.]
- C**
- D**
- E**

As to the need for writing on the transfer of an equitable interest, see 11 HALSBURY'S LAWS (3rd Edn.) 336, para. 542.

- F** As to a trust being able to be constituted by parol, see 33 HALSBURY'S LAWS (2nd Edn.) 93, para. 151.

As to stamp duty on a transfer operating as a voluntary disposition inter vivos, see 28 HALSBURY'S LAWS (2nd Edn.) 475, 476, para. 1005; and for cases on the subject, see 39 DIGEST 284, 285, 667-671, and SUPPLEMENTS.

For the Stamp Act, 1891, Sch. 1, and the Finance (1909-10) Act, 1910, s. 74 (1), see 21 HALSBURY'S STATUTES (2nd Edn.) 652 and 770.

- G** For the Law of Property Act, 1925, s. 53 (1), s. 205 (1) (ii), see 20 HALSBURY'S STATUTES (2nd Edn.) 551, 832.]

Cases referred to:

- (1) *Sinclair v. Brougham*, [1914] A.C. 398; 83 L.J.Ch. 465; 111 L.T. 1; 12 Digest (Repl.) 316, 2436.
- H** (2) *M'Fadden v. Jenkyns*, (1842), 1 Ph. 153; 12 L.J.Ch. 146; 41 E.R. 589; 43 Digest 555, 54.
- (3) *Tierney v. Wood*, (1854), 19 Beav. 330; 23 L.J.Ch. 895; 23 L.T.O.S. 266; 52 E.R. 377; 43 Digest 557, 79.
- (4) *Timpson's Executors v. Yerbury*, [1936] 1 All E.R. 186; [1936] 1 K.B. 645; 105 L.J.K.B. 749; 154 L.T. 283; 20 Tax Cas. 155; Digest Supp.
- I** (5) *Re Chrimes, Locovich v. Chrimes*, [1917] 1 Ch. 30; 27 Digest (Repl.) 113, 840.
- (6) *Martin v. Inland Revenue Comrs.*, (1930), 15 A.T.C. 631; Sargant on Stamp Acts (3rd Edn.), p. 350.
- (7) *Re Wale, Wale v. Harris*, [1956] 3 All E.R. 280; 3rd Digest Supp.
- (8) *Milroy v. Lord*, (1862), 4 De G. F. & J. 264; 31 L.J.Ch. 798; 7 L.T. 178; 45 E.R. 1185; 40 Digest 533, 770.
- (9) *Bentley v. Mackay*, (1851), 15 Beav. 12; 51 E.R. 440; 40 Digest 533, 769.
- (10) *Rycroft v. Christy*, (1840), 3 Beav. 238; 49 E.R. 93; 43 Digest 566, 148.

(11) *Inland Revenue Comrs. v. Buchanan*, [1957] 2 All E.R. 400; [1958] Ch. 289. A

Appeal.

The Crown appealed against an order of UPJOHN, J., made on Dec. 3, 1957, and reported [1958] 1 All E.R. 246, allowing an appeal by the trustees of six deeds of declaration of trusts, each dated Mar. 25, 1955, on a Case Stated by the Commissioners of Inland Revenue under s. 13 of the Stamp Act, 1891. The six deeds had been submitted for adjudication of the duty thereon under s. 12 of the Stamp Act, 1891, and the commissioners had been of opinion that each of six instruments executed by the trustees and a Mr. Hunter was a conveyance or transfer by Mr. Hunter of his equitable interest in the eighteen thousand shares held by the trustees which operated as a voluntary disposition inter vivos within the meaning of s. 74 (1) of the Finance (1909-10) Act, 1910, and accordingly was liable to ad valorem stamp duty as a conveyance on sale. They assessed the duty at the rate of £1 per £50 on the sum of £10,500, the agreed value of the shares, i.e. at £210 in all. The trustees contended that each instrument was only a record under seal of what had already taken place and was not a conveyance or transfer operating as a voluntary disposition inter vivos, and that it was chargeable with a fixed duty of 10s. only under the head of charge "declaration of any use or trust" in Sch. 1 to the Stamp Act, 1891. UPJOHN, J., held that Mr. Hunter's equitable interest in the shares had previously been the subject of a parol disposition operating by way of declaration of trust and so valid notwithstanding the requirement of writing in s. 53 (1) (c) of the Law of Property Act, 1925, replacing s. 9 of the Statute of Frauds, because that enactment did not apply to such dispositions; and that the instruments therefore transferred no interest in the shares and were chargeable with 10s. duty only. The Crown appealed to the Court of Appeal. B C D E

The facts stated in the Case Stated appear in the report at [1958] 1 All E.R. 246, at p. 247, letter G. to p. 248, letter E, and are summarised at p. 431, letters D to I, post. F

R. O. Wilberforce, Q.C., and *E. Blanshard Stamp* for the appellant, the Crown. *John Pennycuik, Q.C.*, and *W. T. Elverston* for the respondents, the trustees of the six declarations of trust. G

Cur. adv. vult.

May 15. The following judgments were read. H

LORD EVERSHERD, M.R.: The question presented for the determination of the court by the Commissioners of Inland Revenue in their Case Stated under s. 13 of the Stamp Act, 1891, is whether instruments, self-described as "declarations of trust", are liable to be charged with stamp duty, ad valorem, calculated by reference to the parcels of shares to which they respectively relate. The question so posed requires an answer to the inquiry: Are these several instruments chargeable as "conveyances or transfers operating as voluntary dispositions inter vivos" within the scope and language of s. 74 (1) of the Finance (1909-10) Act, 1910, the relevant portion of which Act must, by the terms of s. 96, be read and construed as one with the Stamp Act, 1891? I

But, as counsel pointed out at the beginning of his opening of the appeal on behalf of the Crown, the form of the question presented by the Case Stated disguises, as not uncommonly is so in stamp duty cases, the true nature of the problem raised. Though we were referred to sections of the Stamp Act containing definitions (e.g., s. 54 and s. 62), nothing in truth turns on the language or effect of s. 74 (1) of the Finance (1909-10) Act, 1910. If the instruments in question alone constitute or alone effectively declare the trusts on which the several shares are now held (as it is of the essence of the Crown's argument that they do), then it is not in doubt that they fall within the ambit of s. 74 (1). Counsel for the named trustees in the instruments (respondents in this court)

- A so concedes; and it is in the obvious interest of the trustees and their beneficiaries that he should do so. We were concerned during the argument to be satisfied that the court could safely and properly accept the result of the concession; for it seemed that, on one view of the case (if the trustees' argument were not acceptable), then the final effect of the transaction before us (including the instruments in question) might be merely negative so that no effective trusts
- B had been constituted at all. For reasons which it will be more convenient to state after the facts have been set forth, we were so satisfied. If the trustees' argument, which UPJOHN, J., accepted, is not well founded, then the instruments are taxable under s. 74 (1). But, as I have said, the conclusion does not at all depend on the solution of any question presented by the legislation relating to stamp duty. It depends rather on a much more difficult problem under the
- C general law; in the end of all, on the question whether certain directions orally given to the trustees by a person, competent by virtue of his interest to give them, which the instruments recited and were according to their language intended to confirm, were effective in law to establish the trusts thereby specified; or whether they constituted "a disposition of an equitable interest or trust subsisting at the time of the disposition" within the terms of s. 53 (1) (c) of the Law of
- D Property Act, 1925, and so failed of effect through want of writing.

The relevant facts, which are fully set out in the Case Stated, and are also related by UPJOHN, J., may be recapitulated as follows: Under six deeds made in the years 1949 and 1950, one Edward William Hunter made voluntary settlements in favour of grandchildren. The original trustees of all the settlements have remained such trustees ever since. On Feb. 1, 1955, Mr. Hunter

- E transferred to the trustees eighteen thousand ordinary shares of £1 each in Sun Engraving Co., Ltd. As the trustees took no beneficial interest in the shares, they held them for Mr. Hunter absolutely. On Feb. 18, 1955—seventeen days after the transfer last mentioned—a meeting took place at the offices of Sun Engraving Co., Ltd., at which were present Mr. Hunter, the trustees and the senior partner in a firm of solicitors. At the meeting Mr. Hunter (to use the
- F language of the findings of the commissioners in para. 5 of their Case Stated) "orally and irrevocably directed" the trustees to divide the eighteen thousand shares into six equal parcels and to hold one of such parcels on the trusts and subject to the provisions contained in each of the six settlements above mentioned of 1949 and 1950 (to resume my quotation from the Case Stated)

- G "to the intent that such directions should result in the entire exclusion of Mr. Hunter from all future right title and benefit to or in the said shares . . . and the income thereof."

The question in the appeal is: What was the effect, if any, of Mr. Hunter's directions at the meeting on Feb. 18, 1955?

- H Finally, on Mar. 25, 1955, were executed six declarations of trust, one such declaration being related to each of the six above mentioned settlements. The declarants were in each case the trustees. The instruments recited the events of the meeting of Feb. 18 in terms corresponding to the findings of the commissioners above referred to. They further recited that the trustees thereupon assented to, and accepted, the trusts reposed in them by Mr. Hunter's directions; and that the giving of such directions and the nature thereof were testified by
- I Mr. Hunter's executing (as he did) the instruments. It was then witnessed by the operative part of the instruments, and the trustees thereby acknowledged and declared, that "they had been since" Feb. 18, 1955 "and are now" holding the shares on the trusts and subject to the powers and provisions of the respective instruments of 1949 and 1950.

Having stated the terms of the instruments, the "declarations of trust", it will be convenient to dispose of the doubt, earlier mentioned, whether the court ought to act on the concession of counsel for the trustees if it rejected his main argument. The operative part of each of the declarations of trust witnessed

that the trustees acknowledged and declared that they had been since the preceding Feb. 18 "*and are now*" holding the shares on the specified trusts. The directions given on Feb. 18, 1955, and their intention had been recited; and Mr. Hunter "testified" to the giving of the direction and his intention by executing the instruments: in the circumstances I am satisfied that, if the directions were, for want of writing, ineffective on Feb. 18, Mr. Hunter could not after Mar. 25 recall or purport to revoke the beneficial interests arising under the trusts on which, on that later date, the trustees declared, in his presence, that they held the shares. Whatever might be or have been the effect (if any) of the trustees' acknowledgment or declaration that they had so held the shares since the preceding Feb. 18, it clearly follows in my judgment that (on the hypothesis that the oral directions on Feb. 18 had no legal effect) the instruments of Mar. 25, 1955, must have effectively established or constituted the relevant trusts and therefore must, as counsel for the trustees conceded, be conveyances or transfers operating as voluntary dispositions *inter vivos* within the terms of s. 74 (1) of the Finance (1909-10) Act, 1910, aided by the definition provisions of s. 54 and s. 62 (and particularly the latter) of the Stamp Act, 1891.

I return to the main question. It is, to my mind, though difficult, a short one. We were very properly referred to a number of cases, both ancient and modern. But, in the end, the problem will be resolved as the few short questions put to us at the end of their arguments by counsel for the trustees and counsel for the Crown are answered. It is not in doubt that on Feb. 18, 1955, and immediately before the meeting on that day described in the Case Stated and recited in the instruments of Mar. 25, 1955, the shares were vested in the trustees as registered proprietors; but the trustees held the shares on trust wholly for Mr. Hunter, who was entitled, absolutely, to all the benefits belonging to them. The subject-matter being shares in a company, the right to transfer them depended on the company's regulations; but, subject to those regulations, the trustees would be bound to deal with the shares and all the benefits attached to them as Mr. Hunter required. Those rights, which Mr. Hunter had in personam against the trustees, would be enforced, if necessary, by the courts. But, as LORD PARKER of WADDINGTON pointed out in his speech in *Sinclair v. Brougham* (1) ([1914] A.C. 398 at p. 441), equitable rights, though in origin they may have been rights in personam only, have come to acquire the characteristics of proprietary rights. In that sense, therefore, Mr. Hunter no doubt had an equitable interest in the shares, proprietary in character, of which, as such, he was capable of "disposing". He was undoubtedly capable, in the eye of the law, or rather (perhaps) of equity, of assigning such "rights", such "interest" to another or others, wholly or in part; and if he desired or purported so to do, it is no less undoubted that, by the terms of s. 53 (1) (c) of the Law of Property Act, 1925, writing would be required to give effect to his desire.

Is that what Mr. Hunter purported to do on Feb. 18, 1955? Counsel for the Crown says "yes". According to his argument, that is the sole question and that is the inevitable answer; for, by doing what he did, he purported to "dispose of", i.e., to get rid of, all his beneficial rights. Moreover, the beneficial interests of those entitled under the declared trusts amounted, in sum, to the whole beneficial interest in the shares: i.e., to that which formerly had belonged to Mr. Hunter. So (if this argument is right) the answer to the question put during the argument by MORRIS, L.J.: "If Mr. Hunter on Feb. 18, 1955, purported to make a disposition, to whom and of what did he dispose?" must be: "To the beneficiaries under the trust and of the whole beneficial interest".

On the whole, I have come to the conclusion that this analysis, for all its attraction, is an over-simplification and ought not to be accepted. It was conceded in argument, and cannot in my judgment be doubted, that it is competent for an owner of personal property to declare himself effectively by word of mouth a trustee of the property for another (see per LORD LYNDHURST, L.C., in *M'Fadden v. Jenkyns* (2) (1842), 1 Ph. 153). Such a declaration did not

- A require writing for its efficacy according to s. 9 of the Statute of Frauds; nor, in my judgment, is the situation altered by virtue of the repeal of that section and the substitution for it of s. 53 (1) (c) of the Law of Property Act, 1925. True, where A. is legally and beneficially the owner of the property, there is no room for the subsistence of an equitable interest in him distinct from the "legal" title. Still, if A. declares himself a trustee of the property wholly
- B for B., he may, in common sense and common terminology, be said to have "got rid of", i.e., "disposed of", his former subsisting beneficial interest.

It is also clear that equitable interests have the characteristic that they may be lost, defeated or destroyed in certain circumstances not involving, sensibly, any distinct dealing with or disposition of them. One example was given by LORD PARKER in the passage above quoted from his speech in *Sinclair v. Brougham* (1); where the rights of the equitable owner are defeated on a purchase for value of the legal estate by one without notice of the equitable interest. Another instance is the defeasance of a subsisting vested interest by the exercise of a special power of appointment.

From these instances it follows, in my judgment, that a subsisting equitable interest may be "disposed of" (in the popular sense of being got rid of), though

D it is not the subject of any "surrender" in favour of the holder of some other interest out of which the subsisting interest is derived, or on which it is dependent; and though it is not the subject of any assignment or of any dealing with it as a distinct subject-matter and as a continuing entity. The true nature of what was done or purported to be done on Feb. 18, 1955, has to be judged, in my view, in the light of what is said above.

E One other proposition may also be asserted. If property be vested in A. on trust, absolutely, for B., then B., in addition to his power of assigning his equitable interest and his power of declaring himself a trustee of it for C., may effectively direct A. to hold the property—i.e., the property itself and all interests therein—on trust for C. That indeed, as counsel for the trustees pointed out, is in accordance with common form in settlements where at the date of the

F settlement the property (i.e., the legal estate in it) has already been transferred to the trustees and where by the settlement the beneficial owner directs the trustees and declares the trusts on which the property itself is to be held. The decision of SIR JOHN ROMILLY, M.R., in *Tierney v. Wood* (3) ((1854), 19 Beav. 330), may be cited as authority for the general proposition.

The validity of the proposition does not, however (nor did the decision in

G *Tierney v. Wood* (3)) determine the question whether such a declaration of trust by way of direction on the part of the beneficial owner required or requires writing under s. 9 of the Statute of Frauds or s. 53 (1) (c) of the Law of Property Act, 1925. Such a method of dealing with a beneficial interest in personal property (with which alone we are concerned) appears, however, to have been regarded as distinct from both an assignment, on the one hand, and a declaration

H of trust of the interest in the beneficial owner's hands, on the other. See, e.g., per ROMER, L.J., in *Timpson's Executors v. Yerbury* (4) ([1936] 1 All E.R. 186 at p. 194), and *Re Chrimes, Locovich v. Chrimes* (5) ([1917] 1 Ch. 30). In *Timpson's Executors v. Yerbury* (4) ROMER, L.J., said ([1936] 1 All E.R. at p. 194):

I "Now the equitable interest in property in the hands of a trustee can be disposed of by the person entitled to it in favour of a third party in any one of four different ways. The person entitled to it (i) can assign it to the third party directly, (ii) can direct the trustee to hold the property in trust for the third party: see per SARGANT, J., in *Re Chrimes* (5), (iii) can contract for valuable consideration to assign the equitable interest to him, or (iv) can declare himself to be a trustee for him of such interest."

But in neither case was the question involved with which we are concerned. Nor indeed does that question appear to have been directly the subject of any

judicial decision, though counsel for the Crown has relied on certain language used in *Re Chrimes* (5), and also more particularly on the language used by ROWLATT, J., in *Martin v. Inland Revenue Comrs.* (6) ((1930), 15 A. T. C. 631), to support his argument that such a direction to the trustee and legal owner by the beneficial owner, even if it be in form distinct, nevertheless has the effect of, or necessarily involves, an "assignment" or at least "a disposition of an equitable interest subsisting at the time of the disposition" within the meaning of s. 53 (1) (c) of the Law of Property Act, 1925. The question for us is whether that submission is correct: and it must, I apprehend, be answered, in the absence of any direct authority, on principle. A

I am not prepared to dissent from the negative answer which UPJOHN, J., gave to the question. In other words, judged against the general background of the characteristics of equitable interests, I think on the whole that a direction of the kind given in the present case by Mr. Hunter is something distinct, not only in form, but also in substance, from an assignment; that it no more is or involves a disposition of a subsisting equitable interest than does a formal declaration of trust by an absolute proprietor of personal property, and accordingly that, like such a declaration of trust, it may take effect without writing. In form there can be no doubt that it is more closely analogous to such a declaration of trust than it is to an assignment. Indeed it is, in form, such a declaration; since it declares the trusts on which the legal owner is to hold the property as, admittedly, it is within the province of the beneficial owner to do. In the present case the events of Feb. 18, 1955, are found in para. 5 of the Case Stated. B C D

"Mr. Hunter orally and irrevocably directed the [trustees] thenceforth to hold the . . . shares . . . and the income thereof" E

on the trusts in the paragraph more particularly specified; and the instruments of Mar. 25, 1955, contained recitals to the same effect coupled with acknowledgments and declarations by the trustees that they had so held the shares since the preceding Feb. 18. Some significance should, in my view, be given to the use of the word "irrevocably". For, if, as counsel for the Crown contends, the transactions of Feb. 18 purported to constitute an "assignment" of Mr. Hunter's equitable interest to the beneficiaries under the specified trusts, it is to be observed that no notice was given to any of such beneficiaries. In the absence of such notice it may be forcefully contended that any "assignment" might thereafter have been recalled by Mr. Hunter. F

I have not, accordingly, been persuaded that there is any principle of law or equity which prevents the transaction of Feb. 18, 1955, being in substance as well as form other than that which on its face it purported to be and from taking effect accordingly—namely, as a direction to the trustees declaring the trusts on which they should hold the property: and, if the result (assuming its efficacy) was to defeat or override the pre-existing beneficial rights of Mr. Hunter, that result was an incidental consequence, but did not involve or amount to the transaction becoming that which in terms Mr. Hunter clearly did not intend, namely, an assignment to anyone, or a disposition in anyone's favour, of those beneficial rights. G H

I am therefore, for my part, prepared to accept the analysis of the problem put at the end of his argument by counsel for the trustees in the form of four questions and to accept also counsel's answers to the questions. The questions and their answers are as follows: (i) Can an equitable owner of property declare trusts of the property itself? Answer: "Yes". (ii) Did Mr. Hunter express himself on Feb. 18, 1955, as declaring trusts of the shares of which he had the beneficial ownership? Answer: "Yes". (iii) Is a declaration of the trusts on which property is to be held a disposition of a subsisting equitable interest in that property? Answer: "No". (iv) Is such a declaration of trust, though not itself such a disposition as mentioned in question (iii), to be treated as such I

A because it has the incidental result of overriding an existing equitable interest ?
Answer: "No".

In *Re Chrimes* (5) the question presented to SARGANT, J., was whether the plaintiff, being at the relevant time entitled to a reversionary interest under a will subject to a restraint on anticipation, had by a deed-poll executed while she was a spinster, successfully imposed new trusts on her reversionary interest
B so that she was subject when married only to such (more limited) restraint as was contained in the new trusts. The deed-poll, which was addressed to all the world, took the form of a declaration that the trustees of the will should (subject to prior interests and otherwise as therein stated) hold the plaintiff's reversionary interest, in the event of her marriage, for her separate use, so that she should have full power to charge or anticipate the same subject to a certain proviso to which
C I need not further refer. It was conceded in argument that it was competent for one in the plaintiff's situation to defeat the restraint by an assignment of her interest while discover: but it was contended for those impugning the validity of what the plaintiff had done that a similar result could not be achieved by a mere declaration of new or different trusts, as the plaintiff had purported to do by the deed-poll.

D SARGANT, J., in deciding for the plaintiff, said that, if the distinction above mentioned was well founded, what the plaintiff had done in any case constituted a complete assignment. But he later added ([1917] 1 Ch. at pp. 36, 37):

"Now it is well established that in the case of an equitable interest outstanding in trustees or other holders a voluntary direction by the owner to the trustees or holders to hold the whole or part of that interest upon
E trust for a third person operates as a complete and effectual transfer of the interest to which the direction extends."

That was followed by a reference to (among other cases) *Tierney v. Wood* (3). This passage was referred to by UPJOHN, J. ([1958] 1 All E.R. at p. 250), but its use by the learned judge was forcefully invoked by counsel for the Crown as disclosing a fallacy in his reasoning. For the cited passage was, according to
F counsel, authority for the view that a direction to trustees in relation to the trust property, by one entitled by virtue of his interest in the trust property to give it, operated, necessarily, as a "transfer", in the sense of an assignment (total or partial according to the extent of the direction) of his beneficial interest. There is no doubt that SARGANT, J., held, and intended to hold, that the plaintiff's deed-poll in *Re Chrimes* (5) operated as an "assignment" of her reversion:
G and I am not to be taken as casting any doubt on the correctness of that view. But the vital question with which we are concerned, the construction of s. 53 (1) (c) of the Law of Property Act, 1925, was not and could not, for obvious reasons, have been in the judge's mind. Nor was the corresponding question under s. 9 of the Statute of Frauds (i.e., whether such a "direction" as the
H plaintiff gave by declaring trusts in her deed-poll required to be in writing) since it was, in fact, written. It is to be noted, too, that at the date of the deed-poll the plaintiff's interest under the trusts was a limited interest, that of a reversioner, subject to subsisting life interests. She had no power to give directions to the trustees comparable to that which Mr. Hunter had on Feb. 18, 1955. Finally, the passage cited is not entirely clear in all respects, and counsel
I for the Crown himself invited us to suppose that words to the effect "in property, the legal estate in which" had been per incuriam omitted after the words "equitable interest".

Martin v. Inland Revenue Comrs. (6) at first sight more nearly approximates to the present case. The essential facts were that Mr. Martin, having first transferred certain freehold property and the benefit of a mortgage to other persons without conferring on them any beneficial interest (so that they held the property on trust absolutely for himself) after a short interval, by deed, declared trusts of the property in the trustees' hands. The relevant question was whether

the second deed constituted a conveyance operating as a voluntary disposition inter vivos within the meaning of s. 7 (1) of the Finance (1909-10) Act, 1910; and that question ROWLATT, J., answered affirmatively. A

Again, however, the question with which we are concerned (viz., whether a direction or declaration of trust made in circumstances comparable to those of Mr. Martin amounts to a disposition of a subsisting equitable interest within s. 53 (1) (c) of the Law of Property Act, 1925) did not, of course, arise. ROWLATT, J., held the declaration to have operated as a voluntary disposition within s. 74 (1) of the Finance (1909-10) Act, 1910; and, as I have earlier stated, it is conceded in the present case that, if the operation of the relevant trusts must be related to the instruments of Mar. 25, 1955, those instruments are likewise chargeable with ad valorem duty. *Martin v. Inland Revenue Comrs.* (6) does not, in my judgment, assist the Crown in the present case. B C

UPJOHN, J., referred also in his judgment to his own earlier decision in *Re Wale, Wale v. Harris* (7) ([1956] 3 All E.R. 280), as having been relied on before him by the Crown. The question in *Re Wale* (7) was, however, widely different from that before us. The present question was not at all raised. It is sufficient for me to say that, once again, nothing in *Re Wale* (7) assists the solution of the present problem. D

That problem must indeed be determined, as I have said, as a matter of principle uncovered by any authority. It is, whether the directions given on Feb. 18, 1955, amounted in law to a disposition of a subsisting interest within the meaning of s. 53 (1) (c) of the Law of Property Act, 1925. In the end of all it depends, briefly and simply, on the significance in the context of that subsection of the word "disposition". The section reproduces s. 3, s. 7, s. 8 and s. 9 of the Statute of Frauds which were, by the Act of 1925, repealed. Paragraph (b) of s. 53 (1) of the Law of Property Act, 1925, follows fairly closely the terms of the repealed s. 7 of the Statute of Frauds. On the other hand, the language of para. (c) in the Act of 1925 departs substantially from that of s. 9 of the Statute of Frauds, which read (so far as relevant): E

"... all grants and assignments of any trust or confidence shall likewise be in writing ... or else shall ... be utterly void and of none effect." F

If the present question had arisen for determination under s. 9 of the Statute of Frauds, it is, in my judgment, reasonably clear that it would have been answered in the same sense as in UPJOHN, J.'s judgment: for the transactions of Feb. 18, 1955, could not to my mind, have been sensibly described as constituting or operating as, a grant or assignment of a trust or confidence—particularly bearing in mind the established law that a trust of personalty could be effectively declared by parol. Has the law been altered by the replacement of s. 9 of the Statute of Frauds by s. 53 (1) (c) of the Law of Property Act, 1925? No doubt, as counsel for the Crown observed, proper effect must be given to a change of language, even though the expressed purpose of the new enactment be that of consolidation only of the existing law—(See CRAIGES ON STATUTE LAW (5th Edn.), p. 333, et seq.). Still, in such a case, the court may, in my judgment, properly prefer that interpretation, if fairly open, which more closely reflects the scope of the replaced enactment; and more particularly, perhaps, where, as in the present case, the language of the repealed statute might in modern times appear somewhat archaic. G H

As UPJOHN, J., pointed out at the end of his judgment, the word "disposition" is one of wide import, general rather than precise. Many contexts could no doubt be found in which the word or its derivatives would cover any means whereby the owner of any right or property succeeded in getting rid of that which he formerly enjoyed. But, if the word bears this widest significance, then does the validity of a parol declaration of trust of personalty now survive? As UPJOHN, J., observed, if the section has worked such a change in the law, it has not been noticed in any of the well-known text-books. The meaning of the I

- A word must be discerned from and, as I think, limited by the context of the succeeding words "subsisting at the time of the disposition". It is said that the presence of these words is apt to save the parol declaration of trust. But, in the case at any rate of such a declaration by one who is the owner beneficially of property, the legal estate in which is vested in another as trustee for him—what is referred to in the American RESTATEMENT OF THE LAW OF TRUSTS, edited by Professor Austin Scott of Harvard University, as "sub-trusts"—the practical effect would seem, in common sense, to amount, or to be capable of amounting, to the "getting rid of" a trust or equitable interest then subsisting. If, therefore, the word "disposition" ought in its context to be so limited as to exclude such a declaration, it should also in my judgment (having due regard to the pre-existing law and to the characteristics of equitable rights or interests to which I have earlier referred) be construed so as not to cover a transaction such as the present which, though it may result in the destruction or defeasance of subsisting equitable rights, is not in form or (as I think) in reality apt or directed to constitute any dealing with those rights.

- It remains for me to say something of the judgment of UPJOHN, J., with which I am respectfully in agreement. The learned judge thus expounded his conclusion ([1958] 1 All E.R. at p. 250):

"In my judgment a direction to trustees to hold trust property on trust for a donee operates as a transfer of the equitable interest to the donee by way of trust and not by way of assignment."

- Elsewhere the learned judge similarly uses the word "transfer", which may have been derived from its use by SARGANT, J., in the passage above quoted from *Re Chrimes* (5). The use was seized on by counsel for the Crown as indicating that UPJOHN, J., had in some sense misapprehended the essential point for his decision. But I agree with counsel for the trustees that, in its context, the learned judge used the word in a special sense indicating that the equitable rights had in effect been displaced or transposed and meaning something wholly distinct from "disposition" in the sense of an assignment or direct dealing with an interest, the defined identity of which survives, recognizably, the dealing. So much, indeed, clearly appears from the final words of the passage from the judgment which I have quoted. Any other view would be wholly destructive of the reasoning and logic of the judgment.

- For the reasons which I have tried to state, I would, if the matter rested with me, dismiss the appeal. But my brethren, whose judgments I have had the advantage of reading in advance, have reached an opposite conclusion. The sole essential question is, as I have more than once said, an extremely short one. As MORRIS, L.J., observes in his judgment, what Mr. Hunter did and intended to do on Feb. 18, 1955, was neither an assignment by him of his beneficial interest, nor a declaration of trust of that interest. It was a direction to the trustees, which, by reason of the power to direct, which he had, put an end to his beneficial rights. Was it therefore a disposition by him of an equitable interest subsisting at the time of the disposition? That is the one question which can be shortly and simply stated. I would answer the question negatively, but my brethren think that it should be answered affirmatively. In the result, the appeal must be allowed.

- MORRIS, L.J. (read by the Master of the Rolls): This is an appeal from the judgment of UPJOHN, J., whereby he allowed an appeal by way of Case Stated under s. 13 of the Stamp Act, 1891, from assessments to ad valorem duty made by the Commissioners of Inland Revenue in respect of six instruments each made on Mar. 25, 1955, and each called a declaration of trust. The commissioners were of opinion that each of the instruments was a conveyance or transfer operating as a voluntary disposition inter vivos within the meaning of s. 74 (1) of the Finance (1909-10) Act, 1910. The facts which are recorded in the Case

Stated can be shortly summarised. Mr. Hunter was the holder of eighteen thousand ordinary shares of £1 each in Sun Engraving Co., Ltd. On Feb. 1, 1955, he transferred those shares to Mr. Grey and Mr. Randolph (the trustees). The shares were to be held by them as nominees for and to the order of Mr. Hunter. On Feb. 18, 1955, at the offices of the company Mr. Hunter orally and irrevocably directed the trustees thenceforth to hold the shares and the income thereof, as to three thousand of them, on the trusts and with and subject to the powers and provisions declared by and contained in a settlement dated July 22, 1949, in favour of a grandson of Mr. Hunter, as to four further blocks of three thousand shares each on the trusts respectively of four settlements executed in 1949 in favour of four other grandchildren, and as to the remaining three thousand shares on the trusts of a settlement executed in 1950 on his then existing and certain possible after-born grandchildren. The trustees were and continued to be trustees of each of the six settlements. The directions given by Mr. Hunter on Feb. 18 were to the intent that they should result in his entire exclusion from all future right, title and benefit to or in the shares or any of them and the income thereof.

On Mar. 25, 1955, the six instruments were executed. In each one the opening words are as follows:

"This declaration of trust is made the 25th day of March 1955 by Arthur William Grey of Milford House Milford Lane Strand in the county of London chartered accountant and Leslie Richard Randolph of 19 Fleet Street in the City of London bank manager (hereinafter called 'the trustees')."

Each then recited that prior to Feb. 18 three thousand shares were held as nominees for and to the order of Mr. Hunter. There was a recital of what had been done on Feb. 18 with the assertion that the direction given

"did immediately result in the entire exclusion of Mr. Hunter from all future right title and benefit to or in the said shares or any of them and the income thereof."

After further recitals the deed continued:

"Now this deed witnesseth and the trustees hereby acknowledge and declare that they have been since the date of inception and are now holding the said shares specified in the said schedule hereto and the income thereof upon such trusts and with and subject to such powers and provisions as are by and in the said settlement declared and contained concerning the trust fund as therein defined or such of the same trusts powers and provisions as are now or may hereafter be subsisting or capable of taking effect to the intent that the said shares should since the date of inception form an addition to and be one fund with the said trust fund for all purposes. In witness whereof the trustees and Mr. Hunter have hereunto set their hands and seals the day and year first above written."

It is common ground that, if what took place on Feb. 18 had the result that thereafter the six blocks of three thousand shares each were held by the trustees on the trusts declared by the six respective trusts, then no property passed in and by the six "declarations of trust" of Mar. 25, and those instruments would not be chargeable to ad valorem stamp duty. The commissioners submit that the directions of Feb. 18 were ineffective for the reason that they were oral and not in writing. The commissioners submit that the provisions of s. 53 (1) (c) of the Law of Property Act, 1925, were applicable.

It thus comes about that, though the direct matter for determination is whether the six instruments of Mar. 25 should be assessed to ad valorem stamp duty, the principal issue which arises is whether the provisions of s. 53 (1) (c) of the Law of Property Act, 1925, prevented the directions given on Feb. 18 from being effective. If those provisions did not so prevent, then no further question now arises and the appeal fails. Before the learned judge, a submission was

A alternatively made by the commissioners to the effect that the oral directions on Feb. 18 and the subsequent deeds executed on Mar. 25 should be taken and read together. That submission failed and has not been made in this court. If the provisions of s. 53 (1) (c) rendered what took place on Feb. 18 ineffective, then the question arises whether the instruments of Mar. 25 were chargeable with ad valorem duty.

B Section 74 (1) of the Finance (1909-10) Act, 1910, is in the following terms:

“Any conveyance or transfer operating as a voluntary disposition inter vivos shall be chargeable with the like stamp duty as if it were a conveyance or transfer on sale, with the substitution in each case of the value of the property conveyed or transferred for the amount or value of the consideration for the sale:

C “Provided that this section shall not apply to a conveyance or transfer operating as a voluntary disposition of property to a body of persons incorporated by a special Act, if that body is by its Act precluded from dividing any profit among its members and the property conveyed is to be held for the purposes of an open space or for the purposes of its preservation for the benefit of the nation.”

D Part 5 of the Act of 1910 (which part contains s. 74) is to be read as one with the Stamp Act, 1891 (see s. 96 (5) of the Act of 1910). Section 62 of the Stamp Act, 1891, is in the following terms:

“Every instrument, and every decree or order of any court or of any commissioners, whereby any property on any occasion except a sale or mortgage, is transferred to or vested in any person, is to be charged with duty as a conveyance or transfer of property:

E “Provided that a conveyance or transfer made for effectuating the appointment of a new trustee is not to be charged with any higher duty than 10s.”

Section 54 of the Stamp Act, 1891, is in the following terms:

F “For the purposes of this Act the expression ‘conveyance on sale’ includes every instrument, and every decree or order of any court or of any commissioners, whereby any property, or any estate or interest in any property, upon the sale thereof is transferred to or vested in a purchaser, or any other person on his behalf or by his direction.”

G From a citation of these sections it becomes clear that there may be a wide range of instruments which become chargeable with duty as conveyances or transfers of property.

The issue which arises calls for an analysis of what took place on Feb. 18. That is necessary in order to decide whether s. 53 (1) (c) of the Law of Property Act, 1925, applies. That section took the place of s. 3, s. 7, s. 8 and s. 9 of the Statute of Frauds, and sub-s. 1 (c) provides as follows:

H “a disposition of an equitable interest or trust subsisting at the time of the disposition, must be in writing signed by the person disposing of the same, or by his agent thereunto lawfully authorised in writing or by will.”

Section 205 (1) (ii) of the Law of Property Act, 1925, contains the following definition:

I “‘Conveyance’ includes a mortgage, charge, lease, assent, vesting declaration, vesting instrument, disclaimer, release and every other assurance of property or of an interest therein by any instrument, except a will; ‘convey’ has a corresponding meaning; and ‘disposition’ includes a conveyance and also a devise, bequest, or an appointment of property contained in a will; and ‘dispose of’ has a corresponding meaning;”

There is no doubt that between Feb. 1 and Feb. 18 Mr. Hunter owned the equitable interest in the eighteen thousand shares. On Feb. 18 he directed the

trustees to hold the shares thenceforth in a different way. Instead of holding them for him, the trustees were to hold them on the trusts and with and subject to the powers and provisions declared by and contained in certain settlements. It has therefore first to be considered what exactly it was that Mr. Hunter did or purported to do on Feb. 18. Did he purport to effect a direct assignment of his existing equitable interest to some third party or parties? It seems to me that he did not. Did he purport to declare himself a trustee for others of his existing equitable interest? Again it seems to me that he did not. Nor did he enter into any contract for valuable consideration to assign his equitable interest to some third party. What he did was to direct the trustees that for the future they were to hold the trust property, not for him, but on certain trusts which he declared: his equitable interest was to be completely determined.

It is well-established law that a declaration by parol is sufficient to create a trust of personal property (see *M'Fadden v. Jenkyns* (2) (1842), 1 Ph. 153; *Milroy v. Lord* (8) (1862), 4 De G.F. & J. 264). But the only question which now arises relates to an equitable interest or trust which was subsisting in Mr. Hunter before he gave his oral directions to his trustees on Feb. 18. The limited issue is whether there was a purported "disposition" of Mr. Hunter's interest. If there was, then it was ineffective or unavailing for lack of writing.

Counsel for the Crown submitted that the owner of a subsisting equitable interest, the legal estate being vested in trustees, could make a settlement or trust of that equitable interest by assigning it to trustees to be held on the new trusts: counsel further submitted that, if instead of appointing new trustees the owner directed the existing trustees who held the legal estate to hold on the new trusts, the effect and result of this would be that there would be an assignment to the trustees, the direction being a form of equitable assignment. On this view Mr. Hunter's words on Feb. 18 would have been ineffective had the governing statutory provision been s. 9 of the Statute of Frauds.

Out of a wealth of citation of authority no case emerges in which the present point has arisen for decision either under s. 9 of the Statute of Frauds or under s. 53 (1) (c) of the Law of Property Act, 1925. In *Bentley v. Mackay* (9) ((1851), 15 Beav. 12), no point seems to have been taken in regard to s. 9 of the Statute of Frauds; neither was any point taken in *M'Fadden v. Jenkyns* (2), though that case related rather to the creation of a trust than to any dealing with an existing equitable interest. In *Martin v. Inland Revenue Comrs.* (6) (1930), 15 A.T.C. 631, a case much relied on by counsel for the Crown, no point arose comparable with that now in issue. As s. 53 of the Law of Property Act, 1925, is the section which now applies, the issue involved is whether Mr. Hunter purported to dispose of his interest. The word "disposition" must be given a normal meaning. The legislature chose to use this word in the new statute. Counsel for the Crown placed reliance on some words used by SARGANT, J., in his judgment in *Re Chrimes, Locovich v. Chrimes* (5) ([1917] 1 Ch. 30). In speaking of a direction given by the owner of an equitable interest to trustees in whom the legal estate is outstanding SARGANT, J., said (*ibid.*, at p. 36):

"... a voluntary direction by the owner to the trustees or holders to hold the whole or part of that interest upon trust for a third person operates as a complete and effectual transfer of the interest to which the direction extends."

I cannot, however, regard those words as decisive of the present problem.

Mr. Hunter was certainly in a position to declare a trust (as was the case in *Tierney v. Wood* (3) (1854), 19 Beav. 330). In *Rycroft v. Christy* (10) ((1840), 3 Beav. 238), LORD LANGDALE, M.R., in reference to directions given by a beneficiary said (*ibid.*, at p. 242): "she transferred the trust from herself to the

- A object she desired to be benefited . . .” The notion of a transfer of the equitable interest is involved both where transfer takes place by way of assignment and where it takes place by way of direction to trustees to hold on trust for a donee or donees. But, whatever language may be employed in cases where general principles have been under consideration, the short question which here emerges is whether what Mr. Hunter did purported to amount to a “disposition” by him.
- B The word “disposition” is a word of wide signification. Before Feb. 18 Mr. Hunter possessed a subsisting equitable interest in the shares; his purpose and object when he gave his oral direction was to deprive himself immediately and irrevocably of his subsisting personal beneficial interest, so that others could and should become beneficially entitled. It was a necessary part of his purpose that he should deal with his personal interest; he terminated it and informed
- C his trustees that they should no longer hold for him but should hold on the substituted trusts which he declared. I cannot resist the conclusion that this was a purported “disposition” by him of his interest. In *Inland Revenue Comrs. v. Buchanan* (11) ([1957] 2 All E.R. 400) a question arose whether a surrender is a disposition. LORD GODDARD, C.J., said (*ibid.*, at p. 402):

D “I think that a surrender clearly is a disposition. A person can dispose of his interest in a fund or in a chattel or in anything else in a variety of ways, but, if, having an interest in a fund, although the interest may not then be in possession, he surrenders that interest, it seems to me that he disposes of it.”

- E I consider that Mr. Hunter purported to effect a disposition but that by reason of s. 53 (1) (c) his oral words on Feb. 18 were ineffective. The instruments of Mar. 25 were, however, made operative and effective by the parties thereto and were in my judgment chargeable to ad valorem duty as assessed by the commissioners. It is with a natural diffidence that I differ from the opinions of my Lord and of the learned judge but I feel constrained to the view which I
- F have expressed and I would allow the appeal.

- ORMEROD, L.J.: I agree with MORRIS, L.J., that this appeal should be allowed. No useful purpose would be served by setting out the facts again and I do not propose to do so. It is sufficient to say that on Feb. 1, 1955, Mr. Hunter, the settlor, voluntarily transferred to the trustees eighteen thousand
- G shares, of which he was the owner, in the Sun Engraving Co., Ltd., thereby causing the legal estate to be vested in the trustees and the beneficial interest to be vested in him by reason of a resulting trust. On Feb. 18, 1955, in the presence of the trustees and a member of a firm of solicitors, he orally directed the trustees to hold the shares on certain trusts subject to the intent that he, the settlor, should be excluded from all future right title and benefit in or to the said
- H shares or the income thereof. It is agreed that the question on which the appeal turns is whether in the course of the transaction of Feb. 18 he made a disposition of his subsisting equitable interest within the meaning of s. 53 (1) (c) of the Law of Property Act, 1925. There can be no doubt that, up to the moment of the oral direction being made, there was a subsisting equitable interest in the shares vested in the settlor. At that moment the equitable interest ceased to be vested
- I in him. Either it was transferred from him to the trustees for them to hold the shares in trust for the beneficiaries or it ceased to exist and a new equitable interest was created in the terms of the direction. If what took place was a transfer of the settlor's interest, then it could not be argued that it was not a disposition within the meaning of the section. I do not think, however, that it was a transfer. It was certainly not in my judgment a transfer which was in the nature of an assignment. The more difficult question is whether the transaction was a “disposition” in spite of the fact that it should not be regarded as a

transfer. Counsel for the trustees has argued that the purpose of what took place on Feb. 18 was that the settlor should give directions to the trustees as to the trusts on which and the persons for whom they should hold the shares, that the cessation of the settlor's interest was an incidental consequence of this purpose and that he neither intended to effect a disposition of his interest, nor did he in fact do so. I may say at once that I find it difficult to accept that argument.

I have found little or no assistance from the authorities that have been cited. It is true that ROMER, L.J., in *Timpson's Executors v. Yerbury* (4) ([1936] 1 All E.R. 186 at p. 194) says:

"Now the equitable interest in property in the hands of a trustee can be disposed of by the person entitled to it in favour of a third party in any one of four different ways."

and goes on to specify as one of these ways a direction to the trustees to hold the property in trust for a third party. But the question of the construction of s. 53 (1) (c) had not arisen in the case, and for my part I do not regard this passage as of assistance in the present case. The question is whether the word "disposition" should be given the wide meaning that it would seem to have in normal everyday usage, or whether it should have a meaning so restricted as to make s. 53 (1) (c) of no wider import than s. 9 of the Statute of Frauds. That section requires that "all grants and assignments of any trust or confidence shall likewise be in writing". If the meaning of the word "disposition" is to be restricted to "grants and assignments", then the case would not in my judgment be within the section.

Counsel for the trustees has argued that s. 53 (1) (c) was a consolidation of the existing law and was in effect a re-enactment of s. 9 of the Statute of Frauds, and should not be given a wider meaning unless there was a clearly expressed intention that such a meaning should be so given. Counsel for the Crown, on the other hand, argued that effect must in any event be given to a change of language and that the language of the new section might well be intended to bear a wider construction than the old one, particularly having regard to the change which has taken place in the nature of equitable interests since the passing of the Statute of Frauds. Giving full consideration to the argument that the section is to a large extent a consolidation of the existing law, I have come to the conclusion that the wider construction of the section is the right one. If the intention had been to limit its operation to grants and assignments, I see no reason why the section should not have read "a grant or assignment of an equitable interest or trust subsisting at the time of the grant or assignment". The section, however, does not so read. The word "disposition" has been used, and, in my judgment, this word should be given its normal meaning. If this be right there can, I think, be little doubt that the case comes within the section, and the transaction is void for want of writing.

It must be looked at, not from the point of view of the new interest which was to be vested in the trustees, but from that of the interest which was vested in the settlor up to the time of the direction being given. This was an interest which he had himself created, apparently for the purpose of being in a position to give the appropriate directions to the trustees at a later date. In order to do this effectively, it was essential that the equitable interest should be vested in him and that it should cease to exist at the time and by reason of the direction. The transaction therefore was one which was, in my judgment, a "disposition" within the meaning of the section of the settlor's equitable interest. He "disposed" or "got rid" of it, by causing it to cease to exist in carrying out

A the purpose for which he brought it into being. It follows, in my judgment, that the transaction of Feb. 18 was void and that the declaration of trust of Mar. 25, 1955, is liable to be stamped ad valorem.

Appeal allowed. Ad valorem duty assessed at £210. Leave to appeal to the House of Lords granted.

B Solicitors: *Solicitor of Inland Revenue; Soames, Edwards & Jones* (for the trustees).

[Reported by F. A. AMIES, ESQ., Barrister-at-Law.]

C

OUGHTRED v. INLAND REVENUE COMMISSIONERS.

[COURT OF APPEAL (Lord Evershed, M.R., Morris and Ormerod, L.J.J.), April 24, 25, May 15, 1958.]

Stamp Duty—Conveyance on sale—Transfer of shares—Shares subject to settlement—Oral agreement to exchange reversionary interest in settled shares for shares owned by life tenant—Trustees' subsequent transfer of shares to life tenant—Whether conveyance of beneficial interest or legal estate only—Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 54, Sch. 1—Law of Property Act, 1925 (15 & 16 Geo. 5 c. 20), s. 53 (1), (2).

On June 18, 1956, O.'s son, being absolutely entitled to shares subject to O.'s life interest under a settlement, made an oral agreement with O. to exchange his reversionary interest in these settlement shares for other shares to the intent that O.'s life interest in the settlement shares should be enlarged into absolute ownership. On June 26, 1956, O. transferred to nominees for her son the shares that she had agreed to exchange, the trustees of the settlement executed a transfer of the settlement shares to her (her son not being a party to this deed) and the trustees, O. and her son executed a deed of release to the trustees in respect of the settlement trusts. The deed of release recited that on June 18, 1956, O.'s son and O. had agreed that they would exchange on June 26 the reversionary interest of the former for the shares of the latter "to the intent that" O.'s life interest in the settlement shares "should be enlarged into absolute ownership thereof." The deed of release continued "The trust fund . . . is now held by the trustees in trust for [O.] absolutely . . . and it is intended that the same shall forthwith be transferred to [O.]." The operative part began: "Now in consideration of the premises and of the transfer to be made as aforesaid," and this was followed by the release and discharge to the trustees. On appeal from a decision that the transfer of the settlement shares by the trustees did not attract ad valorem stamp duty under s. 54 of the Stamp Act, 1891, as O.'s son's beneficial interest in the settlement shares had passed by the oral contract of June 18, 1956, writing not being necessary for this purpose by reason of s. 53 (2) of the Law of Property Act, 1925,

Held: the transfer of the settlement shares to O. was liable to ad valorem stamp duty (at a rate appropriate to a conveyance on sale) on the consideration given by her for her son's reversionary interest in the settlement shares, notwithstanding that he was not a party to the deed transferring them, because (i) O. had not acquired the whole beneficial interest in the settlement shares before the three deeds of June 26, 1956, were executed and (ii), the three

deeds of June 26 being contemporaneous, the deed of transfer of the settlement shares was the completion of the oral contract of exchange of June 18, the true view of the contemporaneous deeds (deduced particularly from the terms of the deed of release) being that the trustees were enabled to transfer the shares with all rights attached to them to O.

A.-G. v. Brown ((1849), 3 Exch. 662) applied.

Decision of UPJOHN, J. ([1958] 1 All E.R. 252) reversed.

[**Editorial Note.** Though the question of the effect of s. 53 (2) of the Law of Property Act, 1925, did not arise for decision by the Court of Appeal, the court expressly declined to accept the decision in the court below on that question (see p. 446, letter D, post). On the further question whether the contract of June 18, 1956, would have been ineffective to transfer the son's equitable reversionary interest in the shares on the ground that it was an oral contract the present case should be compared with *Grey v. Inland Revenue Comrs.*, p. 428, ante.

As to stamp duty on conveyances or transfers on sale, see 28 HALSBURY'S LAWS (2nd Edn.) 458, para. 973; and for cases on the subject, see 39 DIGEST 278-281, 621-651.

For the Stamp Act, 1891, s. 54, see 21 HALSBURY'S STATUTES (2nd Edn.) 627.

For the Law of Property Act, 1925, s. 53, see 20 HALSBURY'S STATUTES (2nd Edn.) 551.]

Cases referred to:

(1) *Grey v. Inland Revenue Comrs.*, ante, p. 428.

(2) *A.-G. v. Brown* (1849), 3 Exch. 662; 18 L.J.Ex. 336; 13 L.T.O.S. 121; 154 E.R. 1011; 39 Digest 296, 766.

Appeal.

The Crown appealed against an order of UPJOHN, J., made on Dec. 3, 1957, and reported [1958] 1 All E.R. 252, allowing an appeal by Case Stated by the respondent in which she sought the determination by the court of the amount of stamp duty chargeable on an instrument of transfer of shares dated June 26, 1956, made by the trustees of a settlement to the respondent. Under the settlement one hundred thousand ordinary shares of 10s. each and one hundred thousand first preference shares of 10s. each in William Jackson & Son, Ltd., were held on trust for the respondent during her life and, by virtue of a deed of appointment made by the respondent on June 18, 1956, were held on trust after her death for her son Peter Oughtred. A power of revocation reserved in the deed of appointment was released by a deed of release made by the respondent and dated the same day. By an oral agreement also made on June 18, 1956, between the respondent and her son, it was agreed that on June 26, 1956, the son would exchange his interest under the settlement, the power of appointment and the deed of release for 28,510 fully paid preference shares of 10s. each and 44,190 fully paid ordinary shares of 10s. each in William Jackson & Son, Ltd., owned by the respondent to the intent that the respondent's life interest in the trust fund of the settlement should be enlarged to absolute ownership thereof. A deed of release made on June 26, 1956, between the respondent and her son and the trustees, released and discharged the trustees from all actions, proceedings, claims and demands in respect of the execution of the settlement. On June 26, 1956, the trustees transferred the settlement shares to the respondent and on the same day, by the direction of the son, the respondent transferred the shares agreed to be exchanged to Donald Miller Jones and Noel Oughtred Till who held them as trustees for the son under a separate trust deed.

The Commissioners of Inland Revenue were of opinion that, for the purposes

- A of the Stamp Act, 1891, and particularly of s. 55, the oral agreement made between the respondent and the son on June 18, 1956, was an agreement for the sale of the son's equitable reversionary interest in the settlement shares to the respondent in consideration of the shares agreed to be exchanged for them, and that, apart from the transfer, no instrument in writing transferring the son's
- B equitable reversionary interest to the respondent having been produced to them, the transfer of the settlement shares was a conveyance on sale of the equitable interest and liable to ad valorem duty on £33,140, being the agreed value at the date of transfer of the shares transferred in exchange therefor; and it was a transfer not on sale to the respondent of the legal interest in the settlement shares. They assessed the ad valorem duty at £663 10s. plus 10s. fixed duty. The
- C respondent contended that no ad valorem duty as a conveyance or transfer on sale was exigible on the transfer and that it was liable to the duty of 10s. only under the head of charge "conveyance or transfer of any kind not hereinbefore described" in Sch. 1 to the Stamp Act, 1891. UPJOHN, J., allowed the appeal, holding that, on the making of the oral agreement for the exchange, the vendor had become a trustee of his reversionary interest for the life tenant (writing not
- D being required for constructive trusts by s. 53 (2) of the Law of Property Act, 1925), and the subsequent transfer of the shares conveyed only the legal interest and no beneficial interest in the shares; and the transfer was a transfer on the winding-up of the trust and not a conveyance on sale within the meaning of s. 54 of the Stamp Act, 1891. The Crown appealed to the Court of Appeal.
- E *P. E. Whitworth* for the respondent.
R. O. Wilberforce, Q.C., and *E. Blanshard Stamp* for the Crown.

Cur. adv. vult.

- May 15. LORD EVERSHERD, M.R., read the following judgment of the court: The question in this appeal is whether a transfer of shares in ordinary
- F form is chargeable with ad valorem stamp duty, as on a sale, by reference to the consideration therefor; or only with the sum of 10s. The facts are as follows. Immediately prior to the making of the oral agreement about to be related, Mrs. Phyllis Brown Oughtred, the respondent in this court, had the beneficial enjoyment during her own life of one hundred thousand 10s. preference shares and one
- G hundred thousand 10s. ordinary shares of William Jackson & Son, Ltd., standing in the names of the trustees (including herself) of a settlement dated Jan. 1, 1924. By virtue of an irrevocable appointment by the respondent in favour of her only son, Mr. Peter Bentham Oughtred, pursuant to a power in that behalf contained in the settlement, the reversionary beneficial interest in the said shares, subject to the respondent's life interest, belonged absolutely to the son. On June 18,
- H 1956, an oral agreement was made between the son Peter and the respondent to the effect that (to quote the findings in the Case Stated)

- "Peter would on June 26 [following] exchange his interest under 'the settlement' [for certain other shares in the same company belonging absolutely to the respondent] to the intent that [the respondent's] life interest [under the settlement] should be enlarged into absolute ownership thereof."
- I

On June 26, 1956, three deeds were executed, viz.: (i) a deed of release whereby, after reciting the various matters of fact above mentioned, the respondent and her son gave to the trustees of the 1924 settlement a complete release and discharge from all their obligations as such trustees; (ii) the deed of transfer, the subject of this appeal, of the two hundred thousand shares in William Jackson & Son, Ltd., from the trustees of the settlement to the respondent;

and (iii) a deed of transfer of the consideration shares in the same company from the respondent to nominees of her son. A

We have mentioned the three deeds in the order which, if chronological, would be most favourable to the respondent. There was, however, no evidence or finding as to the order in which the deeds were in fact executed, and in our judgment they should be regarded as having been executed contemporaneously.

In *Grey v. Inland Revenue Comrs.* (1) (ante, p. 428), in which we have just given our judgment, the problem, and the only problem, was one arising on the terms of s. 53 (1) (c) of the Law of Property Act, 1925; and it appeared at one time that a like problem arose in the present appeal also. It was and is the contention of the Crown that the oral contract of June 18, 1956, had been ineffective to transfer the son's reversionary equitable interest in the shares to his mother. UPJOHN, J., had rejected this argument on the ground that, as a result of the contract, the son had, in any case, become a constructive trustee of his interest for his mother, that s. 53 (2) of the Law of Property Act excepted constructive trusts from the operation of sub-s. (1), and, accordingly, that the result was the same for present purposes as though the son had on June 18 effectively assigned his interest to the respondent, leaving the legal estate in the shares outstanding in the trustees, on trust absolutely for the respondent. In this court the case for the Crown has, we think, been somewhat differently presented, and in the end of all, the question under s. 53 (2) of the Law of Property Act does not, in our judgment, strictly call for a decision. We are not, however, with all respect to the learned judge, prepared to accept, as we understand it, his conclusion on the effect of s. 53 of the Law of Property Act. B C D E

In this court counsel for the Crown has put the Crown's case alternatively. In the first place he has said that, since immediately before the execution of the transfer on June 26, the son's equitable reversionary interest remained in him and since, by the effect of the transfer the respondent acquired a full legal and beneficial title to the shares, therefore the transfer must have operated both to assign to the respondent her son's reversionary interest and also the legal estate. On this view, which the commissioners accepted, the transfer should be stamped, both ad valorem in respect of the former property, and with 10s. in respect of the legal estate. Alternatively, counsel contended that the transfer, read in the light of the contemporary transfer of the other shares to the son's nominees, and of the deed of release, was in truth nothing other than the completion and the contemplated method of completion of the oral contract and so was a "conveyance or transfer on sale of property" within the meaning of s. 54 of, and Sch. 1 to, the Stamp Act, 1891. F G

Apart from the point above mentioned under s. 53 of the Law of Property Act, 1925, the Crown's former alternative is, in our judgment, faced with the formidable objection that, if the transfer operated as an assignment of the son's interest as a distinct item of property (as must follow from the Crown's claim to the additional 10s. duty), then how was it achieved in the absence of the son as a conveying party? We have found difficulty in appreciating the answer to this objection, but it is, in the event, unnecessary for us to express a view on it; for we have come to the conclusion that the Crown is entitled to succeed on counsel's second alternative, though the result is to diminish the amount of duty leviable by the item of 10s. H I

It is undoubtedly true that stamp duty is leviable on instruments and not on transactions; but it is equally clear that the court is not thereby debarred from inquiring what is the true nature and intended purpose of the instrument sought to be charged. In the present case the transfer in suit, together with the transfer to the son's nominees by the respondent of the consideration shares, were contemporaneous with the deed of release. The terms of the last-mentioned deed are,

A in our judgment, of vital significance. It recites that on the previous June 18 the son and the respondent had agreed that they would on June 26 exchange his rever-
sionary interest for her shares "to the intent that" the respondent's life interest
"should be enlarged into absolute ownership thereof". It is true that the recital
continues (somewhat ungrammatically):

B "The trust fund . . . is now held by the trustees in trust for [the respon-
dent] absolutely . . . and it is intended that the same shall forthwith be
transferred to [the respondent]."

The operative part, however, is:

C "Now in consideration of the premises *and of the transfer to be made as
aforesaid*"

followed by a release and discharge to the trustees. In our judgment, in the light
of the language which we have quoted and of the fact that the oral contract was
one for an exchange to be effected on June 26, the proper conclusion is that the
D transfer constituted (as it was intended and contemplated that it should)
the completion of the oral bargain made eight days before; and so constitutes the
conveyance on, i.e., consequent on and in implementation of, the contract for
sale of June 18.

The material part of the learned judge's judgment was ([1958] 1 All E.R.
at p. 255):

E "Regard must be had to the facts of each case. Plainly it is not essential
that the vendor should be a party. For example, where shares are in the
names of nominees, the transfer from such nominees is plainly a conveyance
on sale, and, despite the submission to the contrary of counsel for the appel-
lant, in such a case it is not necessary to mention expressly the equitable in-
F terest in the deed of transfer. In this case, however, the appellant could not
call on the trustees to convey the shares to her merely on proof of the oral
agreement. They were entitled to say, and in this case presumably did say:
'Here is a subsisting trust, and we will not part with the trust assets
except with the assent of everyone who is interested in them and on having a
G release in the usual way not only from you but from Peter. We are not
concerned with dealings between beneficiaries.' Although the transfer was
executed as a direct result of the agreement for sale, and really on the
occasion thereof, still it remains in my judgment incorrect in the particular
circumstances of this case to describe it as a conveyance on sale. The transfer
was in my judgment a transfer not on sale but on the winding-up of the trust
H and on the release of the trustees. This point also fails."

With the earlier part of this passage we respectfully agree; but we differ from
the learned judge in his conclusion. We do not think, with all respect to him, that,
in light of the circumstances that we have mentioned, the transfer can properly be
regarded as one consequent on a winding-up of the trusts; or, even if it was so in
I some sense, that it was not therefore in substance and reality a completion of
the contract.

As the learned judge observed, it is not essential that a vendor should be a
party to the instrument which constitutes the completion of his contract for sale.
An obvious example, given by the judge, is a transfer of shares by the vendor's
nominees. *A.-G. v. Brown* (2) ((1849), 3 Exch. 662), is also authority for such a view.
Though the precise point was a different one, the substance of the matter in that
case was that the grant of a lease by the freeholder to B constituted the completion

of A's agreement to sell to B for valuable consideration his own contractual right to a lease from the freeholder. If, immediately after the transfer the respondent had the whole legal and beneficial interest in her shares, and if, immediately prior to the transfer (and the other contemporary documents) she had not got (as in my view she had not) the entire beneficial interest, then in our judgment it must follow that the former state of affairs was achieved, as it was intended that it should be, by the instrument of transfer, which thereby completed and implemented the bargain that mother and son had previously made. A
B

The distinction between the two alternative presentations of the Crown's case may be a fine one, but it is real. It is of the essence of the former alternative that the transfer operated to convey two separate and distinct "properties", viz., the legal estate and the son's reversionary equitable interest, the Crown claiming duty in respect of each "conveyance". Though the vendor under the contract need not be a conveying party, the latter must, as we conceive, be in a position to convey the property alleged to pass. The second alternative treats the three documents of June 26 (being the date fixed by the contract for completion) as contemporaneous, and deduces—particularly from the terms of the release—that the trustees were thus enabled and entitled to transfer to the respondent (as the transfer on the face of it purports to do) the shares themselves with all rights and benefits attached thereto. For these reasons we think that the appeal should be allowed. C
D

Appeal allowed. Leave to appeal to the House of Lords granted.

Solicitors: *Moeran, Oughtred & Co.*, agents for *Robinson, Sheffield & Till*, Beverley, Yorkshire (for the respondent); *Solicitor of Inland Revenue*.

[*Reported by F. A. AMES, Esq., Barrister-at-Law.*]

A

NOLAN v. DENTAL MANUFACTURING CO., LTD.

[MANCHESTER ASSIZES (Paull, J.), April 29, 30, May 1, 1958.]

Factory—Protection of eyes—Grinding machine—Obligation to provide goggles—Injury to workman's eye—Failure of workman to show that he would have worn goggles if they had been provided—Causation—Factories Act, 1937 (1 Edw. 8 & 1 Geo. 6 c. 67), s. 49—Protection of Eyes Regulations, 1938 (S.R. & O. 1938 No. 654), schedule.

B

Safe System of Working—Extent of master's duty—Duty not only to provide safety appliances but also to ensure their use by means of orders and supervision—Machine shop—Risk of injury to eyes at grinder for sharpening tools—Goggles not provided—Probability that toolsetter would not have used goggles, if provided, unless compelled to do so.

C

The plaintiff was employed in the defendants' factory as a toolsetter. He had been with the defendants since 1948, had worked in the machine shop since 1951, and was an experienced toolsetter. In the course of his work he had to sharpen his tools on a carborundum wheel, usually two or three times a day. The time spent by him in sharpening tools was not more than half an hour a day. The risk of an accident happening when sharpening tools was small, but the injury, if an accident did happen, might be serious. The plaintiff had never used goggles while sharpening his tools and, as was the general view among toolsetters in the factory, preferred not to do so. It would have required strict orders and supervision to ensure that goggles were used in the factory when tools were sharpened. Under s. 49 of the Factories Act, 1937, and the Protection of Eyes Regulations, 1938, the defendants were under a statutory duty to provide goggles for the use of toolsetters while they were using a carborundum wheel, but, on the facts, the statutory duty was not fulfilled, although there was a pair of goggles in the store nearby. On Dec. 5, 1956, while the plaintiff was sharpening his tools, a chip flew off the carborundum wheel and struck him in the left eye. As a result of the accident, he lost his eye. He claimed damages against the defendants for breach of statutory duty under s. 49 or for negligence at common law.

D

E

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Held: (i) the plaintiff had not established that the injury to him was caused by the defendants' breach of statutory duty under s. 49 of the Factories Act, 1937, in failing to provide goggles, because he had not proved that he would have worn the goggles if they had been provided; therefore his claim for damages for breach of statutory duty failed.

G

Bonnington Castings, Ltd. v. Wardlaw ([1956] 1 All E.R. 615) applied.

(ii) the defendants were, however, in breach of their common law duty not to expose the plaintiff to unnecessary risk because in the circumstances of this case (viz., where the injury risked was serious although the risk of an accident happening was small, and where strict orders and reasonable supervision would have been required to ensure that goggles were worn) there was an obligation on the defendants not only to provide goggles but also to give strict orders that they were to be used and to supervise workmen to a reasonable extent to see that the orders were obeyed, and the defendants had done none of these things.

H

I

Haynes v. Qualcast (Wolverhampton), Ltd. ([1958] 1 All E.R. 441) applied.

[**Editorial Note.** In considering this case on the question of the extent of an employer's common law duty towards his workmen comparison may usefully be made with the speech of LORD MORTON OF HENRYTON in *Paris v. Stepney Borough Council* ([1951] 1 All E.R. at p. 51). The present case has carried somewhat further the extent of an employer's duty in that it recognises a duty not only to provide a safety appliance but also to order it to be used and to see that the orders are carried out so far as is reasonably possible.

Other comparable cases concerned with the question of the extent of an employer's common law duty to his workmen in relation to plant, summarised by LORD OAKSEY in *Winter v. Cardiff R.D.C.* ([1950] 1 All E.R. at p. 822) as a duty to act reasonably in all the circumstances, are *Quinn v. Horsfall & Bickham, Ltd.* ([1956] 2 All E.R. 467, see p. 471, letter G) and *Crookall v. Vickers-Armstrong, Ltd.* ([1955] 2 All E.R. 12, see p. 16, letter E), though the latter decision was principally concerned with statutory duty.

As to a master's duty to provide a safe system of work, see 22 HALSBURY'S LAWS (2nd Edn.) 188, para. 314; and for cases on the subject, see 34 DIGEST 194, 195, 1580-1595.

For the Factories Act, 1937, s. 49, see 9 HALSBURY'S STATUTES (2nd Edn.) 1039.]

Cases referred to:

- (1) *Bonnington Castings, Ltd. v. Wardlaw*, [1956] 1 All E.R. 615; [1956] A.C. 613; 3rd Digest Supp.
- (2) *Haynes v. Qualcast (Wolverhampton), Ltd.*, [1958] 1 All E.R. 441.
- (3) *Smith v. Baker & Sons*, [1891] A.C. 325; 60 L.J.Q.B. 683; 65 L.T. 467; 55 J.P. 660; 34 Digest 202, 1657.

Action.

The plaintiff, a toolsetter employed by the defendants, was struck in the left eye by a chip which flew off a carborundum wheel while he was sharpening his tools in the machine shop of the defendants' factory, and, as a result of the accident, he lost the eye. He claimed damages against the defendants for negligence and for breach of their statutory duty under the Factories Act, 1937. The facts appear in the judgment.

D. J. Brabin, Q.C., and *R. Lambert* for the plaintiff.

Fenton Atkinson, Q.C., and *C. M. W. Elliott* for the defendants.

Cur. adv. vult.

May 1. PAULL, J.: In this case the plaintiff brings an action against his employers in respect of an accident which happened to him on Dec. 5, 1956, while he was sharpening a tool on a carborundum wheel in the machine shop at the defendants' factory; while he was doing so, a chip flew off the carborundum wheel and struck him in the eye. By reason of the accident, the plaintiff has lost his left eye.

The facts in connexion with the accident, as I find them, are as follows. The plaintiff is a toolsetter and was so employed by the defendants. He is an experienced toolsetter and has worked as such with the defendants since, at any rate, 1948, first in what is called the burr shop and since 1951 in the machine shop, where he was at the time of the accident. As a toolsetter, he had from time to time to sharpen his tools on a small grinder, which is shown in a photograph, which was one of the exhibits, as being immediately under an adjustable lamp. At the time of the accident there was no adjustable lamp, and one of the complaints of the plaintiff is that the lighting was quite inadequate, as a result of which he had to put his face too near to the carborundum wheel. I do not think that there is anything in this complaint. It is quite true that a balcony had been built which to some extent, no doubt, cut off the natural light, but two lamps in the new ceiling were quite close to the machine and there were other lamps in the ceiling. Mr. Smith, a witness for the plaintiff, said that he was not troubled by the lighting from the ceiling and I am satisfied that the plaintiff would have had his face just where he did have it at the time of the accident, however good the lighting had been. The plaintiff used to sharpen his tools on this wheel, not more often than six times a day at most, and usually only two or three times a day. On each occasion only a short period of time was necessary in order that the tool should be sharpened. The total time involved for this sharpening of tools during a day's work was not more than about half-an-hour

A in short, broken periods. At no time had the plaintiff worn goggles during those periods and I am satisfied that he never considered that there was any danger in using the carborundum wheel in this way. He, himself, said: "I never saw any particular hazard in this job," and later on in his evidence he said: "I did not see any need for goggles".

I am satisfied that no goggles were "provided" in any real sense of that word.

B An old pair of goggles was somewhere in the machine shop, probably hanging by one particular grinder of a different type, which the foreman said he did consider dangerous. In addition, there was one pair of goggles in the stores, quite close to where the carborundum wheel was. As, however, there were at least three or four carborundum wheels, of the same kind as the one on which the plaintiff was working at the time of the accident, and all of them might be in operation

C at the same time, it cannot possibly be said that goggles were provided for use by toolsetters on these grinders. Further, I am satisfied that there were no adequate notices as to goggles being available. There were no notices in the machine shop at all. There was one notice on a partition outside the machine shop, but I am not sure what were the terms of that notice and I am quite satisfied that neither the management nor the employees treated it as worthy of attention.

D I am also satisfied that, if goggles had been provided in the sense of being made available and the plaintiff's attention had been merely drawn to this fact as opposed to his being required to use goggles, the plaintiff would not have used them. Unless compelled by order so to do, the plaintiff would never have gone to the stores, even though they were quite close to the machine, drawn a pair of goggles, used them and taken them back to the stores, each time he wanted

E to use the machine for a period which could be reckoned in minutes. It would have required strict orders and supervision to make the plaintiff do so. The attitude of experienced toolsetters towards goggles is well shown by Mr. Smith's evidence on behalf of the plaintiff that even now, in spite of the accident to the plaintiff and the questions by the foreman, he prefers not to use them. "I prefer", he told me, "to grind by natural vision", and that, in my judgment,

F was the attitude, and is the attitude, of these toolsetters.

Although the plaintiff and the other toolsetters take up this attitude towards goggles, I am satisfied that the defendants' manager, Mr. Goldstone, realised that there was always a danger, although a very small one in his opinion, of this type of accident occurring. Mr. Goldstone told me that no such accident had ever occurred on any machine of this type at their factory, and I have no evidence

G that any such accident has ever occurred anywhere while this type of work was being done on a carborundum wheel. Mr. Goldstone told me that he thought it was right that apprentices should wear goggles, and he said: "I made sure that the apprentices did wear them". I do not accept this as a statement of fact; I do not think he did make sure that apprentices wore goggles, although possibly an apprentice occasionally did so. Mr. Smith told me that he had a vague

H impression that that might be so. The statement of Mr. Goldstone, however, does persuade me that Mr. Goldstone was not unaware of the possibility of an accident happening while the grindstone was being so used for the purpose of sharpening tools. That being so, he must have been aware that, if such an accident did happen, the consequences to the operator might be very serious, possibly even amounting to total blindness.

I Those being the facts as I find them, I have now got to consider the claims made in the action and the defences thereto. The statement of claim claims damages both in respect of breach of statutory duty and also in respect of a breach of the defendants' common law duties. The first head of the claim is head (i) in para. 3 of the statement of claim; that reads as follows:

"The defendants, their servants or agents, failed to provide suitable goggles or effective screens to protect the eyes of the plaintiff, contrary to s. 49 of the [Factories Act, 1937]."

Section 49 of the Act reads:

"In the case of any such process as may be specified by regulations of the Secretary of State, being a process which involves a special risk of injury to the eyes from particles or fragments thrown off in the course of the process, suitable goggles or effective screens shall, in accordance with any directions given by the regulations, be provided to protect the eyes of the persons employed in the process."

In pursuance of that section, the Protection of Eyes Regulations, 1938 (S.R. & O. 1938 No. 654) were made on July 5, 1938, and the processes to which s. 49 were applied were specified in the schedule to the regulations. The very first process* set out in the schedule is the dry grinding of metals, and there is no doubt that this was a dry grinding of metal. The schedule says "applied by hand" and there is no doubt that this metal was applied by hand; "to a revolving wheel or disc driven by mechanical power", and that is this case. On my finding, there has been a clear breach of s. 49 by the defendants. Counsel for the defendants, however, while admitting this breach, contended that the plaintiff had not shown that the breach of this section resulted in the accident. Counsel submitted that the obligation was only to provide, not to take any steps towards insuring that the plaintiff wore goggles, and that it was obvious that the plaintiff in fact would not have worn goggles merely because they were provided.

Until the decision in *Bonnington Castings, Ltd. v. Wardlaw* (1) ([1956] 1 All E.R. 615), there were authorities which said in terms that it did not lie in the mouth of the defendants to say that, even if they had not fulfilled their statutory obligation, it was for the plaintiff still to show that the breach caused the accident, but in *Bonnington Castings, Ltd. v. Wardlaw* (1) the House of Lords put the onus of showing that the accident resulted from the breach fairly and squarely on the plaintiff. LORD REID said ([1956] 1 All E.R. at p. 618):

"The fact that Parliament imposes a duty for the protection of employees has been held to entitle an employee to sue if he is injured as a result of a breach of that duty, but it would be going a great deal further to hold that it can be inferred from the enactment of a duty that Parliament intended that any employee suffering injury can sue his employer merely because there was a breach of duty and it is shown to be possible that his injury may have been caused by it. In my judgment, the employee must, in all cases, prove his case by the ordinary standard of proof in civil actions; he must make it appear at least that, on a balance of probabilities, the breach of duty caused, or materially contributed to, his injury."

I therefore ask myself the question: Has the plaintiff shown that, if goggles had been provided in respect of this work, the probability is that he would have worn them? To that, on the facts as I have found them, I answer quite definitely, "No". In my judgment, the plaintiff fails on this head of his claim.

Heads (ii) and (iii) of the claim are heads relating to lighting, and, once more, on the facts which I have found, the plaintiff fails to establish any case. Head (iv) claims that the defendants failed, in the circumstances, to provide the plaintiff with reasonably safe and proper equipment for use in the course of his employment. That puts the duty no higher than the statutory duty and, if that is the claim made by the plaintiff, then in my judgment that claim fails, as I have held that, if goggles were merely provided, the plaintiff would not have used them. Then the other head to that claim is: ". . . or to have the said machine shop as safe as reasonable care and skill would have permitted". That claim, as I see it, is merely as to the condition of the shop and has nothing to do with the provision of the goggles.

* The first process specified in the schedule is: "Dry grinding of metals or articles of metal applied by hand to a revolving wheel or disc driven by mechanical power."

A As the pleadings were drawn when this action came before me, those were the only heads under which the plaintiff claimed, but, during the argument before me, *Haynes v. Qualcast (Wolverhampton), Ltd.* (2) ([1958] 1 All E.R. 441) was cited to me, and in the closing speeches the arguments proceeded somewhat on the line whether there was liability at common law, on the assumption that the claim was a claim in respect of a failure to provide a proper system of work. Having
B looked carefully at the pleadings since the time when the arguments closed and found that such a plea was not in the statement of claim, I felt that I ought to give an opportunity to the plaintiff to consider whether or not he desired to make any amendment to his pleading, and counsel for the plaintiff applied to me this morning to amend his statement of claim. The amendment which he seeks to make, and which counsel for the defendants does not oppose, is as follows:

C "That the defendants failed to take reasonable steps to promote the use of protective goggles by workmen engaged in dry grinding of metals and so to provide and impose a safe system of work in their said machine shop."

In my judgment, this case comes within that class of case where the employer
D must, at common law, go a very considerable length in insuring, not only that safety appliances are provided, but that they are used. In *Haynes v. Qualcast (Wolverhampton), Ltd.* (2), molten metal dropped on the employee's foot. If he had been wearing safety boots, he would not have been injured, but no safety boots were being worn. LORD EVERSHERD, M.R., said ([1958] 1 All E.R. at p. 444):

E "The test I take to be the general one, that it is the duty of an employer in such a case as this to take reasonable care for the safety of his workmen. Counsel for the plaintiff pointed out that molten metal is of a temperature of something like thirteen hundred degrees centigrade. From that fact it is, of course, plain that if it gets on the skin or the body it is likely to do
F serious and painful injury, although the injury may not be, and was not in the present case, of any lasting effect. If, then, that is the nature of the hazard, I think that the obligation of the defendants extended to more than merely having the spats available in case any experienced moulder thought he would like to ask for them. I do not think that it is necessary to attempt to define in this case the extent of the duty to warn or advise. I am certainly not prepared to say that this is a case in the class of those, for example,
G where the eye is at risk and where, having regard to the nature of the hazard, there is a duty on the employer to go to very considerable lengths to try to see that his workmen take advantage of the protective equipment supplied."

Thus LORD EVERSHERD pointed out that, where there was the danger of injury to eyes, where a man might be made blind either in one eye or in both, then there
H was a duty on the employer to take very considerable steps to see that the workmen in fact used the protective appliances provided, and, in my judgment, the mere fact that such an accident is not a very likely one, does not affect the employer's duty as long as the risk is there.

In the same case PARKER, L.J., said ([1958] 1 All E.R. at p. 446):

I "The common law duty of an employer is, I think, in the words of LORD HERSHELL in *Smith v. Baker & Sons* (3) ([1891] A.C. 325 at p. 362), to take 'reasonable care . . . so to carry on his operations as not to subject those employed by him to unnecessary risk'. It is quite clear that in an operation of this sort there is a risk, and a risk of serious injury—true, not injuries which are likely to be fatal or to affect the eyes, but clearly such as are likely to produce injury by burning. It seems to me perfectly clear, in those circumstances, that there is a duty on employers, not only to have protective clothing available, but to inform anybody coming into their

employment that they have got that equipment, and to take some steps to educate the man to wear the equipment for his own safety. Exactly what those steps should be, I find it unnecessary to determine. In some cases the hazard may be so great and the injury, if it occurs, so serious, that it might be necessary to make the wearing of the protective clothing a rule of the factory. Again, where the matter is not so serious, mere advice might be sufficient. At any rate, in this case, some steps should have been taken to educate men for their own protection to wear the protective clothing."

I have already stated that it would, in my judgment, have required a strict order and supervision to ensure that the plaintiff used the goggles, if goggles were provided, but I hold that in this case there was a common law obligation on the part of the defendants not only to provide goggles, but to give strict orders that they were to be used and to supervise their workmen, at any rate to a reasonable extent, in order to insure that their orders were obeyed. I hold that because, although the risk of accident happening was not a very great one, that risk was a very serious one since, if an accident did happen, the consequences would in all probability be the loss of the sight of one eye and a possibility of the loss of the sight of both eyes. I hold that, if there had been a strict order and supervision, the probability is that the injury would not have happened by reason of the accident. I do not think that the plaintiff was the type of man who, in spite of strict orders and supervision, would have tried to dodge them on every occasion. I think that, if there had been the rule laid down in the factory that goggles were to be worn and if, on any occasion when it was seen by the foreman that goggles were not being worn, the workmen had been pulled up by the foreman, in a very short time it would have been the custom in this factory automatically for the workmen to go to the stores to draw the goggles, to wear them during the process, and then to return them. I hold, therefore, that the plaintiff has proved liability under that head of claim and that head of claim only.

The question of contributory negligence has been raised but, in my judgment, contributory negligence does not arise in this action. No goggles having been provided, the plaintiff cannot be said to have been negligent in not using non-existent goggles. It follows that the plaintiff is entitled to damages. He has lost an eye and he is left with one eye which is not a very good eye in the sense that his distant vision cannot be brought up to normal, although he can read very small print. Shortly after the eye had been taken out, he met with another accident due to his having only one eye and not being accustomed to avoid articles on his left as he passed them. The proper way of approaching that aspect of the case, however, is no longer in dispute and it was agreed by counsel that the liability to meet with such accidents was a factor to be taken into consideration in judging the amount to be given to the man as a one-eyed man and that no special damage can be claimed in respect of that particular accident. It now remains for me to assess his damages. On the whole, I think that the proper sum to award the plaintiff, in addition to the agreed special damage of £190 14s., is £2,250.

Judgment for the plaintiff.

Solicitors: *W. H. Thompson* (for the plaintiff); *James Chapman & Co.*, Manchester (for the defendants).

[*Reported by M. DENISE CHORLTON, Barrister-at-Law.*]

A

Re CASTIGLIONE, ERSKINE & CO., LTD.

[CHANCERY DIVISION (Roxburgh, J.), May 19, 1958.]

Company—Reduction of capital—Cancellation of some unissued shares and subdivision of all unissued shares before cancellation of some—Cancellation of issued shares held by company's nominee—Confirmation by the court—Companies Act, 1948 (11 & 12 Geo. 6 c. 38), s. 61, s. 66 (1), s. 67 (1), (2), s. 69 (1), (2).

B

There is no reduction of capital under s. 66 to s. 69 of the Companies Act, 1948, until an approved minute has been registered; but a resolution which diminishes share capital in a way that does not require the confirmation of the court, as, e.g., a resolution for the subdivision and cancellation of unissued shares, can take effect from the time of its being passed. Accordingly, if on a reduction of capital unissued shares are to be subdivided and cancelled, the cancellation should be effected in practice as part of the process of reduction of capital and the subdivision by means of a resolution to take effect on the reduction taking effect rather than separately under s. 61* of the Companies Act, 1948, notwithstanding that under s. 61 (3) the cancellation of share capital is not a reduction of capital within the Act.

C

D

[As to reduction of capital and confirmation by the court, see 6 HALSBURY'S LAWS (3rd Edn.) 154-156, paras. 323-327.

For the Companies Act, 1948, s. 61, s. 66-s. 69, see 3 HALSBURY'S STATUTES (2nd Edn.) 512, 515-518.]

E

Case referred to:

(1) *Re Salinas of Mexico*, [1919] W.N. 311; 9 Digest (Repl.) 172, 1069.

Petition.

F

G

The company, Castiglione, Erskine & Co., Ltd., presented a petition to the court for an order confirming a special resolution, dated Apr. 11, 1958, for a reduction of capital. The capital of the company was £25,000 divided into five thousand preference shares of £1 each (all issued and fully paid), 18,520 ordinary shares of £1 each (all issued and fully paid), 480 ordinary shares of £1 each (unissued) and one thousand "A" shares of £1 each (all issued and fully paid). The capital was to be reduced to an aggregate of £4,750 divided into nineteen thousand ordinary shares of 5s. each. The preference shares were to be wholly repaid. The holders of the 18,520 ordinary shares were to be repaid 15s. per share and each share reduced to a 5s. share. The 480 £1 shares were to be subdivided into 1,920 ordinary shares of 5s. each, and of these 1,440 were to be cancelled. The one thousand "A" shares which were registered in the name of a nominee for the company were to be extinguished and cancelled.

H

The terms of the special resolution are set out at the beginning of the judgment.

J. G. Monroe for the company.

I

* Section 61 of the Companies Act, 1948, provides so far as relevant: "(1) A company limited by shares . . . and having a share capital . . . may alter the conditions of its memorandum as follows, that is to say, it may— . . . (d) subdivide its shares, or any of them, into shares of smaller amount than is fixed by the memorandum, so, however, that in the subdivision the proportion between the amount paid and the amount, if any, unpaid on each reduced share shall be the same as it was in the case of the share from which the reduced share is derived; (e) cancel shares which, at the date of the passing of the resolution in that behalf, have not been taken or agreed to be taken by any person, and diminish the amount of its share capital by the amount of the shares so cancelled.

"(2) The powers conferred by this section must be exercised by the company in general meeting.

"(3) A cancellation of shares in pursuance of this section shall not be deemed to be a reduction of share capital within the meaning of this Act."

ROXBURGH, J.: A special resolution was passed on Apr. 11, 1958, in A
this form:

"That the capital of the company be reduced from £25,000 divided into
five thousand preference shares of £1 each, 18,520 ordinary shares of £1 each,
480 ordinary shares of £1 each and one thousand 'A' shares of £1 each
to £4,750 divided into nineteen thousand ordinary shares of 5s. each and B
that such reduction be effected by: (a) repaying to the holder of the
preference shares the whole of the capital paid up thereon and cancelling
such preference shares upon terms that the dividend thereon shall be
payable down to the date of repayment; and (b) paying to the holders of the
18,520 issued ordinary shares capital paid up thereon to the extent of 15s.
per share thereby reducing the nominal value of such shares to 5s. . . ." C

Then come the words which introduce the difficulty:

"and upon the foregoing reductions of capital taking effect: (c) sub-
dividing each of the 480 unissued ordinary shares of £1 each in the capital of
the company into 1,920 ordinary shares of 5s. each; and (d) cancelling and
extinguishing 1,440 of the unissued ordinary shares of 5s. each resulting
from the aforesaid subdivision; and (e) cancelling and extinguishing the
one thousand 'A' shares numbered 1 to 1,000 both inclusive now registered
in the name of Margareta . . . as nominee for the company." D

The point is this. The subdivision of the unissued shares and the cancellation
of some of the unissued shares, in para. (c) and para. (d), respectively, are opera-
tions which the company can carry out under s. 61 of the Companies Act, 1948,
without the confirmation of the court. The cancellation and extinguishment,
in para. (e), of the one thousand "A" shares registered in the name of Margareta,
is an operation which cannot be carried out except by confirmation of the court.
That is the point of the distinction, a point which, as far as I know, has always E
been observed in practice hitherto by the forms of orders which have been made. F

The case, at first sight, appeared to raise a question whether the court could,
and, if it could, would, sanction a conditional reduction. That is certainly
what the language of the resolution suggests: ". . . upon the foregoing
reductions of capital taking effect" cancelling the one thousand "A" shares.
A closer analysis, however, has led me to the conclusion that that is not really G
the point at all—if it had been, I do not think that I could have sanctioned this
reduction—but the resolution is really logically incorrect. Although the Com-
panies Act, 1948, uses somewhat ambiguous language at times, I think that the
true effect of s. 66 to s. 69 inclusive is that there is no reduction of capital until
the registration of the approved minute, whereas a resolution which is not subject H
to the reduction procedure takes effect as soon as it is passed unless it, in itself,
contains some language putting off its operation. If it contains such language,
there is nothing invalid about that.

The point is not too clear, because s. 66 (1) reads: "Subject to confirmation
by the court, a company . . . may . . . reduce its share capital . . ." and,
therefore, *prima facie*, one would have thought that the reduction, if confirmed, I
was made by the passing of the resolution; but that is not the whole story by
any means. Section 67 (1) begins with that conception, when it says:

"Where a company has passed a resolution for reducing share capital,
it may apply to the court for an order confirming the reduction."

That is consistent with the view which one would take of s. 66 (1), but from then
on the Act takes on a new conception, because s. 67 (2) speaks of "the proposed

A reduction of share capital", and that is quite inconsistent with the view which I should have formed of s. 66 (1) and s. 67 (1) in isolation. Then s. 68 might be thought to go back to the original conception, but s. 69 is, I think, so clear as to be unambiguous. Section 69 (1) reads:

B "The registrar of companies, on production to him of an order of the court confirming the reduction of the share capital of a company, and the delivery to him of a copy of the order and of a minute approved by the court . . . shall register the order and minute."

Section 69 (2) reads:

C "On the registration of the order and minute, and not before, the resolution for reducing share capital as confirmed by the order so registered shall take effect."

There is really no ambiguity about that sub-section, and, therefore, any reasoning which might be founded on s. 66 (1) and s. 67 (1) cannot possibly prevail in the light of that clear and relevant proposition.

D That shows, I think, that para. (e) of the resolution, qua the cancellation of the issued shares, is misconceived, because the position is this: there is no reduction until the order and the minute are registered, and, therefore, if this reduction is to take effect at all, it must take effect precisely at the same moment as the reductions provided for in para. (a) and para. (b) of the resolution. I see no reason to introduce some artificial punctum temporis; I prefer the other phrase, uno ictu. Therefore, para. (e), which relates to the cancellation of the issued shares, should have followed para. (b) and preceded the words "and upon the foregoing reductions of capital taking effect". On the other hand, the subdivision of shares and the cancellation of unissued shares are matters which the company can do without the confirmation of the court, and, therefore, the introductory words "upon the foregoing reductions of capital taking effect" become apposite and normal. That is logically correct.

E That situation and how to deal with it was present to the minds of two eminent company judges, ASTBURY, J., and P. O. LAWRENCE, J., because a point somewhat similar to the present point (though not quite the same) arose in *Re Salinas of Mexico* (1) ([1919] W.N. 311). In that case a minute was approved which first dealt with the actual reduction confirmed by the court (which I need not read) and then continued with these words:

H "A special resolution of the company has been passed and confirmed [that relates to the old procedure in relation to special resolutions] to the effect that on such reduction taking effect the capital of the company as so reduced be subdivided . . ."

There is no question there of cancelling unissued shares, but it deals with the precise point so far as subdivision is concerned, and that, if I may say so, is logically right. It is the practice which is nowadays invariably followed, and I hope that it may continue to be followed.

I I do not find it necessary to send this back. I am about to sanction para. (a) and para. (b), and the intention of the resolution plainly was that I should also sanction para. (e). Therefore I am not going to put the company, on this purely technical question, to the expense of passing another resolution. On the other hand, I attach importance to the correct procedure being followed and I am not sure that I shall be so indulgent if this point occurs again. That is why I have dealt with the matter at some length.

I think that a new special form of order will have to be made for this particular

case*, and I would like to say this in amplification of what I have just said before we do something special in this case. The cancellation of the unissued shares can be done under s. 61. When, however, it is part of a scheme of reduction which has to be sanctioned by the court, it is usual and convenient to treat it, not as a separate matter being dealt with under s. 61, but as part of the general scheme of reduction. I hope, therefore, that in future, in a similar case that practice will be followed. I think that the minute should be brought into company chambers, and, no doubt, it will be dealt with there. If there is any difficulty about it, it can be mentioned to me, and, if it is all right, I shall not trouble counsel to appear before me.

Solicitors: *Linklaters & Paines* (for the company).

[Reported by R. D. H. OSBORNE, ESQ., *Barrister-at-Law*.]

Re FILBY BROS. (PROVENDER), LTD.

[CHANCERY DIVISION (Roxburgh, J.), May 5, 12, 1958.]

Company—Winding-up—Compulsory winding-up—Concurrent jurisdiction—Transfer of proceedings—Petitions presented by two judgment creditors—One petition in county court and the other in the High Court—Procedure—Costs—Companies Act, 1948 (11 & 12 Geo. 6 c. 38), s. 219 (1)—Companies (Winding-up) Rules, 1949 (S.I. 1949 No. 330), r. 46.

If, in a case where the High Court and a county court have concurrent jurisdiction, two different petitioners petition for the winding-up of the same company, the one in the High Court and the other in a county court, the proceedings should continue as to both petitions; and the High Court should resolve the matter, that court being informed by affidavit as to the relevant facts concerning the county court petition (see p. 461, letter C, post).

On Apr. 14, 1958, a petition for the winding-up of a company was presented in a county court by a judgment creditor. The petition was to be advertised on Apr. 18 and to be heard on May 14. A number of creditors supported the county court petition. On Apr. 16 another judgment creditor of the company, not knowing about the county court petition, presented a similar petition in the High Court. The county court petitioner served notice on the High Court petitioner stating that the county court petitioner intended to appear on the hearing of the High Court petition and to support that petition subject to the county court petition. There was no opposition to either petition. The High Court petition came before the court on May 5, when the matter was adjourned for an affidavit to be filed by the county court petitioner. The company did not appear.

* The minute should not, therefore, be regarded as a precedent, but its form illustrates the matters decided in this case and accordingly is stated here. The minute, as approved, was as follows:

"The capital of Castiglione, Erskine & Co., Ltd., was by virtue of a special resolution and with the sanction of an order of the High Court of Justice dated May 19, 1958, reduced from £25,000 divided into five thousand preference shares nineteen thousand ordinary shares and one thousand 'A' shares all of £1 each to £5,110 divided into 18,520 ordinary shares of 5s. each and 480 ordinary shares of £1 each. At the date of the registration of this minute all the said ordinary shares of 5s. each have been issued and are deemed to be fully paid up. The said special resolution provides that on such reduction of capital taking effect the capital is to be further reduced to £4,750 by the subdivision of the said 480 ordinary shares of £1 each into 1,920 ordinary shares of 5s. each and the cancellation of 1,440 of such shares.

"The capital of the company is accordingly on the registration of this minute £4,750 divided into nineteen thousand ordinary shares of 5s. each of which 18,520 have been issued and are deemed to be fully paid up and the remaining 480 are unissued."

Thus, in accordance with the practice in other cases, the minute in this form shows clearly the amount to which the capital was ultimately reduced, viz., £4,750.

A **Held:** the county court petition should be transferred to the High Court and, in the particular circumstances of this case, no one being at fault, a double set of costs up to the date of the order for transfer would be given, viz., High Court costs and county court costs on each petition according to the usual form of High Court and county court winding-up orders.

[As to the power to transfer winding-up proceedings, see 6 HALSBURY'S LAWS (3rd Edn.) 700, para. 1393.

B For the Companies Act, 1948, s. 219 (1), see 3 HALSBURY'S STATUTES (2nd Edn.) 638.

For the Companies (Winding-up) Rules, 1949, r. 45 and r. 46, see 4 HALSBURY'S STATUTORY INSTRUMENTS 141.]

Petition.

C The petitioners, British Feeding Mills Co., Ltd., as judgment creditors of Filby Bros. (Provender), Ltd. (referred to hereinafter as "the company"), presented a petition in the High Court on Apr. 16, 1958, for the compulsory winding-up of the company, not knowing that on Apr. 14, 1958, a petition for the compulsory winding-up of the company had been presented in the Colchester County Court by British Oil & Cake Mills, Ltd., who were also judgment creditors of the company. The Colchester petition was advertised on Apr. 18, 1958, and was to be heard on May 14. There was a number of supporting creditors to the Colchester petition, and there was no opposition to either of the petitions. No contributory had given notice to support or to oppose the Colchester petition. British Oil & Cake Mills, Ltd. served a notice on British Feeding Mills Co., Ltd. that they intended to appear on the hearing of the High Court petition and to support the petition, subject to their own petition. On May 5 the High Court petition came before ROXBURGH, J., who adjourned the matter until May 12 for an affidavit to be filed on behalf of British Oil & Cake Mills, Ltd. The affidavit having been filed, the matter now came before HIS LORDSHIP.

E *Raymond Walton* for British Feeding Mills Co., Ltd. (the petitioners in the High Court).

F *M. M. Wheeler* for British Oil & Cake Mills, Ltd. (the petitioners in Colchester County Court).

The company did not appear.

ROXBURGH, J.: This is a remarkable case, because, although in relation to certain companies the High Court and the county courts have had concurrent jurisdiction over a long period of years, the difficulty which has arisen in this case appears never to have arisen before, and the solution of it is by no means certain or easy. In this case it is common ground that the Colchester County Court has jurisdiction to wind-up Filby Bros. (Provender), Ltd. (referred to hereinafter as "the company"), and on Apr. 14, 1958, the British Oil & Cake Mills, Ltd. (referred to hereinafter as "the Colchester petitioners") presented a petition in the Colchester County Court for the company to be wound up by the court. That petition was ordered to be advertised on Apr. 18, 1958, and to be heard on May 14, 1958; that is to say, next Wednesday. Everything which has been done in the Colchester County Court appears to have been done in due order. A considerable number of creditors have given notice to support that petition—and that is important. So far, no creditor has given notice to oppose it in the Colchester County Court, and, though the list is not yet finally closed in that court, I have every reason to suppose that no such notice will be given. I am prepared, therefore, to take a certain risk, which should not be regarded as a precedent; I take it with a view to trying to save still further costs in this difficult and technical matter. No notice of opposition would be relevant in this particular case unless it was by a creditor whose debt exceeded the combined totals of the debts of all the creditors who support the petition. In the unlikely event of such a notice of opposition being given in the Colchester County Court, an immediate application must be made to me, but it is such an

unlikely event that I am prepared in this particular case to ignore the possibility. A
I want to make it quite plain, however, that it does not follow that such a possibility will be ignored in other cases.

On Apr. 16, 1958, British Feeding Mills Co., Ltd. (referred to hereinafter as "the High Court petitioners") presented a petition in the High Court for the company to be wound up. They did not in fact know, and they could not from any advertisement have known, of the Colchester petition because it was not advertised until two days later. It so happened that the High Court petition came before me on May 5, that is to say, before the Colchester petition was due for hearing. That would not necessarily always be so, although it would generally be the case. B

The Colchester petitioners served a notice on the High Court petitioners in this form: C

"Take notice that the [Colchester petitioners], a creditor for £622 4s. 8d., intends to appear on the hearing of the petition and support the petition, subject to the petition of the [Colchester petitioners] presented to the Colchester County Court on Apr. 14, 1958."

Although I am not going to penalise the Colchester petitioners in regard to that notice, I am quite sure that, in the circumstances, it was not the proper notice to give. They did not file any affidavit and, when the matter came before me, I adjourned it for an affidavit. It seems to me that this must have been right, because the High Court cannot take judicial notice of what is going on in the Colchester County Court or in any other county court, as it has no means of informing itself of such matters; and, as counsel was not himself present in the Colchester County Court, he could only speak from hearsay, which is not a proper manner of putting evidence before the court. In those circumstances, therefore, it seems to me quite clear that anyone who appears on the hearing of a High Court petition, and who is aware of a county court petition, has the duty to put the facts in an affidavit. Moreover, he has, I think, a duty to make up his own mind as to what he wants, for it is quite clear that no court could sensibly allow both the petitions to proceed in different courts. It is also quite clear that the only question which arises when such a conflict comes into existence is whether the county court proceedings are to be transferred to the High Court or whether the High Court proceedings are to be transferred to the county court, so that the matter can thenceforth proceed on both petitions in the same court. It is important always to bear in mind that the first petition to be presented, not the first to be heard, is in many respects the crucial petition, because many transactions are affected by the date of the commencement of the winding-up, and, therefore, it would not do to extinguish the earlier in date. Probably the normally convenient course would be to keep both petitions alive, but to deal with them as one, as soon as the situation is revealed. D E F G

I have thought a good deal about what is the right procedure. Nothing is to be found, either in the Companies Act, 1948, or in the Companies (Winding-up) Rules, 1949, which gives any real indication. It is, I think, clear that the question must be solved in the High Court and not in the county court, whichever be the earlier petition in date, because, if I rightly read r. 46 of the Rules of 1949, the county court judge cannot transfer the county court proceedings to the High Court, and, per contra, the High Court judge can either keep them or transfer them to the county court under r. 45. In those circumstances, therefore, it is, I think, reasonably plain that the only court in which this knotty problem can be adequately solved is the High Court. The difficulty is that, when the petition comes before the court for the first time, not everybody may know anything about it. There may be people, as there were in this case, who have given notice in Colchester who had never heard of the High Court petition and who did not appear before me on May 5. At one time I thought that perhaps there ought to be a duty on somebody to take out a summons for a transfer, H I

A but now I do not think so. I think that, if and when this unusual situation occurs, the judge himself must sort out the tangle at the first hearing at which the evidence is available—today in this case—in accordance with the circumstances before him.

Under s. 219 (1) of the Companies Act, 1948, it is quite plain that the judge can exercise this power without any application from any of the parties to the petitions, and it will be for him to use his own discretion as to what, if any, steps ought to be taken in order to bring the situation which has arisen to the notice of the persons who have given notice in one or other of the courts. The steps which ought to be taken may be expected to differ according to the circumstances of each particular case. Therefore, I do not propose to attempt to lay down any general proposition beyond the one which I have laid down, namely
C that, where this difficulty arises, it is clear that, once it is discovered, the proceedings should continue as to both petitions; secondly, that the matter must be resolved in the High Court; and thirdly, that, provided that the parties bring the facts to the notice of the judge by affidavit, it will be for him in the first instance to decide what shall be done next. There I leave the general proposition.

In this particular case, the Colchester petitioners have not only put the facts
D on record, which they had to do, but they have done something very useful which perhaps they did not have to do: they have succeeded in finding out the views of all the Colchester supporting creditors except one, who has not indicated any view but is supporting the petition. In those circumstances it is safe for me in this case to act without any further consultation with, or information to, the persons who have given notice in Colchester, and it so happens that nobody has
E given notice in London, except the Colchester petitioners. Therefore, I feel able to make an immediate order for transfer of the Colchester proceedings to London. The order will operate immediately and, as time is short, I shall request the registrar to communicate at once with the registrar of the Colchester County Court informing him that this has happened and that in due course he will get a sealed copy of the order, as provided for by the rules*. Also, notice of
F change of venue must be given to the Colchester supporting creditor who has not got in touch with the Colchester petitioners. It is immaterial who does that, as long as somebody does it†. Thirdly, counsel for the Colchester petitioners will accept the obligation of informing the Colchester supporting creditors who have been in contact with him. The company does not appear, and it is a plain case for a winding-up order, which I now make.

G I want to say something about costs. On this occasion nobody was at fault, because the jurisdiction is concurrent and both petitions were presented quite independently, neither petitioner having any knowledge of the other petition; moreover, the procedure is obscure. I must, therefore, up to the moment of this order (which, I suppose, is made on both petitions), give a double set of costs—viz., costs in the High Court in the usual form of order, and costs in the
H Colchester County Court in the usual form of order, to be paid out of the assets in the normal way. I think that the High Court petitioners should draw up the order, because, although I have acted on my own motion, under s. 219, in regard to the transfer of the proceedings, I have not acted entirely on my own motion because there was a petition for a winding-up order. In those circumstances, therefore, I think that the proper course would be for counsel for the
I High Court petitioners to draw up the order.

Order accordingly.

Solicitors: *Cosmo Cran & Co.* (for the High Court petitioners); *Hatchett Jones & Co.* (for the Colchester petitioners).

[Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.]

* See Companies (Winding-up) Rules, 1949, r. 48 (1).

† Subsequently counsel for the Colchester petitioners said that they would get in touch with the creditor.

GRECH v. ODHAMS PRESS LTD. AND ANOTHER.
ADDIS v. ODHAMS PRESS LTD. AND ANOTHER.

[COURT OF APPEAL (Jenkins, Parker and Pearce, L.JJ.), May 5, 6, 7, 22, 1958.]

Libel—Fair comment—Findings that words complained of untrue but fair comment—Comment founded on inaccurate statement of witness in judicial proceedings—Whether findings inconsistent or comment unfair.

Libel actions were brought by G. and J.A. in respect of a passage in a newspaper which included the words, "with the help of [J.A.,] an ex-solicitor, . . . [G.] drew up a petition to the Home Secretary. Into it he put all the dirt he knew". At a trial held at the Central Criminal Court, which ended the day before the words complained of were published, a witness, P., had said in evidence that G. had told him that he, G., had sent a petition to the Home Secretary and was being helped in prison "by some solicitor by the name of [A.] or something". G. himself gave evidence at the trial at the Central Criminal Court, and there stated that he wrote his petition himself and without assistance, save that another prisoner whom he declined to name had corrected his English. In the libel actions the jury found, in the cases of both G. and J.A., that the words complained of were defamatory, and that they were not a fair and accurate report of judicial proceedings but that they were fair comment on a matter of public interest; the jury also found that the words were untrue as regards G., and it was admitted that the statement in relation to J.A. was untrue. On appeal,

Held: (i) in the case of G., the words were capable of being fair comment on a matter of public interest (see p. 469, letter B, post), and the findings of the jury that the words were untrue yet were fair comment were not inconsistent nor was the finding of fair comment perverse (see p. 470, letter C, post).

(ii) in the case of J.A., the statement referring to J.A., was not a fair and accurate report of the judicial proceedings (and thus would not support a defence of fair comment), because it did not attribute to the witness P., the statement that J.A. helped to draw up the petition but stated that as a fact, and because it did not refer to G.'s evidence of the limited assistance derived from his helper (see p. 471, letter I, to p. 472, letter B, post); the statement was capable of a defamatory meaning and had been found to be defamatory, and therefore a new trial, limited to damages, would be ordered.

Per CURIAM: if a statement made by a witness is fairly and accurately reported and attributed to the witness who made it, then, although the evidence given by the witness is afterwards shown to be false, the statement reported can be made the subject of fair comment (see p. 472, letter B, post).

Appeal dismissed in the case of G., but allowed in the case of J.A.

[As to the defence of fair comment being available only where the matter is comment and not fact, see 20 HALSBURY'S LAWS (2nd Edn.) 488, para. 596; as to the requirement that comment must be fair, see *ibid.*, p. 492, para. 599; and as to the distinction between the defence of fair comment and that of justification, see *ibid.*, 497, 498, para. 610; for cases on the subject, see 32 DIGEST 142, 143, 1738-1742, 144, 1745-1748 and 149, 150, 1805-1811.]

Cases referred to:

- (1) *Kemsley v. Foot*, [1952] 1 All E.R. 501; [1952] A.C. 345; 3rd Digest Supp.
- (2) *Mangena v. Wright*, [1909] 2 K.B. 958; 78 L.J.K.B. 879; 100 L.T. 960; 32 Digest 140, 1722.

Appeal.

The plaintiffs in consolidated libel actions appealed against the decision of DONOVAN, J., and a jury, dated Nov. 7, 1957, and reported [1957] 3 All E.R. 556,

A dismissing their actions for libel against Odhams Press Ltd., as printers, and Daily Herald (1929) Ltd., as publishers, of the words alleged to be defamatory, on the ground that the statements of which they complained, although untrue, were fair comment. The facts appear in the judgment.

C. G. Allen for the plaintiff, Grech.

The plaintiff Addis, in person.

B F. H. Lawton, Q.C., and H. M. Davidson for the defendants.

Cur. adv. vult.

May 22. JENKINS, L.J.: The judgment that I am about to read is the judgment of the court in this case.

C It appears that early in 1954 Grech, who was of Maltese origin but had been in this country since 1947, went into partnership with another Maltese named Micalleff in a business euphemistically described as the letting of furnished flats, the premises used for this purpose being in the Paddington area. In May, 1954, Grech was convicted on a charge of knowingly permitting a flat of which he was the tenant to be used as a brothel. According to Grech, the business of letting furnished flats resulted in his becoming the victim of blackmail at the hands of two members of the Metropolitan police, Detective-Inspector Jacobs and Detective-Sergeant Robertson. In particular, he says that Jacobs asked him for £2,000 (later reduced to £500 down and £30 per week) in consideration of Jacobs ceasing to keep the business premises under observation, an offer which he (Grech) refused.

D On July 24, 1954, the premises of one, Jack Morrison, at Barrie House, in or near Lancaster Gate, were broken into by a thief who stole £500 and other property. An Italian girl named Lanteri was employed by Morrison at Barrie House as a servant. She was or had been Grech's mistress (according to Grech) but they had quarrelled over her relations with some other man. Barrie House was only a matter of fifteen yards from the partnership premises at 47, Lancaster Gate. On July 28, 1954, Grech was arrested by Robertson and charged with the theft at Barrie House. Robertson had found, or claimed to have found, at Grech's flat at 57, Queen's Gardens, Lancaster Gate, a key which fitted the door of Morrison's premises at Barrie House.

E Grech was allowed bail and before his trial a remarkable scheme was, according to Grech, concocted between Robertson, Grech's solicitor, Canter, and one Page, the effect of which was that the lock of the door of Grech's flat should be changed for one which the Barrie House key would fit, so that it could be represented at the trial that the key found at Grech's flat was the key of his own door which, by pure coincidence, happened to fit the Barrie House door. The scheme was carried out and Robertson, according to Grech, demanded £300 for his services in the matter, but later agreed to accept £150 down and £150 on Grech's acquittal. Grech says he paid the £150 and maintains that the key had, in the first instance, been "planted" in his flat by Robertson. The case came to trial on Oct. 6, 1954, and had, notwithstanding the stratagem of the key, resulted in the conviction of Grech, who was sentenced to three years' imprisonment. It appears that Grech served part of his sentence at Maidstone Prison, and that the plaintiff, Addis, a former solicitor, then serving a sentence of two years' imprisonment for fraud (the person or one of the persons defrauded being a certain George Dawson) was for some time in Maidstone Prison while Grech was also there. While in prison, Grech submitted two petitions to the Home Secretary with the object of securing a review of his case. It is not now disputed that Addis had nothing whatever to do with the preparation or submission of these petitions. In them Grech made grave charges against the police and others and, in particular, raised the matter of the key. These petitions resulted in investigations which led to the trial at the Central Criminal Court of Robertson, Canter and Page on a charge of conspiracy to defeat the ends of justice, and, after a trial lasting from Nov. 16 to Nov. 29, 1955, all three were convicted and sentenced to terms

of imprisonment. Grech gave evidence for the prosecution and accordingly was not himself prosecuted for his part in the conspiracy. A

The alleged libel on both plaintiffs was contained in an article about the conspiracy trial which appeared in the "Daily Herald" on Nov. 30, 1955, the words complained of being these. There is a cross-heading "All the Dirt", and then come the words,

"At his trial Grech said the key was for his flat. And on the order of the court, Robertson was sent to try it. He reported that it fitted a lock there, but the jury convicted Grech and he was sentenced to three years. There he brooded over his belief that he had first been framed, then induced to pay out money for the 'Fiddle' and yet jailed. With the help of Jasper Addis, an ex-solicitor, one time man of affairs to George Dawson—and jailed for defrauding him—Grech drew up a petition to the Home Secretary. Into it he put all the dirt he knew, and as a Maltese running West End flats as brothels he thought he knew a great deal."

In Grech's case the following questions were put to the jury and were answered by them as follows: Question

(1): Are the words complained of defamatory? Answer: Yes.—If so, then (2): Are they true? Answer: No. (3): If not true, are they nevertheless a fair and accurate report of some of the proceedings at the trial of Robertson, Canter and Page? Answer: No. (4): Alternatively, are they fair comment on a matter of public interest? Answer: Yes. D

Then question (5) is: Damages, if any? To which there is no answer.

In Addis's case, the questions put to the jury, and their answers, were the same, apart from the question whether the words were true which was not included in Addis's case because the defendants admitted that they were not. E

On these answers, the learned judge, after legal argument, gave judgment for the defendants against both plaintiffs, who now appeal to this court.

The argument for Grech was, substantially, to the effect that the jury having found that the words were defamatory and untrue and were not a fair and accurate report of the proceedings, could not consistently with this finding go on to find, as they did, that the words were fair comment on a matter of public interest. It was said further that the words were incapable of being fair comment because they were not founded on any substratum of truth. We confess to considerable sympathy with these arguments but have come to the conclusion that they should not prevail. F

In his summing-up the learned judge dealt first with the question of Grech. On the first question, that is to say, whether the words were defamatory, he directed the jury as follows: G

"The first question for you is whether the words complained of are defamatory, that is to say, would they tend to lower these plaintiffs in the estimation of right-minded people? To decide that, of course, one must first consider the meaning of the word 'dirt' in the context of this article. Obviously, it means some disreputable conduct on somebody's part—low down, discreditable action by somebody—evil work, if you like, dirty work. H

"Now suppose you were to know of such evil work on somebody's part and you disclosed it to the proper authorities, and then somebody wrote in a paper 'He disclosed all that evil work to the Home Secretary'. Obviously, that, by itself, would not be defamatory. It would not tend to lower you in the eyes of right-thinking people: it ought to have the opposite effect. If, instead of writing 'He disclosed all that evil work', a newspaper wrote 'He disclosed all that dirt', here again you are not being defamed, the word 'dirt' being simply a short colloquial word descriptive of the evil you had reported. In this case, before one can properly say that Grech and Addis have been defamed, one has got to find something more than the mere I

- A use of the word 'dirt', and something more than the mere statement that Grech disclosed dirt to the Home Secretary. It is said on their behalf that you do find something more: you find it in the words 'all the dirt he knew'. Once again, members of the jury, if you or I know of some evil-doing that ought to be reported and we report it all, we are not defamed if someone says of us 'He reported all the evil-doing he knew'; or, substituting the words 'all the dirt he knew' for 'all the evil-doing he knew', we simply reported everything we knew. On the other hand, if it could be reasonably inferred from the context of what was written about us that we had some particular purpose of our own in view in making this report to the Home Secretary and yet nevertheless went outside that particular purpose and reported dirt merely for the sake of reporting dirt, well, then, that might well be defamatory—if someone said of us 'He reported all the dirt he knew, relevant or irrelevant'—and so here the sense—the only sense, you may think—in which the words complained of could be regarded as defamatory, is that they mean that Grech reported discreditable things about other persons which were quite extraneous to and quite irrelevant to his petition. Well, certainly no other meaning has been suggested by anybody here in which the words could be defamatory, no other sense in which the words could be defamatory, and so this phrase, 'he put in all the dirt he knew' may mean one of two things: first, that he reported all the discreditable things he knew done by others, and relevant to his petition. If that is all they mean, well, then, no reasonable person, I suggest, could say that those words are defamatory. I leave it to you to decide, but you may agree that merely to say 'He put in all the discreditable things done by others relevant to his own petition' could not possibly be defamatory.
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- E

"The second and alternative meaning is this, that the words mean that he reported all the discreditable things he knew done by others, even though they were irrelevant to his petition, what I may call 'irrelevant dirt'. If that is what they mean, then the words could well be regarded by you as defamatory because they are saying, 'Well, he raised the dirt merely for the sake of raking it over.' Of course, if you think there is some other sense in which the words could reasonably be regarded as defamatory, you will consider it. All I can say is I cannot.

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- "Therefore, what you have to do at the outset is to consider and answer the question, bearing in mind those two alternative meanings and any other which occurs to you, Are the words, in their ordinary or in any other sense, defamatory of Grech? In considering whether they do mean that he included all the dirt, relevant or irrelevant, that he knew, of course you will be entitled to consider the words which follow 'and as a Maltese running West End brothels he thought he knew a good deal'. Well, now, members of the jury, you will probably ask yourselves, does that support the view that what the reporter meant was that Grech was merely reporting all the relevant discreditable things he knew, or does it not rather support the view that what the reporter meant was that he was reporting all the dirt he knew, relevant or irrelevant?"

On the question whether the words were true, the learned judge said this in summing-up:

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- "So the first question is, did he include irrelevant dirt in his petitions? Well, now, those petitions and the exercise books which went with them have been put in, and I am not going through them all again. The defence have drawn attention to certain specific matters which they say support their allegation that he put in irrelevant dirt: the statement in the exercise book about Miss Lanteri; the mention by name of the three alleged burglars or housebreakers of the Morrison's flat; the mention by name of a number of police officers; the mention of Mr. Canter, the solicitor, as a crook; the

mention in the second petition of the names of a number of Maltese who had been living on immoral earnings and were being blackmailed by the police. I think that is the lot."

After discussing this aspect of the case at some length the learned judge said this:

"Now, members of the jury, it is not for you and I to decide whether all these allegations are true or false. We know that some of them, apparently, turned out to be true; Inspector Jacobs lost his job and Robertson and Canter were imprisoned. The question for you is: Are they so obviously irrelevant as to justify anyone saying, 'Well, he is just uncovering dirt for the sake of uncovering it'? The answer to that, you may think, is obviously 'No, they are not so irrelevant and, indeed, not irrelevant at all'. One might test it in this way. Suppose there were a retrial of the housebreaking charge tomorrow—there cannot be, but suppose, for the sake of argument, there were—and these persons were called as witnesses, Miss Lanteri, and all the rest of them, would it be irrelevant to put those matters to those witnesses, if they were called to support the charge of housebreaking against Grech? Obviously not. They would be admissible questions at the trial asked in order to discredit, if possible, the evidence the witnesses had given. Therefore, in my view, there is really no evidence on which anyone could justly say that in his petition Grech put dirt which was irrelevant, but I am going to leave the matter to you, members of the jury, in case you can find any evidence of it. If you think he did put irrelevant dirt in, then the statement complained of is true, and you will answer question (2) by saying 'Yes'. If you think he did not put in dirt which was obviously irrelevant or even irrelevant, then you would answer question (2) by saying 'No, the words are not true. It is not true to say that he put irrelevant dirt into his petition'."

On the question whether the defendants could claim privilege on the ground that the words complained of were a fair and accurate report of judicial proceedings, the learned judge, after some introductory observations on the nature of this ground of privilege said this in summing-up:

"The difficulty in the defendants' way here is this, that nobody did say in court, 'Grech did put into his petition all the dirt he knew', so the defendants say, 'Well, it may be true that those literal words were not used, but we are entitled to summarise it'—and that is true—'and things were said in the trial which make that remark of ours in the paper a substantially accurate summary,' so we must look and see what was done or said in court which makes that, if the defendants are right, a fair and accurate report. So far as things done are concerned, it seems from the transcript of the proceedings of the trial which we have seen that the two petitions and the two exercise books were in fact produced in court, but there is no evidence before you that they were read in full: in fact the evidence of that is all the other way and, indeed, one would hardly expect them to be read in full. Here were three men being charged with putting a false lock on a door, and that was made an issue in Grech's petitions showing why he was unjustly convicted of housebreaking and before all that was read out in court it would have been challenged."

A little further on the learned judge said this:

"As regards things which were said in those proceedings, the only passages I can find which approximate to a description in court of the contents of these petitions are these:"

He then went on to refer to an observation by the Lord Chief Justice recorded in the transcript of the second day's proceedings to the effect that the first

A petition "contained plenty of allegations against the police". He also referred in summing-up to the following passage in Grech's cross-examination:

"Mr. Durand (counsel) then says to Grech: 'I suggest that the whole of your account thereafter is directed against getting some consideration for yourself provided you could bring down as many police officers as you could possibly name and besmirch'. Answer, from Grech: 'I would not say that, sir. I just mentioned the name of two'. Q.—'I do not want any names at present, but in the course of your protest to the Home Secretary about how many police officers have you implied by suggestion or given their names direct? A.—Four. Q.—Four? A.—Yes. Q.—No more? A.—No. Q.—Are you sure? A.—To the best of my recollection it is four'."

C The learned judge also referred to a passage in the cross-examination of Inspector Hannam. The question is:

"Have you been the officer in charge of this prosecution? A.—I have been in charge of the investigation. Q.—In charge of the investigation into the matters alleged by Mr. Grech in his two petitions and the accompanying documents? A.—Yes. Q.—Would it be right to say that the matters alleged by Mr. Grech in those documents could be compendiously described as vice in the West End? A.—Yes, I think so, yes, in the broad sense."

Then the learned judge said this:

E "Now bearing those things in mind, members of the jury, do you think it is a fair and accurate report of these matters to say 'Into his petition he, Grech, put all the dirt he knew', meaning by that 'all dirt, relevant and irrelevant'. Now if you think it is a fair and accurate summary, say so, and then your answer to question (3), in the case of Grech, is 'Yes'. But if you think it is not, then you must say it is not. Here again, the onus of proving it is on the defendants, and if you are left in doubt about the matter, reasonable doubt about the matter, you must answer question (3) 'No'."

The learned judge then proceeded to deal with the defence of "fair comment on a matter of public interest". This being the question decided against Grech by the jury, we had better read the learned judge's summing-up in regard to it in full:

G "Well, now, if you say it was not a fair and accurate report of the proceedings, or some of them, then you must go on to consider the last defence of the defendants, that is to say, that 'In any event, what we said was fair comment on a matter of public interest'. Members of the jury, of course the administration of justice, which fundamentally is the matter involved in this context, is a matter of public interest. Your own good sense will tell you that, but that is a matter about which I have to decide and I do decide. In the contest of matters of public interest, a man may comment pretty freely in this country, and run no risk of having a successful libel action brought against him, provided, of course, his comment is fair, and, as to what is fair, a liberal view is taken. It does not mean it has got to be accurate, it does not mean it has got to be full, it does not mean, even, that it has got to be restrained. Even if the comment is strong and perhaps prejudiced, still it is not actionable if it might nevertheless be the comment of some fair man. But this particular defence to a libel action must fulfil certain conditions if it is to succeed. The two conditions which are relevant for your purpose today are these: first of all, the words complained of must be comment, not another allegation of fact. Second, the comment must be fair. So the first question in relation to this defence is: Were these words comment, 'into which he put all the dirt he knew'? Well, now, members

of the jury, you may think that that is not comment, it is simply an allegation of fact. Of course, it is sometimes difficult to distinguish between a statement of fact which is simply a statement of fact and one which can also be reasonably regarded as comment, and that is a question for you in this case, which it is. Again, you may think the question is so difficult that you cannot say, without some doubt lurking in your mind, whether it is in fact comment or whether it is an allegation of fact. Well, if you think it is not comment, or if you are left in doubt about it, then this particular defence fails, for here again the onus is on the defendants to prove it is comment. If you think it was not, then straight away you would answer question (4) by saying 'No', because the first condition, that it is comment, would not be satisfied. If you come to the conclusion, 'Yes, it was comment', then you must go on to consider whether, as comment, it is fair—was it fair comment, and that involves necessarily coming to some conclusion as to what facts these words, if they be comment, were comment upon.

"So far as I can understand the matter, the only facts which answer that description, are the facts that Grech sent in a petition to the Home Secretary, naming some police officers and others, as involved in highly discreditable actions. It is true that happened. Grech did send in such a petition, and you have to ask yourselves, if that is comment at all, is it fair comment on those facts to say that he put into his petition 'all the dirt he knew' meaning by that irrelevant as well as relevant 'dirt', because, of course, you will understand that we are considering this defence on the hypothesis that the words are defamatory, and the only defamatory interpretation in sight at the moment is that irrelevant dirt was included in the petition. Now if you think that no irrelevant dirt was included, then you should bear that in mind in considering whether this comment, if it be comment, is fair or unfair. If you think the words were comment, but that they were not fair, then the answer to question (4) is 'No'. If you think the words were comment and that they were fair, then the answer to that is 'Yes'. If you are in doubt about either of those matters, as to whether it was comment or whether it was fair comment, then you must answer question (4) by saying 'No', and the defendants will not have made out that particular defence."

The learned judge's summing-up on the four effective questions in Grech's case (we are omitting the passage dealing with the fifth question concerning damages which on the jury's answers to the other questions did not arise) appears to us to be perfectly fair and adequate and to admit of no criticism of any real substance.

Counsel for the defendants has attacked the learned judge's formula, "all the dirt relevant or irrelevant" contending that it is not defamatory to say of a man that he has reported wrongdoing to the proper authority; the question of relevant or irrelevant is immaterial. We are not sure that we ourselves would have adopted the formula of "all the dirt relevant or irrelevant" to convey the sense in which the words complained of were or were capable of being defamatory. It appears to us that the language used also imports in its natural meaning a suggestion that the petitions included charges which, whether relevant or not to the review of his conviction and sentence which Grech was seeking to obtain, were nothing but mud-slinging or scandalmongering and made without any bona fide belief in their truth. But nothing really turns on this, which may perhaps be regarded as implicit in the learned judge's formula. It will be remembered that in the summing-up the learned judge said:

"Of course, if you think there is some other sense in which the words could reasonably be regarded as defamatory, you will consider it. All I can say is I cannot."

A To our minds, the words complained of were well capable of a defamatory meaning, and it was for the jury to decide whether they were defamatory or not.

On that part of the summing-up which dealt with the defence of fair comment on a matter of public interest, we think, if it erred at all, it erred in favour of Grech, indicating as it did that the jury might well think that the words complained of amounted to a statement of fact and not comment at all. That the

B words were capable of amounting to comment and fair comment on a matter of public interest we have no doubt. The inquiry is, as LORD PORTER said in *Kemsley v. Foot* (1) ([1952] 1 All E.R. 501 at p. 505):

“Is there subject-matter indicated with sufficient clarity to justify comment being made?, and whether the comment actually made is such as an honest though prejudiced man might make.”

C Here, the subject-matter, the petition, is specifically referred to, and though there were in fact two petitions, we do not think that this can affect the matter. Moreover, the very use of the word “dirt” might well be thought to import a moral judgment. Further, having regard to the references to the petitions in the judicial proceedings, it was open to say that the comment was fair.

D In his judgment ([1957] 3 All E.R. 556) the learned judge dealt in this way with the contention raised on behalf of Grech to the effect that the finding of fair comment in answer to question (4) was inconsistent with the findings in answer to questions (1) and (2) that the words were defamatory and untrue. The learned judge said this (*ibid.*, at p. 557):

E “It is argued that those two findings are inconsistent. In my view they are not necessarily so at all. Otherwise, it seems to me that the defence of fair comment would be almost valueless; for, if the jury found that the words were not defamatory, or being defamatory were true, then the defence of fair comment would not be needed.

F “The answers to questions (1) and (2)—more particularly question (2)—proceed, I think, on the hypothesis that the words complained of were, or might be, statements of fact; and the jury are saying, ‘Well, on that hypothesis they were defamatory and untrue’. Then, in question (4), they come to consider an alternative hypothesis—namely, that the words were fair comment—and they come to the conclusion, ‘Yes, they were comment and they were fair’. Therefore, since one has to canvass every possibility in these cases and get answers from the jury to all questions which might conceivably arise, it does not surprise me that one receives answers such as I have received, and which, I repeat, I do not think were inconsistent, as is now claimed.

G “It is said also that there is no evidence to support the finding of fair comment. I have made fairly clear my own view whether the words were comment at all, but it is the jury’s view which matters and I cannot say that no reasonable person could construe the words as comment. Suppose that the ‘Daily Herald’ had written ‘Grech drew up a petition to the Home Secretary. Our comment on the petition is that into it Grech put all the dirt he knew’. If the jury read the words actually used in the present case as really coming to the same thing as the words that I have supposed, I could not say that it was unreasonable to do so. Comment, I suppose, is often to be recognised and distinguished from allegations of fact by the use of metaphor; and here, for what it is worth, resort was had to the language of metaphor.

H “Again, I do not think that I can say there was no evidence of fairness. Some of the contents of the petition were referred to in court. It is clear from what was said in court that they were comprehensive. I may refer, in this connexion, to two or three questions and answers. The questions were addressed to Superintendent Hannam, and were these:”

The learned judge then read the passage from Inspector Hannam's evidence to which we have already referred, and continued (*ibid.*, at p. 558): A

"It would be going too far on my part, I think, to say that it is unfair comment, when the petitions are so described, to say that into them somebody put all the dirt he knew, although, as a fact, that was not true. As a comment it might be the same thing as saying that in a defence the pleader raised every possible point of which he could think, or raised every defence that imagination could suggest. That would not be strictly true, but, as a comment, one would not say that it was unfair. I cannot say that the jury were perverse in finding that it was fair comment." B

With those observations we respectfully agree. The jury's answers must be reconciled so far as it is reasonably possible to do so, and we think that they are fairly capable of reconciliation in the way indicated by the learned judge. The question whether the words were comment, and, if so, were they fair comment, was essentially a matter for the jury to decide, and we cannot hold that no reasonable jury could have decided it in the way this jury did. Accordingly, we would dismiss this appeal in the case of Grech. C

The case of Addis appears to us to be essentially different. He was only dragged into the matter on the strength of an allegation that Grech drew up a petition to the Home Secretary into which he put "all the dirt he knew" and so on D

"with the help of Jasper Addis, an ex-solicitor, one-time man of affairs to George Dawson, and jailed for defrauding him."

It is common ground that Addis, in fact, had nothing whatever to do with the drawing up of either petition, and it appears to us quite impossible to hold or for any reasonable jury to hold that the statement that Grech put into his petition "all the dirt that he knew" and so on was fair comment unless the statement on which the comment was based was either true or else a fair and accurate report of what was said in court. In the result the jury did find in favour of the defendants on the question of fair comment, having been directed as follows by the learned judge in the summing-up: E

"This, members of the jury, is a matter for me, and you must take this from me, and my view upon it is this, that the fact that Addis did not assist, and, therefore, that underlying fact was untrue, does not of itself destroy the plea of fair comment, because it was said in open court that Addis did assist Grech—or, at any rate, that Grech had said so—and I think that that fact, namely, that it was said in open court, prevents the inaccuracy of this statement from being fatal of itself to the plea of fair comment. Just as I have the privilege of saying almost anything I like about anybody—sitting here—so has a witness who goes into the witness-box and gives evidence. They have the same privilege, and anything that they say defamatory of someone else is not actionable, if they say it in judicial proceedings. Therefore, the fact that a witness said, inaccurately, that Grech had told him, or implied inaccurately that Addis had assisted Grech, does not of itself make this plea of fair comment unsustainable, but nevertheless the other difficulties in the defendants' way on this plea may, in your view, be formidable enough, anyway: Is the statement really comment at all? Is it clear that it is comment, because it has got to be clear? If so, is it fair comment? If you are in doubt about either of these matters you should answer question (3), in the case of Addis, by saying 'No'. Only if you are satisfied that the comment is fair comment, would you answer it 'Yes'." F

In his judgment the learned judge said this ([1957] 3 All E.R. at p. 558): G

"In the case of the plaintiff Addis, I have already ruled, in the course of the case, that the repetition of a statement made by a witness at the trial at H

- A the Old Bailey did not destroy the plea of fair comment on the ground that the statement turned out to be false. It is to be noted that what was actually said in court by the witness Page (who was one of the defendants in the case) was that Grech had told him, Page, that Addis had assisted in the drawing up of the petition. In cross-examination, Grech, who was a witness, said that someone assisted him, but gave no name. Grech said
- B that the only assistance given was to correct his grammar and punctuation. The defendants' rendering of all this in the newspaper was that Addis had helped, which no one had actually said at the trial. This was simply the inference that the paper drew from the evidence. No point has been raised, however, on this interpretation of the evidence. The argument in the present case was that, since the plaintiff Addis had not in fact helped, the
- C plea of fair comment could not be sustained and that the decision in *Mangena v. Wright* (2) ([1909] 2 K.B. 958) on this point is inapplicable. The reason suggested is that in that case the instances given by PHILLIMORE, J. (*ibid.*, at p. 977), of statements which were privileged although inaccurate, were errors in a Parliamentary debate, or in the judgment of a judge. A witness's statements in the witness-box are entitled, however, to the self-same
- D privilege: and if comment may be fair although founded on the inaccurate statement of a judge in judicial proceedings, I cannot see in principle why comment may not also be fair although founded on an inaccurate statement, similarly privileged, namely, that of a witness in judicial proceedings."

It will be seen that the learned judge's opinion on this part of the case is based on the view that the untrue statement that "Jasper Addis, an ex-solicitor"

E and so on helped Grech in drawing up his petition is a fair and accurate report of judicial proceedings in open court. The sole reference made at the hearing to anyone helping in the drawing up of Grech's petition or petitions are these. This is the evidence of Grech:

- "Did you write your first petition, or did somebody write it for you?"
- F A.—I wrote it. Q.—Did you write it with anybody's assistance? A.—No. Q.—Any other person, for example? A.—There might be somebody who corrected my English—my mistakes. Q.—Who might that person be? A.—I am afraid that, under prison regulations and unless I am given the opportunity whether I should answer this question or not, I shall be contravening the regulations. Q.—I do not want his name. Through another
- G prisoner? A.—Yes, just corrected my letters, that is all. Q.—Just corrected your English? A.—Yes."

The other reference is on the eighth day of the trial when Page is giving evidence:

- "Q.—Did you know the people about whom he was complaining? A.—Yes, sir, he was even telling me. Q.—Did you know he was petitioning the Home Secretary? A.—Myself definitely. He kept telling me about
- H that, that he had sent a petition to the Home Secretary and Scotland Yard and he was being helped in prison by some solicitor by the name of Addis or something. That is what he was mentioning to me."

- We cannot regard these passages as justifying the claim that the categorical statement to the effect that "Jasper Addis, an ex-solicitor" and so on helped
- I Grech in the preparation of his petition was a fair or accurate report of the proceedings. There is nothing in Page's hearsay evidence beyond the statement that Grech told him that he was being helped in prison by "some solicitor by the name of Addis or something"; and there is nothing in Grech's evidence to indicate that the unknown person who "corrected his English" was Jasper Addis. The so-called fair and accurate report does not attribute the statement that "Jasper Addis, an ex-solicitor" and so on helped Grech to draw up the petition, to Page, but gives it as a statement of fact. In this it differs from the rest of the article which, taken as a whole, attributes the various statements to

the various persons who made them. No doubt the reason for this omission is that no witness did so say. The writer jumped to the conclusion that the "Addis" referred to by Page was Jasper Addis and added the Christian name, which Page did not give, arriving as a matter of inference at the assumption that Jasper Addis was meant. He then adds true but derogatory facts about Jasper Addis. Moreover, the article contains no reference to Grech's evidence as to his unknown helper and the limited assistance which he gave. In our view, it would be impossible for a jury, properly directed, to hold that this was a fair and accurate report.

If a statement made by a witness is fairly and accurately reported, and attributed to the witness who made it, then, no doubt, although the evidence given by the witness is afterwards shown to be false, the statement reported can be made the subject of fair comment. But that is not this case.

Accordingly, we hold that the defence of fair comment cannot be supported in Addis's case.

As we have already said in the case of Grech, we think that the words complained of are well capable of a defamatory meaning. In Addis's case, however, there is not and cannot be any defence of justification inasmuch as it is admitted that Addis had nothing to do with the drawing up of either petition.

In the result, the appeal in Addis's case must be allowed.

Appeal of Grech dismissed: leave to appeal to the House of Lords refused.

Appeal of Addis allowed: new trial, limited to the question of damages, ordered.

Solicitors: *Granville Jones & Co.* (for the plaintiff Grech); *Simmons & Simmons* (for the defendants).

[Reported by HENRY SUMMERFIELD, ESQ., Barrister-at-Law.]

Re WILLS' WILL TRUSTS. WILLS AND OTHERS v. WILLS AND OTHERS.

[CHANCERY DIVISION (Upjohn, J.), April 24, 25, 29, May 23, 1958.]

Trust and Trustee—Powers of trustee—Power of advancement—Power to "raise" any part and to pay or "apply" the same for the benefit of any child—Exercise of power by creating new settlement for children—Validity.

Perpetuities—Rule against perpetuities—Power of advancement—Power extending to "vested" share—Construction—Power exercisable in anticipation of absolute vesting not in defeasance—Power admittedly invalid for remoteness in relation to some interests—Whether power void.

By his will made in 1918, a testator directed his trustees to hold his residuary estate on trust for his children who being male attained the age of twenty-five years or being female attained that age or married under it equally except that each son should take three times as much as each daughter. The testator settled each daughter's share on trust for the daughter for her life with remainder to her issue as she should appoint and declared trusts in default of appointment. By cl. 18 of his will the testator authorised his trustees after the determination or failure of every prior life or other interest or previously with consent of persons entitled to prior interests "to raise any part or parts not exceeding in the whole one moiety of the then expectant contingent presumptive or vested share portion or legacy of any person . . . and to pay or apply the same for his or her advancement or benefit or for the benefit of any child children or wife of such person as

A my trustees shall think fit . . .” In 1927 the testator died leaving five children surviving him. In 1939 the eldest child, a boy, M.W. married and in May, 1940, twins were born of the marriage. On June 15, 1940, when the twins were about a fortnight old, the trustees of the testator's will, in purported exercise of their powers under cl. 18 of the will, executed a deed in which they irrevocably declared and directed that certain investments which had been appropriated to M.W.'s share should be held in trust for the twins on their respectively attaining the age of twenty-one years in specified proportions, and provided that if neither of them should attain the age of twenty-one the investments should be held on the trusts which would have been applicable if the deed had never been executed. The deed conferred no express power or discretion on anyone. In October, 1940, M.W. attained the age of twenty-five years. In 1941 a further child was born of the marriage, and in 1943 M.W. died on war service. The questions arose whether the power of advancement (cl. 18) was void for remoteness and whether if the power of advancement was not void, the deed of 1940 was a valid exercise of it.

D **Held:** (i) the power of advancement conferred by cl. 18 of the testator's will was not void for remoteness, in so far as the power related to the share of M.W., because a power of advancement was intended to permit the absolute vesting of a share in a donee to be anticipated and the word “vested” in cl. 18 meant vested in interest, not vested in possession, so that the power came to an end on M.W.'s attaining the age of twenty-five years and no question of remoteness could arise; moreover, assuming that the power was void for remoteness in relation to a daughter's share, that did not invalidate the power as regards a son's share.

E (ii) the power of advancement was validly exercised by the deed of June 15, 1940, because, in the circumstances in which the deed was executed, an advancement to the twins though on contingent trusts was justified despite their youth, and the transaction effected by the deed constituted (a) a “raising” within cl. 18 of part of M.W.'s contingent share by reason of investments being taken out of the trusts of residue and held on new trusts, and (b) an application of money for the benefit of any child or children of M.W. within cl. 18, not a mere appointment of new trusts.

F *Re Halsted's Will Trusts* ([1937] 2 All E.R. 570), *Re Ropner's Settlement Trusts* ([1956] 3 All E.R. 332) and *Re Meux's Will Trusts* ([1957] 2 All E.R. 630) applied.

G Per CURIAM: unless on its proper construction a power of advancement permits delegation of powers and discretions a settlement created in exercise of the power of advancement is invalid in so far as it purports to delegate powers or discretions in relation to beneficial interests (see p. 478, letter C, post).

H *Re May's Settlement* ([1926] Ch. 136) and *Re Mewburn's Settlement* ([1934] Ch. 112) explained.

I [As to the power of advancement, and the effect of the word “benefit” as authorising a settlement, see 21 HALSBURY'S LAWS (3rd Edn.) 177, para. 385, and p. 178, para. 387; and for cases on what is an advancement, see 28 DIGEST 251-253, 1073-1087, and 43 DIGEST 789, 790, 2274-2285.]

Cases referred to:

- (1) *Re Vestey's (Baron) Settlement, Lloyds Bank, Ltd. v. O'Meara*, [1950] 2 All E.R. 891; [1951] Ch. 209; 2nd Digest Supp.
- (2) *Re May's Settlement, Public Trustee v. Meredith*, [1926] Ch. 136; 95 L.J.Ch. 230; 134 L.T. 696; 37 Digest 409, 187.
- (3) *Re Mewburn's Settlement, Perks v. Wood*, [1934] Ch. 112; 103 L.J.Ch. 37; 150 L.T. 76; Digest Supp.

- (4) *Roper-Curzon v. Roper-Curzon*, (1871), L.R. 11 Eq. 452; 24 L.T. 406; A 37 Digest 498, 915.
- (5) *Re Halsted's Will Trusts*, *Halsted v. Halsted*, [1937] 2 All E.R. 570; Digest Supp.
- (6) *Re Ropner's Settlement Trusts*, *Ropner v. Ropner*, [1956] 3 All E.R. 332; 3rd Digest Supp.
- (7) *Re Tetley's Settlement* (Mar. 31, 1952), unreported. B
- (8) *Re Meux's Will Trusts*, *Gilmour v. Gilmour*, [1957] 2 All E.R. 630; [1958] Ch. 154.
- (9) *Re Morris' Settlement Trusts*, *Adams v. Napier*, [1951] 2 All E.R. 528; 2nd Digest Supp.

Adjourned Summons.

The plaintiffs, the trustees of the will of Frederick Noel Hamilton Wills, deceased, by their originating summons dated Oct. 4, 1957, asked for the determination of the following questions: (i) whether the settlement made by deed-poll of June 15, 1940, by the plaintiffs in exercise or purported exercise of the power in that behalf vested in them by cl. 18 of the will of the testator and of every other power enabling them (a) was a valid settlement or (b) was an invalid settlement because the said power was void for perpetuity or otherwise; (ii) if the settlement made by the said deed-poll was invalid, whether the plaintiffs as the trustees of the said deed-poll should transfer the trust fund and the accumulated income thereof to the personal representatives of Captain Michael Desmond Hamilton Wills, deceased, as part of his estate. C

J. A. Brightman for the plaintiffs, the trustees of the will of the testator.

C. Montgomery White, Q.C., and *D. H. McMullen* for the first and second defendants, the infant twin sons of Captain Wills, deceased. E

Lionel Edwards, Q.C., and *E. Blanshard Stamp* for the third defendant, the youngest son of Captain Wills, deceased.

T. A. C. Burgess for the fourth and fifth defendants, the trustees of the will of Captain Wills, deceased. F

Cur. adv. vult.

May 23. **UPJOHN, J.**, read the following judgment: This summons raises two interesting questions on the will of the late Frederick Noel Hamilton Wills, deceased, whom I will refer to as "the testator". The first question is whether a power of advancement contained in cl. 18 of the will is valid or is void for remoteness, and the second question is whether, assuming the power to be valid, a purported exercise of it in 1940 is a valid exercise of that power. G

The testator made his will on June 2, 1918. After appointing executors and trustees, he bequeathed a number of legacies and disposed of his residuary estate by cl. 14, which I shall read in full:

"Subject as aforesaid I direct that my trustees shall hold my residuary estate upon trust as to two equal fifth parts thereof to pay the income thereof to my said wife during her life without power of anticipation during coverture in addition to the other benefits hereinbefore given to her and from and after the death of my said wife shall hold the capital and future income of the said two fifth parts of my residuary estate upon the trusts hereinafter declared of and concerning the remaining three equal fifth parts thereof And as to the remaining three equal fifth parts of my residuary estate I direct that my trustees shall hold the same upon trust for all or any my children or child who being male shall attain the age of twenty-five years or being female shall attain that age or marry under it and if more than one in equal shares except that each son shall take three times as much as each daughter." H I

By cl. 15 the testator settled daughters' shares on familiar trusts, i.e., to the daughter for life with remainder to her issue as she should appoint and with

A trusts over in default of appointment. By cl. 18 the testator gave the power of advancement in question:

B "I authorise my trustees after the determination or failure of every prior life or other interest or interests (if any) or previously thereto with the consent in writing of every person in existence for the time being entitled to any such prior interest or interests whether vested or contingent to raise any part or parts not exceeding in the whole one moiety of the then expectant contingent presumptive or vested share portion or legacy of any person under any of the trusts or dispositions of this my will or any codicil hereto and to pay or apply the same for his or her advancement or benefit or for the benefit of any child children or wife of such person as my trustees shall think fit And I declare that the power of advancement aforesaid may be exercised in favour of any daughter of mine in respect of her share notwithstanding that she is entitled to a life interest only therein."

C That clause is in unusually wide terms in relation to the objects of the power.

The testator died on Oct. 11, 1927, and his will was duly proved by the executors therein named. At the date of his death the testator left him surviving five children, all infants, of whom the eldest was Michael Desmond Hamilton Wills (whom I will call "Captain Wills"). He was born on Oct. 4, 1915. He married the fourth defendant now Mrs. Mary Margaret Gibbs in 1939 and of that marriage there was issue three children, namely, two twins, the first and second defendants, who were born on May 31, 1940, and the third defendant, who was born on June 26, 1941. Captain Wills duly attained the age of twenty-five in October, 1940, but died on war service on Mar. 16, 1943. On June 15, 1940, when the twins were some fortnight old, the then trustees (who were not the original executors and trustees appointed by the testator's will) executed a deed declaring certain trusts in purported exercise of the power conferred by cl. 18 of the will. This was done in circumstances which I shall mention later. The deed contained a number of recitals, but I need only mention the last two (E) and (F) which recite that certain investments including the investments mentioned in the schedule thereto had been appropriated by the trustees to the share of the residuary estate to which Captain Wills was contingently entitled and that for the benefit of the infant sons of Captain Wills the trustees had determined to execute those presents. By the operative part of the deed in purported exercise of the power contained in cl. 18 of the will the trustees irrevocably declared and directed that the investments mentioned in the schedule thereto should thenceforth be held on the trusts following:

H " (i) If both the elder twin and the younger twin attain the age of twenty-one years as to three equal fourth parts thereof in trust for the elder twin if and when he attains twenty-one and as to the remaining one equal fourth part in trust for the younger twin if and when he attains that age. (ii) If the elder twin attains but the younger does not attain the age of twenty-one years as to the whole in trust for the elder twin if and when he attains that age. (iii) If the elder twin dies under the age of twenty-one years as to the whole in trust for the younger twin if and when he attains that age. Provided always that if neither the elder nor the younger twin attains the age of twenty-one years the investments aforesaid shall be held upon the trusts which would have been applicable thereto if this deed had never been executed and provided also that until some person or persons shall become absolutely and indefeasibly entitled to the investments aforesaid the provisions now applicable thereto under the will of the testator and the said deed of appointment as to investment and variation of the investment thereof shall continue to be operative."

I By his will Captain Wills gave a third of his residue to his widow absolutely and two-thirds to his children who should attain twenty-one. He left a very

large estate. The issue, therefore, is between the twins on the one hand who support the validity of the deed of 1940 and the youngest son on the other hand who, of course, takes no benefit thereunder unless both of his elder brothers fail to attain twenty-one. Captain Wills' widow is in the same interest as the youngest son, but she has in fact taken no part in the argument. A

Counsel for the youngest son submits that the power contained in cl. 18 is void for remoteness on two grounds. First he submits that if you look at the opening words of the clause, it is clear that the power may apply to a vested share where there has been no prior life interest. Therefore it must follow that "vested" must mean not merely vested in interest but vested in possession. B
Then he submits that on its true construction the clause applies to a son's vested share after it has vested in possession, with this result, that a son on attaining twenty-five would not have an absolute right to call on the trustees to transfer his vested share to him because the trustees would be entitled to say, and possibly bound to say, that they would not transfer his share to him because they might desire to exercise the power of appointment in favour of his wife or children. C
If that be the true construction of the power it may well be that it would infringe the rule against remoteness, but I am quite unable to accept this argument. It is to be observed that the power applies not merely to the sons' shares but to the daughters' shares of residue and to legacies given by the will or any codicil. The opening words of cl. 18 were no doubt widely framed to meet a number of possible situations, and I am quite unable to construe the clause as giving the trustees not a power of advancement pending vesting in possession, but in effect a power of defeasance which can operate after a share has vested absolutely in possession. A power of advancement is intended to permit the donee of the power to anticipate the absolute vesting of a share, but when the share has vested absolutely the power necessarily comes to an end. D
In my judgment, "vested" in cl. 18 bears its prima facie meaning of vested in interest; see THEOBALD ON WILLS (11th Edn.), at p. 475. E

The second submission of counsel for the youngest son is this. The state of affairs at the testator's death must be considered. At that time no share of residue had vested at all. Then, as counsel submits truly, for the purpose of the rule regard must be had to possible events. One possible event would be that the whole share of residue would vest in a daughter. If that happened, counsel submitted that in relation to a daughter's share the power of appointment is plainly bad for remoteness. Whether that be so or not I am not going to decide in the absence of the parties directly concerned, but I will assume, for the purposes of argument, that so far counsel's submission is sound and that in the case of daughters' shares the power is void. G
In my judgment, however, that does not in the least invalidate the power in relation to sons' shares. As I have already pointed out the power applies not only to shares of residue, but to legacies given by the will or by any codicil, and it seems to me clear that the power must be looked at in relation to the interest taken by the person who is to be advanced. Under some trusts in the will or codicil it may be that the power is invalid; under other trusts it may be valid. Taking the view that I do, that on its true construction the power comes to an end in respect of sons' shares as and when each son attains twenty-five, no question of invalidity on the ground of remoteness can arise in relation to a son's share. Accordingly, in my judgment, in relation to Captain Wills' share the power of appointment contained in cl. 18 is valid and does not offend the rule against remoteness, and I shall so declare. H I

I turn to the second question, viz., whether the purported exercise of the power conferred by cl. 18 in and by the deed of 1940 is valid. Counsel for the youngest son submits that in fact the trustees did not exercise any power under cl. 18 at all. He says that the trustees raised nothing, paid nothing, applied nothing. All that the trustees did was to declare new trusts concerning certain scheduled investments; they advanced nothing. It was argued that in effect they made no application of any investments, but were really only appointing funds on a

- A contingency which might or might not arise in the future. The question, it was argued, is not whether the objects of the power, the infant children of Captain Wills, obtain some benefit or advantage but whether funds are applied for their benefit. Counsel referred me to *Re Baron Vestey's Settlement, Lloyds Bank, Ltd. v. O'Meara* (1) ([1950] 2 All E.R. 891), where the Court of Appeal held that out and out allocations to infants were applications for their benefit, but he
- B points out that SIR RAYMOND EVERSHED, M.R., at the conclusion of his judgment expressly left open the question which I have to determine, viz., whether under a power such as I have before me one can create sub-trusts.

- It was further submitted that if under a power of advancement one can in effect alter the trusts or create sub-trusts, a number of the earlier authorities such as *Re May's Settlement, Public Trustee v. Meredith* (2) ([1926] Ch. 136) and *Re Mewburn's Settlement, Perks v. Wood* (3) ([1934] Ch. 112), ought to have been differently decided. It was submitted that these authorities show that in exercising a power of advancement trustees cannot declare new trusts. Those authorities were however really considering a different problem, viz., whether in exercising a power of appointment the appointor might properly include a power of advancement or whether such inclusion infringed the principle delegatus non potest delegare.
- D

- On the other hand, there is a number of reported cases in which the court has held that trustees may properly settle funds advanced under a power of advancement. Thus in *Roper-Curzon v. Roper-Curzon* (4) ((1871), L.R. 11 Eq. 452), there was power in a marriage settlement to advance to a son of the marriage "for his advancement or preferment in the world". The trustees applied to the
- E court to know whether they might make an advancement to the son then married and studying for the profession of the law. LORD ROMILLY, M.R., declined to authorise an advancement unless the son settled the funds advanced. In *Re Halsted's Will Trusts, Halsted v. Halsted* (5) ([1937] 2 All E.R. 570), FARWELL, J., decided that under a power of advancement contained in a will "... for his benefit or advancement in life" trustees might settle a sum on an object of the
- F power in order to provide for his wife and children but on terms that the settlement was limited to benefit him, his wife and children with an ultimate trust for residue of the testator's estate.

- In *Re Ropner's Settlement Trusts, Ropner v. Ropner* (6) ([1956] 3 All E.R. 332), HARMAN, J., decided that under a power to apply one quarter of the trust funds "for the advancement preferment or benefit" of beneficiaries, trustees might
- G properly make settlements on objects of the power, the main reason being a desire to avoid heavy duties on the death of a man aged fifty-eight. However, in that case it was conceded by counsel that it was in the power of the trustees to do so.

- WYNN-PARRY, J., has in effect twice come to a similar conclusion. First in *Re Tetley's Settlement* (7) ((Mar. 31, 1952) unreported) mentioned in *Re Ropner* (6) and
- H secondly in *Re Meux's Will Trusts, Gilmour v. Gilmour* (8) ([1957] 2 All E.R. 630). That decision was on the Trustee Act, 1925, s. 53, but I think that it is clear that WYNN-PARRY, J., would have come to a similar conclusion on s. 32 of the same Act. I have seen the settlement approved by the learned judge. It was of the simplest kind and as stated in the judgment (*ibid.*, at p. 636) it merely excluded the plaintiff's life interest and substituted an estate tail contingent on attaining twenty-one for a vested estate tail in the first defendant.
- I

- These decisions have been fairly criticised by counsel for the youngest child. In none of them, it was submitted, was there any argument on whether the transaction amounted to a "raising". In *Roper-Curzon v. Roper-Curzon* (4) and *Re Ropner* (6) there was no argument on the power of the trustees to apply funds by making a settlement. Again it was argued that *Roper-Curzon v. Roper-Curzon* (4) and *Re Halsted* (5) could be explained on the footing that the settlements were made at the request of the object of the power. It was said that it followed from *Re Ropner* (6) that trustees could take away property from a

beneficiary and that could not be right. It is most certainly true that in none of the cases did the court have the benefit of the able arguments which I have had in this case from Mr. Edwards and Mr. Stamp. Nevertheless so far as this court is concerned these authorities establish the proposition that trustees exercising a power of advancement may make settlements on objects of the power if the particular circumstances of the case warrant that course as being for the benefit of the object of the power.

The authorities typified by *Re May* (2) and *Re Mewburn* (3) establish to my mind that any settlement made by way of advancement on an object of the power by trustees must not conflict with the principle *delegatus non potest delegare*. Thus unless on its proper construction the power of advancement permits delegation of powers and discretions a settlement created in exercise of the power of advancement cannot in general delegate any powers or discretions at any rate in relation to beneficial interests to any trustees or other persons, and in so far as the settlement purports to do so it is *pro tanto* invalid. I say that without prejudice to the possible propriety of including ordinary powers of advancement in such a settlement; see *Re Morris' Settlement Trusts, Adams v. Napier* (9) ([1951] 2 All E.R. 528).

I must now consider the circumstances of this particular case to see whether the power of advancement has been properly exercised. When the twins were born in 1940 their father was four months short of his twenty-fifth birthday and was serving with the Coldstream Guards in the Middle East. If he failed to attain twenty-five, and there was, of course, a serious risk that he might, the fortunes of his wife and young family would be grievously affected. I cannot doubt for one moment that a substantial out and out allocation to each infant absolutely (as in *Re Vestey* (1)) under the power of advancement would have been fully justified in the particular circumstances of this case in spite of their extreme youth. The trustees quite properly were considering advancing large sums, the scheduled investments in the deed of 1940 being of the value of £200,000. An out and out allocation would, however, have some drawbacks. If one of the twins died in infancy a substantial sum would be payable in estate duty and the balance would go under the law relating to intestacy probably to the mother and father or the survivor. The deed of 1940 was an extremely sensible method of overcoming those drawbacks by making the advances take effect contingently on the twins attaining twenty-one. Income would still be available for their maintenance pending vesting. The deed of 1940 was of the simplest kind. It did not attempt to confer any powers or discretions on any persons. It would be very regrettable if some policy of the law authorised an out and out advance, but not an advancement on trusts where the particular circumstances of the case made that method the sensible and practical way of doing it. Ultimately, however, the question to be answered is this: Can this transaction properly be regarded as the raising and payment or application of part of the share of residue to which Captain Wills was then contingently entitled "for the benefit of any child children or wife" of Captain Wills? In my judgment the answer is that it was a raising, because the scheduled investments were "raised" in a broad sense by the trustees, not by being realised, but by being taken out of the trusts of residue and held on new trusts for the benefit of the twins; that cannot be affected by the circumstance that in certain events the trusts might fail and the scheduled investments fall back into residue. Furthermore it was in my judgment an application for the benefit of Captain Wills' two eldest children and not a mere appointment of new trusts. Trustees cannot under the guise of making an advancement create new trusts merely because they think that they can devise better trusts than those which the settlor has chosen to declare. They must honestly have in mind some particular circumstances making it right to apply funds for the benefit of an object or objects of the power. Having reached the conclusion that some application is right and proper it is in

- A my judgment a question to be determined in all the circumstances of the case whether the application should be out and out or whether it is desirable to create certain trusts. In this case there was an overwhelming case for an immediate application to protect the twins in case their father should die under twenty-five and a simple settlement creating contingent interests was the best way of effecting that application. In my judgment the deed of 1940 was a valid exercise of the power conferred by cl. 18, and I shall so declare.

Order accordingly.

Solicitors: *Trower, Still & Keeling* (for all parties).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

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TENNEKOON, COMMISSIONER FOR REGISTRATION OF INDIAN AND PAKISTANI RESIDENTS v. DURAISAMY.

- E [PRIVY COUNCIL (Lord Morton of Henryton, Lord Tucker, Lord Cohen, Lord Denning and Mr. L. M. D. de Silva), March 17, 18, 19, 20, 24, 25, May 19, 1958.]

Privy Council—Ceylon—Appeal to Judicial Committee—Jurisdiction of Supreme Court of Ceylon to grant leave—"Civil suit or action in the Supreme Court"—Appeals (Privy Council) Ordinance of Ceylon (c. 85, Vol. II, Legislative Enactments of Ceylon), s. 3.

- F *Privy Council—Ceylon—Registration of Indian and Pakistani residents—Permanently settled in Ceylon—Indian and Pakistani Residents (Citizenship) Act (Ceylon) (No. 3 of 1949), s. 22, as amended by Indian and Pakistani Residents (Citizenship) (Amendment) Act (Ceylon) (No. 37 of 1950), s. 4.*

- G In March, 1951, the respondent applied, under the Indian and Pakistani Residents (Citizenship) Act (Ceylon) (No. 3 of 1949), s. 4 (1), for registration as a citizen of Ceylon. To bring himself within the categories of residents, defined in s. 22 of the Act, who might qualify for registration the respondent had to show that he was "permanently settled in Ceylon". In 1951 he had made remittances to his mother and two sisters who lived in India, and, on "B forms" appropriate for making remittances, he had declared himself to be resident temporarily in Ceylon. The Deputy Commissioner for the Registration of Indian and Pakistani Residents refused the respondent's application on the ground that in the B forms the respondent had declared himself to be temporarily resident in Ceylon and that therefore he failed to prove that he had permanently settled in Ceylon. On appeal by the respondent, the Supreme Court of Ceylon held that a prima facie case for registration had been established. On appeal to the Board by the commissioner, the respondent took a preliminary objection that the Supreme Court had no power to give the appellant leave to appeal. The right of appeal was that referred to in the Appeals (Privy Council) Ordinance of Ceylon, s. 3, as the "right of parties to civil suits or actions in the Supreme Court to appeal to" Her Majesty in Council against the judgments and orders of the Supreme Court. The respondent contended that an appeal

to the Supreme Court under the Indian and Pakistani Residents (Citizenship) Act was not a "civil suit or action."

Held: (i) the respondent's statement of temporary residence on the B forms was not sufficient ground for refusing his application for citizenship when no other action of the respondent indicated that his residence in Ceylon was temporary and his conduct throughout pointed strongly to an intention to settle permanently there.

(ii) the Supreme Court had power to give the respondent leave to appeal to the Board since the words "civil suit or action" in s. 3 of the Appeals Ordinance comprehended the appellate proceedings in the Supreme Court.

Straits Settlements Comr. of Stamps v. Oei Tjong Swan ([1933] A.C. 378) followed.

Per CURIAM: every application to a court for relief or remedy through the exercise of the court's power or authority, or otherwise to invite its interference, is an action within the phrase "civil . . . action" in the Appeals Ordinance (see p. 488, letters C and D, post).

Appeal dismissed.

[As to the acquisition of the status of citizenship of Commonwealth countries, see 1 HALSBURY'S LAWS (3rd Edn.) 533, para. 1028, and p. 551, para. 1052.]

As to the weight to be attached to certain evidence in relation to change of domicile, see 7 HALSBURY'S LAWS (3rd Edn.) 19, para. 35.]

Cases referred to:

(1) *Winans v. A.-G.*, [1904] A.C. 287; 73 L.J.K.B. 613; 90 L.T. 721; 11 Digest (Repl.) 329, 41.

(2) *Ross v. Ellison (or Ross)*, [1930] A.C. 1; 96 L.J.P.C. 163; 141 L.T. 666; Digest Supp.

(3) *Thomas v. Comr. for Registration of Indian and Pakistani Residents*, (1953), 55 N.L.R. 40.

(4) *Straits Settlements Comr. of Stamps v. Oei Tjong Swan*, [1933] A.C. 378; 102 L.J.P.C. 90; 149 L.T. 145; Digest Supp.

(5) *Silverline Bus Co., Ltd. v. Kandy Omnibus Co., Ltd.*, (1956), 58 N.L.R. 193.

Appeal.

Appeal by Herbert Ernest Tennekoon, Commissioner for Registration of Indian and Pakistani Residents in Colombo, from an order of the Supreme Court of Ceylon (GRATIAEN and SANSONI, JJ.), dated Feb. 18, 1955, allowing an appeal by the respondent, Puthupatti Kitnan Duraisamy, under the Indian and Pakistani Residents (Citizenship) Act (Ceylon) (No. 3 of 1949), s. 15, against an order made on Jan. 25, 1954, by Mr. Adhihetty, one of the Deputy Commissioners for the Registration of Indian and Pakistani Residents, under s. 14 (7) (b) of the Act of 1949, refusing the respondent's application, made on Mar. 29, 1951, under s. 4 (1) of the Act for the registration of himself, his wife and his four children as citizens of Ceylon. The following facts are taken from the judgment of the Board. Before counsel for the appellant opened the appeal, counsel for the respondent took a preliminary objection to the jurisdiction of the Board, on the ground that the Supreme Court had no power to give leave to appeal to Her Majesty in Council in this case. The main question in the appeal was whether the deputy commissioner was justified in holding that the respondent had failed to prove that he was "permanently settled in Ceylon", within the meaning of s. 22 of the Indian and Pakistani Residents (Citizenship) Act (Ceylon) (No. 3 of 1949) (hereinafter called "the Act") (as amended by s. 4 of the Indian and Pakistani Residents (Citizenship) (Amendment) Act (Ceylon) (No. 37 of 1950)). The Act came into operation on Aug. 5, 1949. It made provision for granting the status of a citizen of Ceylon to Indian and Pakistani residents in Ceylon who were possessed of a special residential qualification, on the conditions and in the manner therein prescribed. The residential qualification was defined in s. 3 as consisting of "uninterrupted residence in Ceylon" immediately prior

- A to Jan. 1, 1946, for a period of not less than ten years (in the case of a single person) or seven years (in the case of a married person), combined with "uninterrupted residence in Ceylon" from Jan. 1, 1946, until the date of the application for registration. Continuity of residence was to be deemed to be uninterrupted by occasional absences from Ceylon not exceeding twelve months in duration on any one occasion. Section 4 of the Act provided that any Indian or Pakistani resident possessed of this residential qualification "may, irrespective of age or sex, exercise the privilege of procuring registration as a citizen of Ceylon for himself or herself, and shall be entitled to make application therefor" in the manner prescribed by the Act. The section further permitted the additional registration of wives and of dependent minor children ordinarily resident in Ceylon and, in certain defined circumstances, extended the privilege of procuring registration to widows and orphaned minor children of Indian or Pakistani residents.

Section 6 of the Act (as amended by s. 3 of the Act, No. 37 of 1950) provided, so far as is material, as follows:

- D "It shall be a condition for allowing any application for registration under this Act that the applicant shall have—(1) first proved that the applicant is an Indian or Pakistani resident and as such entitled by virtue of s. 3 and s. 4 to exercise the privilege of procuring such registration . . . and (2) in addition, except in the case of an applicant who is a minor orphan under fourteen years of age, produced sufficient evidence (whether as part of the application or at any subsequent inquiry ordered under this Act) to satisfy the commissioner that the following requirements are fulfilled in the case of the applicant, namely— . . . (ii) where the applicant is a male married person (not being a married person referred to in para. (a) of s. 3 (2)), that his wife has been ordinarily resident in Ceylon, and in addition, that each minor child dependent on him was ordinarily resident in Ceylon while being so dependent; . . ."
- F Section 22 of the Act (as amended by s. 4 of the Act, No. 37 of 1950) defines an "Indian or Pakistani resident" as

- G "a person—(a) whose origin was in any territory which, immediately prior to the passing of the Indian Independence Act, 1947, of the Parliament of the United Kingdom, formed part of British India or any Indian State, and (b) who has emigrated therefrom and permanently settled in Ceylon, and includes—(i) a descendant of any such person; and (ii) any person permanently settled in Ceylon, who is a descendant of a person whose origin was in any territory referred to in the preceding para. (a);"

- H The Act made provision for the appointment of an officer to be known as the Commissioner for the Registration of Indian and Pakistani Residents, of Deputy Commissioners and of investigating officers. Applications for registration were to be addressed to the commissioner or a deputy commissioner, and were to be in a prescribed form containing all relevant particulars and supported by affidavit. Certified copies of documents might also be submitted. Each application was to be referred to an investigating officer for investigation and report, and the commissioner (or deputy commissioner) was to take such report into consideration in dealing with the application. Where he was of opinion that there was a prima facie case for allowing the application, he had to give public notice that, in the absence of any written objection received by him within a month, an order allowing the application would be made, and, in the absence of any such objection, the application was to be allowed. If any objection was received, an inquiry into the nature of the objection was to be ordered.

I Where the commissioner (or deputy commissioner) was of opinion that a prima facie case had not been established, he had to serve on the applicant a

notice setting out the grounds on which the application would be refused and giving the applicant an opportunity within three months to show cause to the contrary. If no cause was shown, an order refusing the application was made. If cause was shown, an inquiry was to be ordered, unless the commissioner (or deputy commissioner) took the steps he was authorised to take when there was a *prima facie* case for allowing an application (s. 9 (3)). Such inquiry was to be conducted by the commissioner or a deputy commissioner, who was to have all the powers of a District Court to summon witnesses, compel the production of documents and administer oaths, but the proceedings were to be as far as possible "free from the formalities and technicalities of the rules of procedure and evidence applicable to a court of law", and might be conducted "in any manner, not inconsistent with the principles of natural justice, which to him [the commissioner or deputy commissioner] may seem best adapted to elicit proof concerning the matters that are investigated". At the close of such an inquiry, the commissioner (or deputy commissioner) had either to take the steps he was authorised to take whenever there was a *prima facie* case for allowing an application, or to make an order refusing the application. Section 15 of the Act provided that an appeal against an order refusing or allowing an application was to lie to the Supreme Court.

The respondent applied, on Mar. 29, 1951, to be registered under the Act as a citizen of Ceylon together with his family, stating in his application that he was a married man, an Indian or Pakistani resident, had been continuously resident in Ceylon during the period of seven years commencing on Jan. 1, 1939, and ending Dec. 31, 1945, and from Jan. 1, 1946, to the date of the application, and making a declaration in the terms of s. 6 (2) (iii) and (iv) of the Act. In his supporting affidavit, he deposed that he had been born in India on July 1, 1912, and had been married in April, 1932, and that he was employed as head clerk at Glentilt Estate, Maskeliya, having also a share of Rs. 2,000 in boutique No. 13, Main Street, Maskeliya. In his covering letter, he stated that he came to Ceylon in March, 1931, went back to India for his marriage in April, 1932, and returned to Ceylon with his wife in June, 1934, "from which time I am continually residing in Ceylon with my wife and children. My four children are all born in Ceylon. During the above period of our stay in Ceylon, I had been to India with my family to see my aged parents and relations on four occasions and stayed in India not more than fifteen days during each trip, and we did not visit India during 1942-49". The application was supported by a letter from one M. G. E. de Silva, a Justice of the Peace of Maskeliya, who wrote that, from the year 1934, the respondent and his family had "been continually resident in Ceylon with the exception of short leaves which amounted to not more than one month on each occasion." In the course of the investigation, the respondent produced to the investigating officer a certificate dated Aug. 18, 1951, from the Superintendent of Brunswick Group, Maskeliya, where he had been employed from September, 1934, to September, 1944, stating that

"according to [the respondent's] statement, verified by the estate records, he and his family had been in continuous residence on this estate, except for short visits to India for about fifteen days once in two years."

On Jan. 28, 1952, the respondent answered a questionnaire stating that the only visit he, his wife and minor children had paid to India or Pakistan since Jan. 1, 1936-Jan. 1, 1939, was a visit to India in April, 1942, for one month to see his mother, and he further declared that he had remitted sums of Rs. 70 in May, June and July, 1951, to India for his mother. He subsequently stated, in answer to an inquiry from the office of the Commissioner for the Registration of Indian and Pakistani Residents, that these remittances were made under the estate group scheme on special permit obtained from the Exchange Controller, Colombo, and that he had declared himself on the appropriate forms of applica-

A tion for this purpose, known as "B" forms, to be temporarily resident in Ceylon.

On Sept. 9, 1952, R. T. Ratnatunga, a Deputy Commissioner for the Registration of Indian and Pakistani Residents, gave the respondent notice that he had decided to refuse his application for registration unless he showed cause to the contrary within a period of three months. The grounds for such refusal were specified as follows:

B "You have failed to prove that you had permanently settled in Ceylon; the contrary is indicated by the fact that, in seeking to remit money abroad, you declared yourself to be temporarily resident in Ceylon."

The respondent replied on Sept. 26, 1952, stating the purpose of the remittances to be for the maintenance of his mother and two invalid sisters, and requesting

C a reconsideration of his case. The deputy commissioner acknowledged this letter on Oct. 9, 1952, and stated that an inquiry would be held under s. 9 (3) of the Act. At the inquiry, which was held on Jan. 25, 1954, before V. D. Adihetty, a Deputy Commissioner, the respondent gave evidence substantially confirming his personal history and circumstances as stated in his application. With regard to his visits to India, he said that these were not correctly stated
D in the superintendent's certificate dated Aug. 18, 1951.

"The actual visits I paid to India during this period are in June, 1939, May, 1942, and September, 1949. From the time I came to Ceylon in 1939, I have paid six visits to India up to date."

As to the remittances to India, his evidence was as follows:

E "My mother and sister are dependent on me. From 1935 onwards I have been supporting my mother and sister. Before the Exchange
F Control I used to send Rs. 25 per month for the maintenance of my mother and sister. I applied to the controller for a permit in December, 1949. The controller sent me a general permit to the superintendent of the estate, and informed me that I had to remit money through the estate group
G scheme. Under this permit I sent money to India through the estate group scheme from 1950 March about Rs. 50 a month. I had a renewal permit from Apr. 7, 1951, authorising me to send Rs. 70 a month. Under this permit I sent three sums of Rs. 70 a month in May, 1951, June, 1951, and in July, 1951. I signed 'B' forms under the estate group scheme for the various sums I had remitted to India since 1950 through the estate group
H scheme, and for each remittance I perfected a 'B' form wherein I made a declaration that I was temporarily resident in Ceylon. I ceased sending money from July, 1951, when I came to know definitely that remitting money will affect my citizenship rights through the estate group scheme. It is a fact that I declared myself temporarily resident in Ceylon for the purpose of remitting money to India."

At the end of the inquiry, the deputy commissioner made an order refusing the application, and the respondent appealed to the Supreme Court of Ceylon. The appeal was first argued before FERNANDO, A.J., and that learned judge, on Aug. 6, 1954, reserved the case for the decision of two or more judges as the
I Chief Justice should determine. On Feb. 7 and 8, 1955, the appeal was heard by a bench consisting of GRATIAEN, J., and SANSONI, J. On Feb. 18, 1955, the court delivered judgment allowing the appeal with costs and directing the commissioner to take the appropriate steps under the Act on the basis that a prima facie case for registration had been established.

Sir Frank Soskice, Q.C., and *M. P. Solomon* for the appellant.

Walter Jayawardena and *Sirimevan Amerasinge* (both of the Ceylon Bar) for the respondent.

LORD MORTON OF HENRYTON: It is plain, from the notice of Sept. 9, 1952*, already quoted, and from the terms of the order of Jan. 25, 1954†, that the deputy commissioner based his refusal of the application entirely on his view that the applicant had failed to prove that he had permanently settled in Ceylon. In their Lordships' view, the approach of the deputy commissioner to the determination of this question was wrong in two important respects. First, he said in the course of his order:

"[Respondent's] domicile of origin is clearly India and there is a presumption that this domicile continues, unless the [respondent] has adopted a Ceylon domicile of choice, that is, in other words, he had permanently settled in Ceylon. The burden of proof that he had changed his Indian domicile, or, in other words, that he had permanently settled in Ceylon as required by s. 6 read with s. 22 of the Act, lies on him."

Their Lordships do not regard the question of proving a "change of domicile" as coming into the matter at all. The burden of proving a change of domicile is, indeed, a heavy one, as is illustrated by *Winans v. A.-G.* (1) ([1904] A.C. 287) and many other cases. The Act has made no reference to domicile, but has placed on the applicant the burden of proving that, at the time of his application, he had an intention to settle permanently in Ceylon. They think it likely that the legislature deliberately refrained from any reference to change of domicile, in order to free the commissioner or deputy commissioner (who may not be a lawyer) from the responsibility of investigating a question which, as the judges of the Supreme Court observed "in most cases would present formidable obstacles even to an experienced judge trained in the law".

Secondly, the deputy commissioner concluded his order by saying:

"the [respondent] has admitted that he has made several remittances to India from March, 1950, to July, 1951, through the estate group scheme by perfecting 'B' forms wherein he declared that he was temporarily resident in Ceylon. The [respondent] is an educated man and he knew the implications of declaring that he was temporarily resident in Ceylon. There is clear evidence that the presumption referred to above has not been rebutted. On his own admission he was temporarily resident in Ceylon at the date of his application. The application is therefore refused."

In *Ross v. Ellison (or Ross)* (2) ([1930] A.C. 1 at p. 6), LORD BUCKMASTER observed:

"Declarations as to intention are rightly regarded in determining the question of a change of domicile, but they must be examined by considering the person to whom, the purposes for which and the circumstances in which they are made and they must further be fortified and carried into effect by conduct and action consistent with the declared expression."

In the present case the purpose for which the respondent signed form "B" is beyond doubt. His mother and crippled sisters were resident in India and dependent on him. He found that, under the estate group scheme, there would be difficulties in sending remittances to these relatives if he stated in form "B" that he was permanently resident in Ceylon. Therefore to quote his evidence:

"for each remittance I perfected a 'B' form wherein I made a declaration that I was temporarily resident in Ceylon... it is a fact that I declared myself temporarily resident in Ceylon for the purpose of remitting money to India."

In their Lordships' view, documents signed in these circumstances and for this purpose were of little evidential value for the purpose of determining the

* See p. 483, letters A and B, ante.

† I.e., the refusal of the application.

- A question before the deputy commissioner, especially as they were not "fortified and carried into effect by conduct and action consistent with the declared expression". Apart from the signature of the "B" forms, no action of the respondent indicated that his residence in Ceylon was of a temporary nature. On the contrary, his conduct throughout pointed strongly to an intention to settle permanently in that country. In these circumstances, the deputy commissioner was not justified in treating the statement made on the "B" forms as a sufficient ground for refusing the application. Their Lordships agree with the realistic view taken in similar circumstances by NAGALINGAM, A.C.J., in *Thomas v. Comr. for Registration of Indian and Pakistani Residents* (3) ((1953), 55 N.L.R. 40).

- For these reasons, the decision of the deputy commissioner cannot stand, and the order made by the Supreme Court should be upheld.

Their Lordships now turn to the preliminary objection to their jurisdiction, already mentioned. This objection was based on the Appeals (Privy Council) Ordinance of Ceylon (c. 85, Vol. II, Legislative Enactments of Ceylon, p. 420), hereafter referred to as "the Appeals Ordinance", the relevant parts whereof are the following:

- D "3. From and after the commencement of this Ordinance the right of parties to civil suits or actions in the Supreme Court to appeal to His Majesty in Council against the judgments and orders of such court shall be subject to and regulated by—(a) the limitations and conditions prescribed by the rules set out in the schedule, or by such other rules as may from time to time be made by His Majesty in Council; and (b) such general rules and orders of court as the judges of the Supreme Court may from time to time make in exercise of any power conferred upon them by any enactment for the time being in force",

and

- F "Rule 1. Subject to the provisions of these rules, an appeal shall lie—(a) as of right, from any final judgment of the court, where the matter in dispute on the appeal amounts to or is of the value of five thousand rupees or upwards, or where the appeal involves directly or indirectly some claim or question to or respecting property or some civil right amounting to or of the value of five thousand rupees or upwards; and (b) at the discretion of the court, from any other judgment of the court, whether final or interlocutory, if, in the opinion of the court, the question involved in the appeal is one which, by reason of its great general or public importance or otherwise, ought to be submitted to His Majesty in Council for decision."

- The Supreme Court granted leave to appeal to the Privy Council on the ground that its decision involved a question of "great general or public importance" within the meaning of r. 1 (b). It was conceded before the Supreme Court by the respondent that a question of "great general or public importance" was involved, but it was argued that no appeal lay from its judgment, on the ground that an appeal to the Supreme Court under s. 15 of the Indian and Pakistani Residents (Citizenship) Act was not a "civil suit or action in the Supreme Court" within the meaning of s. 3 of the Appeals Ordinance. The Supreme Court did not accept this argument. The learned Chief Justice referred to two conflicting lines of decision and allowed the application with some hesitation, observing that

"the question that arises for decision is admittedly one which by reason of its great importance should be submitted to Her Majesty in Council for decision."

GRATIAEN, J., said that

"it may be conceded that the proceedings [before the deputy commissioner] did not at that stage constitute a 'civil suit or action' [but] had no

hesitation in reaching the conclusion that the parties to the appeal were parties to a 'civil suit or action in the Supreme Court'." A

It was argued before their Lordships that the learned judges of the Supreme Court were wrong, that they had not power to grant leave to appeal, and that, consequently, their Lordships had no jurisdiction to hear the appeal, unless and until an application to Her Majesty for special leave to appeal was successfully made. It is thus necessary to examine whether the proceedings before the Supreme Court were a "civil suit or action" within the meaning of s. 3. There has been a conflict of authority in Ceylon on the point. B

The words "civil suit or action" first occur in s. 52 of the Charter of 1833, which conferred on the subject a right to appeal to the Sovereign. It is in the following terms: C

"52. And We do further grant, ordain, direct, and appoint that it shall be lawful for any person or persons being a party or parties to any civil suit or action depending in the said Supreme Court to appeal to Us, Our heirs, and successors in Our or Their Privy Council against any final judgment, decree, or sentence, or against any rule or order made in any such civil suit or action, and having the effect of a final or definitive sentence, and which appeals shall be made subject to the rules and limitations following." D

There follow a number of rules and limitations designed among other things to exclude cases considered of insufficient importance to be the subject-matter of an appeal to the Privy Council. It is to be observed that the section enabled a person, subject to these rules and limitations, to appeal as of right to the Sovereign. Section 53, which their Lordships think unnecessary to set out here, preserved intact the right of the Sovereign to admit appeals from the subject even where the subject could not appeal as of right. E

It was argued before the Supreme Court and their Lordships that a civil suit or action means a proceeding in which one party sues for, or claims, something from another. No doubt the words are properly applicable to such cases, and they are the cases to which the words are most frequently applied. But it is necessary to inquire whether the application of the words as they appear in s. 52 of the Charter must be limited to such cases. Their Lordships would make the general observation that s. 52 of the Charter was granting to a subject labouring under a sense of grievance the fundamental right of appealing to the Sovereign and that, though it would be natural to exclude from the range of permissible appeals cases of insufficient importance, it would be difficult to imagine an intention to exclude cases differentiated by reference to the form of the proceedings, regardless of the gravity of the result occasioned by them. And, as s. 3 of the Appeals Ordinance sets out the manner in which "the right of parties to civil suits or actions in the Supreme Court to appeal to His Majesty in Council" is to be regulated, their Lordships do not doubt that the words "civil suits or actions" must be given the meaning which they bore in the Charter of 1833. F G H

The meaning of the words "civil cause" was considered by the Board in *Straits Settlements Comr. of Stamps v. Oei Tjong Swan* (4) ([1933] A.C. 378). The Commissioner of Stamps, under an ordinance of the Straits Settlements, had certified the amount of duty payable on the estate of a deceased person. The executor of the deceased appealed to the Supreme Court against the commissioner's decision and succeeded. An appeal by the commissioner to the Court of Appeal was dismissed. The commissioner applied to the Court of Appeal for leave to appeal to His Majesty in Council, but leave was refused on the ground that it was not competent to that court to grant leave. Their Lordships' Board held that this last decision was wrong, and that, under the law of the Straits Settlements, it was competent for the Court of Appeal to grant leave to I

A appeal. In arriving at a decision, the Colonial Charter of 1855 came under their Lordships' consideration. Section 58 is to the following effect:

B “ 58. And we do hereby further ordain, that if the East-India Company or any person or persons, shall find him, her, or themselves aggrieved by any judgment, decree, order, or rule of the Court of Judicature of Prince of Wales' Island, Singapore, and Malacca, in any case whatsoever, it shall be lawful for him, her, or them to appeal to us, our heirs, or successors, in our Privy Council, in such manner, and under such restrictions and qualifications, as are hereinafter mentioned; that is to say, in all judgments, decrees, or determinations made by the said Court of Judicature in any civil cause, the party or parties against whom or to whose immediate prejudice the said judgment, decree, or determination shall be or tend, may by his or their petition, to be preferred for that purpose to the said court, pray leave to appeal to us, our heirs or successors, in our Privy Council, stating in such petition the cause or causes of appeal ”;

C then follow some provisions as to stay of execution and security for costs; and finally, on such provisions being satisfied, the “ party or parties so thinking him, her or themselves to be aggrieved shall be at liberty to prefer and prosecute ” the appeal. LORD MACMILLAN, delivering the judgment of the Board, said ([1933] A.C. at p. 392):

E “ It is true that the ordinance* in s. 80 which deals with appeals from decisions of the commissioner does not confer a right of appeal to His Majesty in Council. But the Colonial Charter of 1855 provides for leave to appeal being granted by the court of the colony from ‘ all judgments, decrees or determinations made by the said Court of Judicature in any civil cause ’. And s. 1154 of the Civil Procedure Code, provides that subject to certain conditions ‘ an appeal shall lie from the Court of Appeal to His Majesty in Council (a) from any final judgment or order ’. Wider language it would be difficult to imagine. Their Lordships do not think it necessary to repeat the reasons adduced by the Chief Justice against excluding the decision of the Appeal Court in the present instance from the scope of these provisions and content themselves with expressing their agreement. The decision against which the commissioner sought to obtain leave to appeal was in their Lordships' view not a mere award of an administrative character but a judgment or determination made by the court in a civil cause within the meaning of the Charter and a final judgment or order within the meaning of s. 1154 of the Civil Procedure Code, and as such the court could competently have granted leave to appeal from it to His Majesty in Council.”

H Their Lordships interpret the words “ wider language it would be difficult to imagine ” as applying both to the Charter of 1855 and to s. 1154 of the Civil Procedure Code.

I The Board was then considering the words “ civil cause ”, but their Lordships see no good ground for drawing any distinction between these words and “ civil action ”. They agree with the observations just quoted, and they see no good ground for distinguishing the present case from the case just cited. They propose to follow that case, although the decision was arrived at without the assistance of argument by counsel, and to hold that the Supreme Court had power to grant leave to appeal in the present case. The preliminary objection, therefore, fails.

Reference was made in the course of the argument to the definition of the word “ action ” in the Courts Ordinance (c. 6, Legislative Enactments of Ceylon, Vol. 1, p. 25), and in the Civil Procedure Code (c. 86, Legislative Enactments of

* Ordinance No. 13 (Stamps) (Straits Settlements) (Revised Laws, 1926).

Ceylon, Vol. II, p. 428), both of which are earlier in date than the Appeals Ordinance. In each of these earlier ordinances, "action" is defined to mean "a proceeding for the prevention or redress of a wrong". It was argued that the order of the deputy commissioner could not be said to be a wrong in the sense that a tort or a breach of contract can be said to be a wrong, as there was nothing illegal in the action of the deputy commissioner. On the other hand it was argued that the word "wrong" in the definition has a wider connotation and would include the consequence of an order made by a commissioner which is wrong, though legally made. It is not necessary for their Lordships to decide the point. The charter was granted long before the two ordinances mentioned were enacted and, as their Lordships have already pointed out, the words "civil suits or actions" in the Privy Council Appeals Ordinance must bear the same meaning as they bore in the charter. In addition to the definition of "action" (contained in s. 5) mentioned above, the Civil Procedure Code contains the following in s. 6:

"Every application to a court for relief or remedy through the exercise of the court's power or authority, or otherwise to invite its interference, constitutes an action."

This is what their Lordships think is the meaning of "action" in the charter and in the Appeals Ordinance though, as will have been seen, they do not found their decision on this section.

After the application for leave to appeal to the Privy Council had been granted in the present case, a bench of five judges (one of whom dissented) in *Silverline Bus Co., Ltd. v. Kandy Omnibus Co., Ltd.* (5) ((1956), 58 N.L.R. 193), after a very full and careful review of two conflicting lines of authority, decided that an application to the Supreme Court for a writ of certiorari was not a "civil suit or action" within the meaning of s. 3 of the Appeals Ordinance. Counsel for the appellant in the present case did not contend that the decision in the *Silverline* case (5) was wrong; the point actually decided is not before their Lordships, and they have heard no argument on it. It follows, however, from the views which they have already expressed that they cannot accept the view of BASNAYAKE, C.J. (*ibid.*, at p. 213), that the words "civil suit or action" in s. 3 of the Appeals Ordinance should be limited to "a proceeding in which one party sues for or claims something from another in regular civil proceedings".

Their Lordships will humbly advise Her Majesty that this appeal should be dismissed. The appellant must pay the respondent's costs of this appeal.

Appeal dismissed.

Solicitors: *T. L. Wilson & Co.* (for the appellant); *Smiles & Co.* (for the respondent).

[Reported by G. A. KIDNER, ESQ., Barrister-at-Law.]

A

LITHERLAND URBAN DISTRICT COUNCIL v.
LIVERPOOL CORPORATION AND ANOTHER.

[CHANCERY DIVISION (Harman, J.), February 28, March 3, 1958.]

B

Local Government—Transport—Travel concessions—Local authority running public services in area of another local authority—Contribution to cost—Basis of calculation—Public Service Vehicles (Travel Concessions) Act, 1955 (3 & 4 Eliz. 2 c. 26), s. 1 (4).

C

Liverpool Corporation ran omnibus services both within the City of Liverpool and in districts outside the city, including the L. urban district. The corporation permitted elderly people to use its vehicles without payment, and desired that the L. Urban District Council should contribute to the cost incurred in granting this travel concession in the L. urban district in accordance with the Public Service Vehicles (Travel Concessions) Act, 1955, s. 1 (4). The authority of the L. Urban District Council under s. 1 (4) to contribute was limited by that provision to "any cost incurred by" Liverpool Corporation. On the question how the cost was to be calculated,

D

Held: the appropriate method was to calculate the share of the total cost of the transport undertaking attributable to each "passenger journey", by dividing the total expenditure of the undertaking in a given year by the total number of journeys made by both fare-paying passengers and those who, by the concession, travelled free; on the basis of the cost of a passenger journey the total cost attributable to passengers travelling free by concession should then be ascertained.

E

[For s. 1 of the Public Service Vehicles (Travel Concessions) Act, 1955, see 35 HALSBURY'S STATUTES (2nd Edn.) 818.]

Cases referred to:

F

(1) *Prescott v. Birmingham Corpn.*, [1954] 3 All E.R. 299; *affd.* C.A., [1954] 3 All E.R. 698; [1955] Ch. 210; 119 J.P. 48; 3rd Digest Supp.

(2) *Ferrier v. Scottish Milk Marketing Board*, [1936] 2 All E.R. 1131; [1937] A.C. 126; 1936 S.C. (H.L.) 39; 105 L.J.P.C. 135; 155 L.T. 425; Digest Supp.

Adjourned Summons.

G

The plaintiff, the Litherland Urban District Council, applied to the court by originating summons for the determination of the following questions (among others) and certain relief under R.S.C., Ord. 54A, r. 1A: (i) Whether on the true construction of the Public Service Vehicles (Travel Concessions) Act, 1955, and in particular s. 1 (4), the extent to which the plaintiff council might contribute to any cost incurred by the defendant corporation in granting travel concessions to qualified persons in connexion with the public service vehicles undertaking

H

operated by the defendant corporation in (among others) the local government area of the plaintiff council was to be ascertained (a) by reference to the amount of any expenditure incurred by the defendant corporation in respect of its undertaking which would not have been incurred if the concession had not been granted, or (b) by reference to the amount of the revenue lost by the defendant corporation in respect of its undertaking in consequence of the granting of such concessions, or (c) in some other, and (if so) what way.

I

Michael Rowe, Q.C., and *Denys B. Buckley* for the plaintiff, Litherland Urban District Council.

Percy Lamb, Q.C., and *E. W. Griffith* for the first defendant, Liverpool Corporation.

Harold Lightman, Q.C., and *J. V. Nesbitt* for the second defendant, a ratepayer of Litherland Urban District Council.

HARMAN, J.: This originating summons was taken out under R.S.C., A
Ord. 54A, r. 1A, for the purpose of construing the Public Service Vehicles (Travel
Concessions) Act, 1955, and the body which seeks the guidance of the court
on the construction of the statute is the Litherland Urban District Council.
Generally speaking, as the council comes to the court to ask whether a certain
expenditure is or is not legal on the true construction of the Act, the proper
defendant, one would think, would be a ratepayer within the area, and, indeed, B
a ratepayer is a respondent. There is added as defendant the Liverpool Corpora-
tion. That arises out of the curious circumstance that the payment to be made
is one that is being asked for by the Liverpool Corporation, though admittedly
the corporation has no power to enforce the payment. It is in fact a permissive
power on the part of the council which it desires to exercise in a proper manner
which will be unquestionable by any of its ratepayers, but which, as the matter C
stands, has also to be acceptable to the corporation. What the position may be
between the council and the corporation with regard to the subject of payment
is not here to be decided, and I say no more about it.

In and before 1954, a number of local authorities were running bus or trolley
bus or tram services, and it had become a comparatively common feature of
those services that certain concessionary fares were allowed. I think all trans- D
port undertakings have always allowed children to travel at half price. Most
of them, when obtaining powers to run such a service, have had enjoined on
them a duty to grant workmen's tickets at certain hours of the morning. But
the concessions which were brought into issue before this court went beyond
that and were concessions to persons disabled, ex-service men and others, and,
secondly, to what VAISEY, J., in *Prescott v. Birmingham Corpn.* (1) ([1954] 3 All E
E.R. 299 at p. 300) called "old people"—moreover it was a certain class of
old people—those entitled to contributory pensions.

In the case of the City of Birmingham, those concessions were challenged by
a ratepayer and brought to issue in the court in *Prescott v. Birmingham Corpn.* (1).
Both the learned judge and the Court of Appeal (*ibid.*, at p. 698) in that case
came to the conclusion that the scheme which the Birmingham Corporation F
was operating was ultra vires and illegal. Having regard to the widespread
use of schemes of this sort, this decision created a very awkward position in
municipal finance, and, in order to clear the matter up, Parliament thought right
to enact the statute which I have already mentioned.

The statute gives a kind of indemnity for past illegal acts, but it does more than
that, for it provides, by s. 1 (1), that any local authority operating a public
service vehicle undertaking may "make arrangements" for the granting of
concessionary fares. The permission given was not unlimited. It was only
to be given to persons qualified under s. 1 (2), and it was only to legalise what
were called "established travel concessions", i.e., no new ones could be invented:
they must be proved in the way the Act provides to have been in operation in
1954 not later than Nov. 30. "Qualified persons" are defined as including H
men over the age of sixty-five years and women over the age of sixty years.

Liverpool Corporation had been one of those who had been granting certain
concessions, and, therefore, was within the net cast by *Prescott v. Birmingham
Corpn.* (1). It took the proper steps to have its established travel concessions
decided by the traffic authority in the way the Act provides, and continued to
grant those concessions. But there is a complication. The corporation runs
buses not only within the area of the City of Liverpool but in several areas
outside the city, for instance, Bootle and in the Litherland urban district.
However the concessions should be described in terms of money, the figure of
loss or the cost of them, as the case may be, falls on the ratepayers of Liverpool,
and does not fall on the ratepayers of the district outside the city which has en-
joyed the facilities. It was therefore thought right by Parliament, when legalising
these concessionary fares to legalise also contributions to be made by authorities I

A outside the operating area as a matter of fairness and equity, and the present question centres entirely round that power.

Section 1 (4) provides:

B “The council of a county borough or county district in whose area another local authority run public service vehicles may contribute to any cost incurred by that other local authority in the granting to qualified persons of travel concessions in that area.”

C Thus is made legal that which otherwise would not be within the power of the council, i.e., to pay a proper contribution for the facilities granted to those paying rates or those resident in its area. I am told that in fact the service in the Litherland area is provided in part by Liverpool Corporation and in part by a state-owned enterprise, and the concessions are not offered by the latter: so that the residents of Litherland do not get all the facilities which they might get if they lived within the City of Liverpool. Nevertheless, it is a valuable thing for the old people to be able to get into the centre of the city without paying a fare, and it seems appropriate that the council should bear its proportion of the expenditure as the burden arising out of that advantage.

D The question is: what is the meaning of the words “any cost incurred by that other local authority”? The other local authority in this case is Liverpool Corporation. The travel concessions granted are in the Litherland area, and what is questioned by the council is what the cost of that is to the corporation.

E It seems clear enough that, if a proportion of passengers is carried free, it must cost something. If all passengers were carried free, clearly the whole expense of the transport undertaking would be borne out of the rates. If a proportion is carried free, a portion of the expense has to be borne out of the rates, and that may be said to be what it costs to grant the concession.

F In the negotiations which have preceded this action, the corporation argued that it lost this or that amount of revenue by granting these concessions and that was the cost. To that the retort was that loss of revenue was not cost: it was not an expense: that which one does not receive is not what one pays. That seems to me to be quite a logical answer to the way in which the corporation preferred to put its case: but it also put it in another way. It suggested that the matter be regarded from the point of view of the expense of carrying passengers in the aggregate: so, for instance, if all the passengers carried in a given period are calculated on one side, and the expense of the undertaking for the same period is calculated on the other, the average amount which it costs to carry a passenger can be arrived at, and if a number of those passengers are carried for nothing, it is not, says the corporation, incorrect to say that the cost of so doing may be equated to the aggregate average cost of carrying that number of passengers. In other words, the cost of granting travel concessions in the Litherland area to the qualified persons in that area is the expense of so doing having regard to the fact that it costs you X pence to carry each passenger you carry.

I There are answers to that made by the council, viz., that this postulates a number of totally assumed figures. For one thing, it says, it is not true to say that a person in Litherland will take the same average number of journeys, or the same average length of journeys, as a person living in the middle of the city. Still more is it uncertain whether the privileged class would take, if they were not of that class, the same number of journeys which they take when they get them gratis, and that is an incalculable figure. Thirdly, the gross expenses of running the whole undertaking are not properly attributable to the privileged class in the urban district of Litherland. Therefore, it says, the figure so reached is not cost at all, but a mere estimate, and a speculative one at that.

Another objection is made by the council to the way in which the corporation wishes to cost the concessionary travel. It says that assuming that the bus could be filled on any given journey, the fact that one of the persons travelling

on the bus is a person who travels on a pass and not on a ticket does not make any difference to the cost of the journey to the undertakers. Only if it could be proved that, if that seat were not so occupied, it could be filled by a paying passenger, could it be postulated that a cost had been incurred. The council says that before it can be authorised under s. 1 (4) to pay, it must be shown that the corporation has spent X pounds on extra buses, Y pounds on extra conductors and Z pounds on extra petrol and oil, and so forth, and that these things are the cost to the corporation of the granting of travel concessions to the qualified persons of Litherland and no other. A
B

Between those two views, I have to decide. It is pointed out to me that the words "cost . . . of granting the concessions" are to be found in sub-s. (5) and again in sub-s. (6), and that in sub-s. (8) the word "expenditure" seems to have taken the place of "cost". That must mean net expenditure, because in a sense running the bus service if it broke exactly even would cost the rates nothing. C

I do not think "cost" here is expenditure in that sense. I think "cost" must mean gross cost and not the outgoings less the expenditure. Moreover, it is urged on me by counsel for the council that in considering what "cost" means I ought to look at certain authorities, and notably *Ferrier v. Scottish Milk Marketing Board* (2) ([1936] 2 All E.R. 1131), where their Lordships had to deal with a similar expression. That was a case about the production of milk. The objector said that certain deductions made by the board did not represent the cost of operating the scheme, and their Lordships' House held him to be right. LORD ATKIN said (*ibid.*, at p. 1132): D

" 'Costs of operating the scheme' in ordinary language must mean expenditure or liability which if not recouped would fall upon the board; they cannot include in my opinion sums which represent no expenditure or liability of any one but which are levied upon all milk producers . . . " E

LORD MACMILLAN said (*ibid.*, at p. 1137):

"The critical words in the present case—'the costs of operating the scheme'—are in my opinion quite inapt to cover the compensatory levy which the appellant challenges. That the respondents obtain a lower price for milk sold for manufacturing purposes than is obtained for milk sold in the liquid market is doubtless the case. But this is an incident of the scheme, not a 'cost' of operating it. They have not incurred any 'cost' by selling milk in the manufacturing market. There has been no disbursement on their part." F
G

Those observations might be most relevant if I were eventually to deal with these matters on the primary view put forward on behalf of the corporation, viz., that "cost" here means that which is not received having regard to the concessions made. There is a formal sense of the word "cost" which involves no expenditure: it is the cost of something done. If something is done free of charge, it will have cost the person doing it what might have been paid for it. But I do not think that "cost" here can mean that. I think that it must mean expenditure. I do not, however, see that it is not a legitimate way of finding the cost of operating the scheme to find what it costs to carry any particular passenger as a matter of average in the area of this undertaking. Having done so, it may be said that, if you carry passengers free, each one of them costs the operator that much. In the end it may turn out that, whichever view is taken, it does not make very much difference, but I think that that is the way in which it should be done if it is legitimate to do it at all. H
I

In my judgment, Parliament intended that cost should be ascertained in some such way. After all it was the position produced by *Prescott v. Birmingham Corpn.* (1) which Parliament was studying. In that case it was said that the cost of operating the scheme was on an estimate some £90,000. How that

- A was arrived at does not appear, but it was clearly not arrived at in the way which the council put forward as their view of the words in the Act. It is quite true that there is an element of speculation which comes into the calculation, and it may be that it is rather rough and ready, particularly having regard to the possibility that those who travel free will travel more because they do not have to pay. Nevertheless, it does not seem to me to be unfair to do it on an average basis. There is no other way in fact of doing it, and with that the council agree. The council says that as no particular item can be put forward as an expense which has been incurred, the council is not in a position to pay anything. In my judgment, that is not the true way of construing this Act of Parliament. I propose to accede to the argument of the corporation, not exactly as they preferred to put it during most of the proceedings, but in accordance with the alternative view
- C put forward in Mr. Ainsworth's affidavit where he says:

"... by dividing the total expenditure of the undertaking for the year by the total number of journeys made by fare paying passengers and pass holders it is possible to calculate the share of the total cost of the undertaking attributable to each passenger journey whether made by a fare paying passenger or pass holder."

- D That is a basis on which the matter might be fairly calculated. I propose to answer in that sense the question posed by the summons.

- E *[And this court doth declare upon the true construction of the Public Service Vehicles (Travel Concessions) Act, 1955, and in particular of s. 1 (4) thereof that the extent to which the plaintiff council may contribute to any cost incurred by the defendant corporation in granting travel concessions to qualified persons in connexion with the public service vehicle undertaking operated by the defendant corporation in (amongst others) the local government area of the plaintiff council ought to be ascertained as equal to a part of the total expenditure incurred in each year by the defendant corporation in operating the said undertaking bearing the same proportion to the whole of such expenditure in that year as the actual or estimated number of journeys travelled in exercise of any such concessions as aforesaid in that year on the said undertaking by persons resident in the local government area of the plaintiff council bears to the actual or estimated number of journeys travelled in that year on the said undertaking by all members of the public.]*
- F

Order accordingly.

- G Solicitors: *Sharpe, Pritchard & Co.*, agents for Clerk to the *Litherland U.D.C.*, Lancaster (for the plaintiff and the second defendant); *Cree, Godfrey & Wood*, agents for *Town clerk*, Liverpool (for the first defendant).

[Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.]

H

PRACTICE DIRECTION.

Court of Appeal—Notice of appeal—Service—Notice served out of time.

- I Where for any reason notice of appeal in any case is not served in due time (e.g., because an application for a certificate under the Legal Aid and Advice Act, 1949, is pending) if the respondents' solicitors by letter accept service out of time, the "proper officer" defined by R.S.C., Ord. 58, r. 5 (5) has authority, on production of the letter accepting such service, to direct the appeal to be set down without requiring a formal application to the court for an extension of time under R.S.C., Ord. 64, r. 7.

By direction of the

June 19, 1958.

MASTER OF THE ROLLS.

A

R. v. EDGAR. R. v. PARR.
R. v. PONTIKA. R. v. ROONEY.

[COURT OF CRIMINAL APPEAL (Lord Goddard, C.J., Hilbery and Donovan, JJ.), April 21, 1958.]

Criminal Law—Depositions—Signing—Some depositions not signed by examining justice—Whether committal for trial invalidated where other signed depositions are sufficient to justify committal on some charges—Magistrates' Courts Rules, 1952 (S.I. 1952 No. 2190), r. 5 (2). B

Evidence before a magistrate sitting as examining justice inquiring into charges of receiving stolen property and other charges against the appellants was taken on three days. On the second day the magistrate did not sign the depositions that were taken, but on the first and third day he did sign the depositions then taken. The appellants were committed for trial. The depositions which had been signed contained evidence that justified committing the appellants for trial on certain charges of receiving (counts 2 and 3) but not on other charges. The counts on which there was not evidence in signed depositions to justify committal were quashed by the trial judge. The appellants were convicted of receiving. They appealed against their convictions on the ground that by r. 5 (2)* of the Magistrates' Courts Rules, 1952, all the depositions must be signed and, as some of the depositions relevant to the counts for receiving had not been signed, the committal for trial was bad. C

Held: the committal on counts 2 and 3 of receiving stolen property was valid because the evidence in the signed depositions justified committal on those counts, and the irregularity in regard to other depositions that were not signed did not invalidate the committal; therefore the convictions would not be set aside. D

Appeal dismissed. E

[As to the taking of depositions and the need for following the statutory procedure strictly, see 10 HALSBURY'S LAWS (3rd Edn.) 361, 362, para. 660; and for cases on the subject, see 14 DIGEST (Repl.) 218, 1813-1815. F

For the Magistrates' Courts Rules, 1952, r. 5, see 13 HALSBURY'S STATUTORY INSTRUMENTS 41.]

Cases referred to:

- (1) *R. v. Philips, R. v. Quayle*, [1938] 3 All E.R. 674; [1939] 1 K.B. 63; 108 L.J.K.B. 7; 159 L.T. 479; 102 J.P. 467; 26 Cr. App. Rep. 200; 14 Digest (Repl.) 218, 1815. G
- (2) *R. v. Parker*, (1870), L.R. 1 C.C.R. 225; 39 L.J.M.C. 60; 21 L.T. 724; 34 J.P. 148; 14 Digest (Repl.) 220, 1829.
- (3) *R. v. Gee, R. v. Bibby, R. v. Dunscombe*, [1936] 2 All E.R. 89; [1936] 2 K.B. 442; 105 L.J.K.B. 739; 155 L.T. 31; 100 J.P. 227; 25 Cr. App. Rep. 198; 14 Digest (Repl.) 218, 1813. H
- (4) *R. v. London Quarter Sessions (Chairman), Ex p. Downes*, [1953] 2 All E.R. 750; [1954] 1 Q.B. 1; 117 J.P. 473; 37 Cr. App. Rep. 148; 3rd Digest Supp.
- (5) *R. v. France*, (1839), 2 Mood. & R. 207; 14 Digest (Repl.) 220, 1821. I

* Rule 5 (1), (2) of the Magistrates' Courts Rules, 1952, which was made under s. 15 of the Justices of the Peace Act, 1949, as extended by s. 122 of the Magistrates' Courts Act, 1952, provides: "(1) A magistrates' court inquiring into an offence as examining justices shall cause the evidence of each witness, including the evidence of the accused, but not including any witness of his merely to his character, to be put into writing; and as soon as may be after the examination of such a witness shall cause his deposition to be read to him in the presence and hearing of the accused, and shall cause the witness to sign the deposition.

"(2) One of the examining justices shall sign the depositions."

A Appeal.

The appellants and two other men were indicted at the Central Criminal Court on an indictment containing four counts. The first count charged all of them, except the appellant Pontika, with breaking and entering certain premises with intent to steal and stealing therein certain property. The second count charged all of them with receiving a quantity of property knowing it to be stolen. The third count charged the appellant Rooney with receiving two pieces of property knowing them to be stolen. The fourth count charged him with receiving certain other property. The case was heard before the examining magistrate on three different days. On the first occasion a police officer gave evidence against the appellants with regard to statements that they had made. On the second occasion several witnesses were examined as to the facts of breaking and entering and receiving, and on the third occasion another police officer gave evidence. The evidence given by the two police officers was concerned with the charges of receiving but not with the charge of breaking and entering. On the second occasion, viz., on Dec. 17, 1957, the examining magistrate did not sign the certificate or jurat* to the depositions through some mishap or oversight; but the certificates or jurats to the depositions taken on the first and third days were signed by the examining magistrate. The depositions taken on the second day included a substantial amount of evidence relative to the charges of receiving. On motion to the trial judge to quash the indictment he held that the evidence given by the police officers on the first and third days did not establish a prima facie case of breaking and entering, but did establish one of receiving on counts two and three. Accordingly he quashed count one which was against all the prisoners except Pontika. Count four, which was against the prisoner Rooney alone, was also quashed. The prisoners were tried and were convicted on the counts of receiving stolen property. They appealed against their convictions.

Miss P. G. Coles (for the appellant Edgar): In the court below the trial judge relied on *R. v. Philips*, *R. v. Quayle* (1) ([1938] 3 All E.R. 674), but in that case the counts upheld were founded on evidence contained in depositions regularly taken, whereas in this case the receiving count against Edgar was founded on evidence contained in depositions some of which were regularly taken and others of which were not regularly taken.

M. D. L. Worsley (for the appellants Parr and Pontika): Each deposition should have been signed by the examining magistrate (Magistrates' Courts Rules, 1952, r. 5 (2)). The signature of the certificate or jurat at the end of depositions by the examining magistrate does not fulfil the requirement that a deposition should be signed by an examining magistrate; *R. v. Parker* (2) ((1870), L.R. 1 C.C.R. 225) was negatived by the Criminal Justice Act, 1925, s. 13 (3). Alternatively, if the signature of the certificate or jurat is sufficient, the certificate or jurat at the end of each hearing must be signed. As the depositions taken on Dec. 17, 1957, were not signed, the committal for receiving was a nullity, because the Magistrates' Courts Act, 1952, s. 7 (1), makes compliance with the Magistrates' Courts Rules, 1952, a condition precedent to valid committal. The principle expressed in *R. v. Gee*, *R. v. Bibby*, *R. v. Dunscombe* (3) ([1936] 2 All E.R. 89) that s. 17 of the Indictable Offences Act, 1948 (now replaced by the Magistrates' Courts Act, 1952, and the Rules of 1952), must be strictly complied with, applies to this case. The trial judge ought not to have looked at the depositions regularly taken to see whether a prima facie case was disclosed by them; see *R. v. London Quarter Sessions (Chairman)*, *Ex p. Downes* (4) ([1953] 2 All E.R. 750). Section 7 (1) of the Magistrates' Courts Act, 1952, requires that the magistrates' court,

* This is the certificate that concludes Form 9 in the schedule to the Magistrates' Courts Forms Rules, 1952 (S.I. 1952 No. 2191). So far as relevant the words are the same as in Form (M) in the schedule to the Indictable Offences Act, 1848, as substituted by the Indictable Offences Rules, 1926 (S.R. & O. 1926 No. 676), rr. 12, 13 (see 5 HALSBURY'S STATUTES (2nd Edn.) 689).

not the judge at the trial, shall be of opinion that there is sufficient evidence to put a prisoner on trial. A

J. W. Harkess (for the appellant Rooney): The depositions taken on Dec. 17, 1957, were not properly taken; see *R. v. France* (5) ((1839), 2 Mood. & R. 207).

J. B. R. Hazan (for the Crown) was not called on. B

LORD GODDARD, C.J., delivered the judgment of the court, in which, after stating the counts on which the appellants had been indicted, he said: The objection that has been taken in this case is of the highest technicality, but there is nothing wrong in that, for counsel are entitled to take every technical objection which they can on behalf of their clients. The Administration of Justice Act, 1933, abolished grand juries and substituted for presentments to grand juries committal for trial by magistrates. Before the Magistrates' Courts Act, 1952, came into operation magistrates, when proceeding to act as examining justices, were governed by the Indictable Offences Act, 1848; since the Act of 1952 came into operation, they are governed by that Act*. Rule 5 (1) of the Magistrates' Courts Rules, 1952†, provides that, when a deposition is taken, it is to be read over to the deponent and signed by him; and, by r. 5 (2), the deposition is to be signed by the examining justice. That is to authenticate the document, so that there is no question about its being the deposition of the witness. C D

[HIS LORDSHIP referred briefly to the facts and continued:] Counsel moved to quash the indictment on the ground that the committal was a bad committal, because the Rules of 1952 were not complied with. A long discussion took place and many cases were cited, but, when the matter comes to be decided, the point is a simple one. The magistrate signed the deposition of the police officer on the first occasion when the matter came before him, and he also signed the deposition of another police officer on the third occasion when the case was before him. The evidence given by those two officers against the appellants would have justified committal for trial. The question, therefore, is whether the fact that certain depositions were taken which were not signed renders the whole committal bad. In the opinion of the court it does not. We are assuming that those depositions were admissible for any purpose for which a deposition could be read or used; we are also assuming that, if a magistrate has evidence of witnesses taken before him and has not signed the depositions, those depositions would not be usable for committal for trial. I am far from saying, however, that they might not be brought back to the magistrate to be signed, at any rate before the commission day of the assizes; but we need not go into that. It is perfectly clear that there was before the magistrate the evidence of the two police officers which was enough to justify the magistrate in committing the appellants. The fact that there were also the depositions which were not signed and that that was an irregularity cannot affect the question. The whole question in this case is whether the committal of the appellants was a good committal. The learned commissioner held that it was a good committal, except with regard to count one, because the evidence given by the police officers dealt with the charge of receiving but not with the charge of breaking and entering. Therefore, the commissioner said that there was evidence on which the magistrate could commit for receiving, though he could not commit for breaking and entering, and he quashed the count for breaking and entering. He also quashed the fourth count against the appellant Rooney. CASSELS, J., who was sitting at the Old Bailey at the time, was asked to get over this difficulty by preferring a voluntary bill against Rooney, and a E F G H I

* See Magistrates' Courts Act, 1952, ss. 4-12.

† The relevant terms of r. 5 are printed at p. 494, letter I, ante.

A bill was preferred against him. If the conviction against Rooney were quashed, he would have to stand his trial on that bill, but we need not go into these matters beyond saying that there were two depositions before the court which were regularly signed and which justified a committal on the receiving charge. Therefore this appeal fails and is dismissed.

Appeals dismissed.

B Solicitors: *Registrar, Court of Criminal Appeal* (for the appellants); *Solicitor, Metropolitan Police* (for the Crown).

[*Reported by M. D. L. WORSLEY, Esq., Barrister-at-Law.*]

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D GOLD v. PATMAN AND FOTHERINGHAM, LTD.

[COURT OF APPEAL (Hodson, Romer and Sellers, L.J.J.), April 24, 25, 28, May 22, 1958.]

Building Contract—Insurance—Building contractors' obligation to insure against subsidence and collapse of adjoining properties—Whether obligation extended to insurance of building owner—R.I.B.A. form of contract ((1939), revised 1952), condition 15 (a).

E *Evidence—Admissibility—Expert evidence—Building contract—Whether evidence of practical difficulties consequent on one construction of a clause of the contract was admissible.*

Costs—Disallowing costs of successful defendants—Point of law not raised as separate preliminary issue—Alleged breach of contract—Defendants successful on appeal on issue of construction of contract—Adverse findings at trial on all disputed issues of fact—Issues of fact occupying substantial part of time of trial.

F A building contract in the standard R.I.B.A. form (1939 quantities form; revised 1952) provided by condition 14 for the contractors to indemnify the building owner in respect of injury to persons or property, subject to certain exceptions. Condition 15 (a) provided that without prejudice to the contractors' liability to indemnify the building owner under condition 14 the contractors should "effect . . . such insurances . . . as may be specifically required by the bills of quantities and shall produce . . . the relevant policy . . . as and when required by the architect". The bills of quantities provided that the contractors "shall insure or make payments in connexion with the following . . . Insurance of adjoining properties against subsidence or collapse." Condition 15 (b) [A] required the contractors to insure all executed works, etc., in the joint names of the building owner and themselves against loss or damage by fire with insurance companies approved by the architect and to deposit the policies, etc., with him. Having received a claim in respect of damage through collapse of adjoining properties, the building owner brought an action for damages against the building contractors for not insuring the building owner against such liability and for indemnity against the claim. At the trial the contractors called an expert witness to give evidence de bene esse of the practical difficulties that would follow in relation to tendering for contract if such insurance had to be effected. By their defence the contractors raised other issues than the question of construction of the contract and a substantial part of the eight days occupied by the trial was concerned with the determination of these

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issues. The decisions of fact on these issues were adverse to the contractors. A

Held: (i) on the true construction of the contract and the relevant provisions of the bills of quantities, having regard particularly to the contrast shown by the specific provision for fire insurance being in joint names, etc., the obligation undertaken by the contractors for insurance of "adjoining properties against subsidence or collapse" was an obligation to insure themselves, not the building owner; therefore, the action failed. B

(ii) expert evidence of the contractors' difficulty in tendering before contract, etc., if liability to insure the building owner against subsidence of adjoining properties was to be undertaken, was not admissible on the issue of the construction of contract.

(iii) the question of construction could have been suitably decided on a preliminary issue limited to that question; in the circumstances, though the contractors had succeeded in the appeal on the question of construction and the appeal would be allowed with costs, they would be given only half their costs in the court below. C

Appeal allowed.

[Editorial Note. The current standard form of R.I.B.A. contract as revised in 1956, that is, the quantities form, contains condition 15 (a) and (b) [A] in the same terms as that condition in the 1952 revise which was construed in the present case. D

As to liability for injury to persons or property on a building contract, see 3 HALSBURY'S LAWS (3rd Edn.) 546-548, paras. 1104, 1105; and for cases on the subject, see 34 DIGEST 155-160, 1216-1247, 161-165, 1257-1278.

As to the natural right to support, see 12 HALSBURY'S LAWS (3rd Edn.) 604. E

As to evidence of expert witnesses being inadmissible where the question is one of construction of a document, see 15 HALSBURY'S LAWS (3rd Edn.) 323, para. 588, text and note (t); and for cases on the subject, see 22 DIGEST (Repl.) 503-509, 5570-5648.

As to a successful defendant being deprived of costs, see 26 HALSBURY'S LAWS (2nd Edn.) 97, para. 183; and for a case on the subject, see DIGEST (Practice) 858, 4031-4034, 871-873, 4134-4143.] F

Cases referred to:

(1) *Bower v. Peate*, (1876), 1 Q.B.D. 321; 45 L.J.Q.B. 446; 35 L.T. 321; 40 J.P. 789; 34 Digest 164, 1275.

(2) *Scammell (G.) & Nephew, Ltd. v. Ouston*, [1941] 1 All E.R. 14; [1941] A.C. 251; 110 L.J.K.B. 197; 164 L.T. 379; 2nd Digest Supp. G

(3) *Appleby v. Myers*, (1867), L.R. 2 C.P. 651; 36 L.J.C.P. 331; 16 L.T. 669; 7 Digest 364, 129.

Appeal.

The defendant building contractors appealed against an order of GORMAN, J., made on Oct. 11, 1957, that judgment be entered for the plaintiff building owner on the preliminary issues of liability, with costs and damages to be assessed by an official referee, in an action for damages for breach of a building contract by failing to insure the building owner against liability for damage by subsidence or collapse of adjoining properties and for indemnity against claims in respect thereof. The grounds of appeal were (i) that the judge had misdirected himself in holding that certain provisions in the bills of quantities in the contract between the parties, including the words "the contractor shall insure or make payments in connexion with . . . Insurance of adjoining properties against subsidence or collapse", were capable of bearing any meaning sufficiently certain to be given contractual force; and (ii) that the judge misdirected himself in law in holding that on the true construction of the contract between the parties the defendant contractors were bound to take out insurance policies for the benefit of the plaintiff building owner insuring him against legal claims H

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A by the owners of adjoining properties in respect of damage caused by subsidence or collapse of the properties.

Gerald Gardiner, Q.C., and F. E. Hallis for the building owner.

R. D. Stewart-Brown, Q.C., and I. N. Duncan Wallace for the building contractor.

B *Cur. adv. vult.*

May 22. HODSON, L.J., read the following judgment of the court: This is an appeal from a judgment of GORMAN, J., dated Oct. 11, 1957, by which he found the defendants, a firm of building contractors, in breach of contract for failing to insure the plaintiff, a building owner, against the claim of adjoining owners arising out of the collapse of adjoining property on either side of the building owner's property. The question for determination depends on the construction of the contract between the parties, the contract documents being in the first place an agreement in writing dated Apr. 27, 1954, and in the second place drawings and bills of quantities therein referred to.

C The agreement is the standard form of agreement and schedule of conditions of building contract issued under the sanction of the Royal Institute of British Architects, the National Federation of Building Trades Employers and the Royal Institution of Chartered Surveyors. Condition 10, described "bills of quantities", reads as follows:

E "The quality and quantity of the work included in the contract sum shall be deemed to be that which is set out in the bills of quantities mentioned in cl. 2 of these conditions which bills unless otherwise expressly stated shall be deemed to have been prepared in accordance with the principles of the Standard Method of Measurement of Building Works last before issued by the Royal Institution of Chartered Surveyors and the National Federation of Building Trades Employers, but save as aforesaid nothing contained in the said bills of quantities shall override, modify or affect in any way whatsoever the application or interpretation of that which is contained in these conditions."

F "Any error in description or in quantity in or omission of items from the bills of quantities shall not vitiate this contract but shall be rectified and treated as a variation."

Condition 14 has the side note "Injury to persons and property", and says:

G "(a) Injury to persons. The contractor shall be solely liable for and shall indemnify the employer in respect of any liability, loss, claim or proceedings whatsoever arising under any statute or at common law in respect of personal injury to or the death of any person whomsoever arising out of or in the course of or caused by the execution of the works, unless due to any act or neglect of the employer or of any person for whom the employer is responsible."

H "(b) Injury to property. Except for such loss or damage by fire as is at the risk of the employer under cl. 15 (b) (B) of these conditions the contractor shall be liable for and shall indemnify the employer against any loss, liability, claim or proceedings in respect of any injury or damage whatsoever to any property real or personal in so far as such injury or damage arises out of or in the course of or by reason of the execution of the works, and provided always that the same is due to any negligence, omission or default of the contractor, his servants or agents or of any sub-contractor."

I Condition 15 has the side note "Insurance", and it provides:

"(a) Without prejudice to his liability to indemnify the employer under cl. 14 hereof, the contractor shall effect or shall cause any sub-contractor to effect such insurances (including insurance against third-party fire risk) as may be specifically required by the bills of quantities and shall produce or cause such sub-contractor to produce as the case may be the relevant

policy or policies and premium receipts as and when required by the architect; Should the contractor make default in so doing, the employer may insure against any risk with respect to which the default shall have occurred and may deduct the premiums paid from any moneys due or to become due to the contractor.

“(b) [A] The contractor shall in the joint names of the employer and contractor insure against loss and damage by fire for the full value thereof (plus 8½ per cent. to cover architect’s and surveyor’s fees) all work executed and all unfixed materials and goods upon the site but excluding plant, tools and equipment and shall keep such work, materials and goods so insured until the works are delivered up; such insurance shall be with a company or companies approved by the architect and the contractor shall deposit with him the policies and premium receipts; should the contractor make default the employer may insure as aforesaid and deduct the premium paid from any moneys due or to become due to the contractor.”

I think that it is unnecessary to read the rest of that paragraph. The bills of quantities drew attention to the relevant provision in the conditions scheduled to the contract, and on p. 6 there appears the following:

“The contractor shall insure or make payments in connexion with the following:—National Insurance Acts and National Insurance (Industrial Injuries) Acts. Unemployment Insurance Acts. Fatal Accident Acts. Insurance against specific industrial diseases. Employer’s liability, common law, third party. Lord Campbell’s Acts. Damage by aircraft. Damage by storm, flood and tempest or lightning. Insurance of adjoining properties against subsidence or collapse.”

Then follows:

“Such insurances shall be with companies approved by the architect and the contractor shall deposit with him the policies including the fire policies within seven days of their respective issues, and receipts for premiums within seven days of their respective payments.”

The paragraph last read, beginning with the words “Such insurances” purports to override the provisions as to insurance (save as to fire) contained in condition 15 and must therefore be disregarded, having regard to the language of condition 10. No further reference need, therefore, be made to this paragraph.

The building owner, having received a claim from the adjoining owners, claims damages for breach of contract by the defendant contractors because, although the defendants, as building contractors, have insured themselves in respect of any such claims they may receive, they have not insured the plaintiff, the building owner, against any liability which he may have. He accordingly seeks to be indemnified against such claims. It is to be observed that the liability to adjoining owners does not depend on negligence—no negligence is indeed being alleged on either side—but depends on the right to support which the adjoining owners have from the building owner’s land: *Bower v. Peate* (1) (1876), 1 Q.B.D. 321. It is sufficient to say that subsidence on both sides of the building owner’s property appears to have been caused by piling operations carried on on the owner’s land by the contractors’ acting on his instructions or those of his architect.

It is plain from the nature of the contract that there would be no objection to a provision for the insuring of the building owner by the contractors being included in the bill of quantities as an obligation of the contractors, since it may well be convenient for all outgoings in connexion with the building project to be included in one document which can contain all the items for which the building owner will ultimately have to pay. The remaining question is, what is meant by the language of the contract properly construed?

Counsel for the contractors has contended that the words under consideration

A are in any event uncertain, so that there is no contract capable of enforcement, relying in particular on the speeches in the House of Lords in *G. Scammell & Nephew, Ltd. v. Ouston* (2) ([1941] 1 All E.R. 14), where the words under discussion, "hire-purchase terms", were treated as too vague to create an enforceable obligation. It is here conceded that the language of the passage read from the bill of quantities is severable so that the relevant passage can be read as follows:—"The contractor shall insure or make payments in connexion with the following" insurance of adjoining properties against subsidence or collapse.

B We reject the argument that the tautological use of the word "insurance" following "insure" presents any difficulty. No difficulty is presented by the words "or make payments", which are satisfied by the reference to National Insurance in the following list. The argument proceeds, however, that there is uncertainty as to who has to be insured and what is to be covered in particular: C is it simply damage to the adjoining buildings themselves or consequential damage following thereupon?

D We must deal separately with the question who is to be insured, though it falls for consideration on the question of certainty; but, so far as the other matters are concerned, we agree with the learned judge that there is no uncertainty as to the risk to be covered by insurance. That which was to be insured against was the legal liability to adjoining owners arising out of the subsidence or collapse of the premises. It would be wholly wrong in our judgment to say, in the words of LORD WRIGHT ([1941] 1 All E.R. at p. 25), that the language used was so obscure and so incapable of any definite or precise meaning that the court is unable to attribute to the parties any particular contractual intention.

E The only real difficulty which arises is as to the determination of the question who is to be covered by insurance, but the court ought not to be deterred by any difficulty of interpretation which can fairly be surmounted. Looking first at condition 14 of the contract dealing with (a) injury to persons, (b) injury to property, the contractors are bound to indemnify the building owner against loss in the circumstances therein set out. When one comes to condition 15, F the contractors are thereby required to effect insurance or cause any sub-contractor to do so as may be specifically required by the bill of quantities. This condition prima facie refers to the indemnity required by condition 14, for it is introduced by the words "without prejudice to his liability to indemnify the employer under cl. 14 hereof", which indicates plainly that the indemnity is to stand independently of the insurance and that the contractors cannot claim to G have fulfilled their obligation under the indemnity clause in respect of injury to persons or property by effecting a policy or policies of insurance or causing any sub-contractor to do so.

H These policies and their premium receipts must be produced as and when required by the architect. Loss or damage by fire is dealt with in cl. 15 (b) [A], and there, in contrast to the policies referred to in cl. 15 (a), the contractors must insure in the joint names of the building owner and themselves with a company or companies approved by the architect, and the contractors are obliged to deposit (not only produce when required) the policies and premium receipts with the architect. It would thus appear that there is a contrast between policies in which the contractors are insuring themselves, no doubt for the additional security of the building owner, and cases where the contractors are I insuring in the joint names of the owner and themselves. Thus, when the contract requires the building owner (described in the contract as the employer) to be insured by the contractors, it is expressly so provided. Further, it would appear appropriate in cases where the insurance is for the benefit of the building owner to require approval by his architect and deposit of the policy of insurance with him. Condition 25, which deals with fluctuations, refers also to the burden of insurance falling on the contractors under the heading of expenses, including the cost of employer's liability and third-party insurance, and lends support

to the contention of the contractors that these are among the specific insurances contemplated by condition 15 (a) of the contract. These considerations derived from the conditions in the main contract are persuasive to suggest that the insurances specifically required by the bill of quantities will be found to be insurances effected by the contractors for themselves and not for the building owner. A

When one turns to the bill of quantities itself, nothing is found to lead to a contrary conclusion. In construing the obligation beginning with the words "The contractor shall insure", one looks at the whole list of matters in respect of which they have to insure or make payments, and nothing is found in that list pointing to an obligation to insure anyone else but themselves. We cannot find anything in the initial phrase or in the context to lead one to understand that the obligation is to insure not the contractors alone but the building owner either in addition to the contractors or separately from him. The list following the initial phrase is not very illuminating and there is on any view some duplication, for Fatal Accident Acts and Lord Campbell's Acts mean the same thing. All the items in the list would appear to be cases where the contractors must insure themselves, at least so far as they are intelligible, bearing in mind that "Unemployment Insurance Acts" do not exist, and insurances against specific industrial diseases do not add anything to the words above, viz., "National Insurance Acts and National Insurance (Industrial Injuries) Acts." Damage by storm, etc., would be the contractors' risk for them to cover, for they would not be relieved of their obligation by such damage (cf. *Appleby v. Myers* (3) (1867), L.R. 2 C.P. 651 per BLACKBURN, J., at p. 660). B C D

We find no sufficient reason for thinking that, when one comes to the last item "insurance of adjoining properties against subsidence or collapse", the obligation to insure is for the first time in the list an obligation to insure, not the contractors themselves, but the building owner. If there were to be a change of obligation, one would expect some words to be used to show that there is a change, and here there are none; nor would one expect to find such an obligation in this place, having regard to the words of condition 15 (a), where reference is made to such insurances to be effected as may be specifically required by the bill of quantities, the policies to be produced when required and not only to be approved by and deposited with the architect. It is true that there is duplication, since the heading "Employer's liability, common law, third party" no doubt produces the same result; but duplication, as we have said, appears elsewhere in the miscellany and the last item is only a specific identification of one kind of third-party risk. E F

Counsel for the contractors reinforced his argument by a contention that there would be grave difficulties in the way of a contractor knowing what to tender if he had to insure the building owner, for he would not survey the property before tendering, whereas in the case of insuring himself against the risk in question there is no practical difficulty, because the premium is based on the contractor's past record and the number of men he employs. Counsel sought in this connexion to rely on the oral evidence of Mr. Jones, an insurance expert, to show the practical difficulties involved. We see no ground for admitting evidence of this character to show the surrounding circumstances of this particular contract. No trade custom was sought to be proved and it is not contended that both parties were contracting in the light of some special insurance background which could be established by evidence. In any event, we should not have been deterred by the difficulty of effecting an insurance from finding that the obligation to insure the building owner had been placed on the contractors by the contract if the words used had produced that result. The evidence of Mr. Jones could, one would assume (although no argument was addressed to the court on this aspect of his evidence) be used to show uncertainty if there were a latent ambiguity in the use of the word "insurance" in its context. We find nothing in his evidence which was read *de bene esse* to lead to the conclusion that the word "insurance" as here used is uncertain in its meaning. G H I

- A In our opinion the contractors are right in their contention that the obligation to insure adjoining properties against subsidence or collapse is an obligation on the contractors to insure themselves and not the building owner. The appeal is accordingly allowed.

Appeal allowed.

Argument followed on the question of costs.

- B *F. E. Hallis* for the building owner, the plaintiff at the trial: In the court below six out of eight days were dedicated to the trial of issues of fact as well as argument on alleged unfulfilled or broken implied conditions of the contract raised by amendments of the pleadings on which the defendants wholly failed and have not appealed. These were distinct defences from the issue of construction of the contract. There should be an apportionment of those costs favourable to the plaintiff. Had there been raised only this defence of construction on which the defendants have succeeded on appeal, no evidence would have been called at the trial and it would have been unnecessary to have any correspondence, of which a substantial quantity was copied, in court. I submit that a proper order would be that each side should pay its own costs.

- D **SELLERS, L.J.:** If a plaintiff makes unnecessary and unfounded claims, they can well be segregated and he may be penalised in costs; but a greater latitude is given to a defendant.

ROMER, L.J.: As things have turned out, all this could have been determined by a preliminary point of law.

- E *I. N. Duncan Wallace* for the building contractors, the defendants at the trial: The onus of applying for trial of a preliminary point of law should not be put on the defendants. The plaintiff could have applied equally well. By agreement between the parties when the pleadings were closed the issues left to the judge were all issues except damages. Orders for costs may be split up where there are different causes of action between the parties, but here there was one cause of action and one relief was sought. It was not as if the defendants had failed on a lengthy and expensive first contention and succeeded on an alternative secondary contention. A defendant should not be deprived of his costs unless his conduct in the action has been so unreasonable that he deserves to be punished. The proper order, it is submitted, is that the defendants should have their costs here and below unless the court feels that something in the defendants' conduct deserves punishment. The question is whether the contractors were justified, as normal prudent defendants, in raising the further issues.

- G **HODSON, L.J.:** The appeal will be allowed with costs, and, with regard to the costs below, the order is that the defendants obtain judgment against the plaintiff with half their costs. This is a course which the court does not often take, because, when a defendant has an action brought against him he is entitled to raise such defences as are available to him, but I think that in this case there was an opportunity for the defendants to take a clear-cut point of law which depended on the construction of the document and on which this case has ultimately turned, and if that course had been taken a very large expenditure of money would have been saved. On all the issues of fact which were raised by the defendants by calling evidence to prove or disprove certain facts, the learned judge in the court below found against them. For these reasons I think this is a case in which the court is justified in taking an unusual course and not giving the successful party the whole of the fruits of his victory in the court below.

ROMER, L.J.: I agree. I only wish to say once again what I have said on more than one occasion before, that I wish litigants would take advantage of the facilities which are afforded of having a preliminary point of law decided. That could very well have been done in this case. As it turned out before this court,

the matter has depended on the construction of the contractual documents. If the defendants had asked for that point to be decided and had they lost on it, it would still have been open to them to raise all their other defences at the trial, and for my part I wish that they had done so. It seems to me that this was a case par excellence in which the facilities should have been used. I agree entirely with what my Lord says.

SELLERS, L.J.: I agree. I think that the point of law stood out here on the construction of the contract, and it could have been decided with very little expense.

Appeal allowed with costs and half costs in the court below.

Solicitors: *Eric H. Davis & Co.* (for the building owner); *Masons* (for the building contractors).

[Reported by F. A. AMIES, ESQ., Barrister-at-Law.]

SIMONS (trading as Acme Credit Services) v. GALE.

[PRIVY COUNCIL (Viscount Kilmuir, L.C., Viscount Simonds, Lord Morton of Henryton, Lord Tucker and Lord Clyde), April 29, 30, June 3, 1958.]

Privy Council—Australia—New South Wales—Insurance—Marine insurance—Warranty—Warranty that “all arrangements” for conversion of ship made at “inception of this insurance”.

B. and M. were proposing to buy a vessel in New Caledonia for the purpose of transporting cattle from Queensland to Manila. For this purpose, an irrevocable letter of credit was established by B. in favour of the vendors of the cattle. B. asked the appellant to advance him £A23,000 to purchase the vessel, which sum would be paid out of the proceeds of the letter of credit. The vessel would require to be converted for the carriage of cattle. The appellant accordingly got in touch with insurance brokers with a view to obtaining insurance cover to enable him to finance the adventure. The amount of cover was £A29,000 and it was ascertained that the insurance could be effected subject to warranties that “animals available loading and all arrangements for conversion vessel made at inception of this insurance”. On Dec. 13, 1955, the appellant was issued with a certificate by his brokers certifying that he was insured to pay a total loss of £A29,000 in the event of the vessel not completing loading within a certain time from any cause whatsoever, subject to the warranties already ascertained. At this time there was no contract for the conversion of the vessel and, if there was any arrangement for its conversion, it was tentative. Two policies of insurance were issued on Apr. 25, 1956, in which the warranties were “Warranted animals available for loading. Warranted all arrangements for conversion made at inception of this insurance”. The vessel sailed from New Caledonia on Jan. 10, 1956, and berthed at Brisbane on Jan. 16, 1956, but owing to differences of opinion between B. and M., she was never converted and never proceeded to her port of loading in Queensland. The appellant was in no way responsible for the failure of the venture. One of the policies was subscribed by the respondent who was named by the underwriters as the person to be sued on the policies. The appellant sued the respondent for £A29,000. The respondent relied on a breach of the warranty that “all arrangements for conversion made at inception of this insurance”.

Held: the appellant was not entitled to recover the £A29,000 because

- A "at inception of this insurance" meant the moment of time when insurance cover was obtained, and, on Dec. 13, 1955, when cover had been secured, "all arrangements for conversion" of the vessel had not been made and there was, therefore, a breach of the warranty in the contract of insurance.

Appeal dismissed.

- B [As to the formation of a contract of insurance, see 22 HALSBURY'S LAWS (3rd Edn.) 206, para. 389; and as to the commencement of insurance, see *ibid.*, p. 243, para. 467; and as to conditions precedent to liability under a policy, see *ibid.*, p. 219, para. 413.]

Appeal.

- C Appeal by Percy Simons, trading as Acme Credit Services from a judgment of the Supreme Court of New South Wales in Commercial Causes (WALSH, J.), dated Dec. 10, 1957, in favour of the respondent, Anthony Eugene Middleton Gale. The facts are set out in the judgment of the Board.

Sir Garfield Barwick, Q.C., and *M. R. Hardwick* (both of the Australian Bar) for the appellant.

John Megaw, Q.C., and *C. T. Bailhache* for the respondent.

- D LORD TUCKER: The appellant, who was the plaintiff in the action, appeals by leave of the Supreme Court of New South Wales from a judgment of WALSH, J., sitting as the Supreme Court in Commercial Causes in favour of the respondent (defendant) given on Dec. 10, 1957. The action was brought by the appellant under two policies of insurance dated Apr. 25, 1956, for amounts of £A22,000 and £A7,000 respectively subscribed by Underwriting Members of Lloyd's and Members of the Institute of London Underwriters. One of the policies was subscribed by the respondent to the extent of his proportion and, in accordance with the usual custom, he has been named by the respective underwriters as the person to be sued on the policies.

- E The circumstances in which the policies were issued were as follows. One F Salvador Brucelas of Manila and his partner Martinez were proposing to buy a vessel called the *Cap Tarifa* lying in the port of Noumea, New Caledonia, for the purpose of transporting cattle from Townsville, Queensland, to Manila. For this purpose, an irrevocable letter of credit for 160,000 dollars had been established by Mr. Brucelas in Sydney in favour of New Zealand Loan and Mercantile Agency Co., Ltd., who were to be the vendors of the cattle. Mr. Brucelas asked the appellant, through his secretary, Mr. Trevis, to advance G him the sum of £A23,000 to purchase the vessel. This sum would be repayable out of the proceeds of the letter of credit. The vessel would require to be converted for the carriage of cattle. It was anticipated that the vessel would sail from Noumea about Dec. 20, 1955, arrive in Brisbane about Dec. 27, 1955, for conversion, sail from Brisbane on completion of conversion about Jan. 11, 1956, arrive at Townsville about Jan. 14 and, after loading the cargo of cattle, H would sail for Manila about Jan. 18, 1956. The appellant accordingly got in touch with insurance brokers in Sydney with a view to obtaining insurance cover to enable him to finance the venture. The cover required was in the following terms:

- I "If in the event of the ship not completing loading of cattle at Townsville within ninety days from sailing from Noumea from any cause whatsoever that this company be paid an amount approximating £A27,000."

This was subsequently increased to £A29,000. Cables passed between brokers in Sydney and London, as a result of which it was ascertained that the insurance could be effected subject to the following warranties:

"Warranted animals available loading and all arrangements for conversion vessel made at inception of this insurance."

A certificate dated Dec. 13, 1955, was issued to the appellant by Edward Lumley

and Sons (N.S.W.) Pty., Ltd., the appellant's brokers, certifying that he was insured with Lloyd's Underwriters

"to pay a total loss of £A29,000 in the event of the vessel not completing loading Townsville within ninety days from sailing from Noumea from any cause whatsoever."

Subject to the following condition:—"Warranted animals available for loading and all arrangements for conversion of vessel made at inception of this insurance." In the policies issued on Apr. 25, 1956, the warranties read as follows:

"Warranted animals available for loading. Warranted all arrangements for conversion made at inception of this insurance."

The Cap Tarifa did not sail from Noumea until Jan. 10, 1956, she berthed at Brisbane on Jan. 16, 1956, but, owing to differences of opinion between Mr. Brucelas and his partner, the vessel was never converted and never proceeded to Townsville.

It is common ground that the appellant was in no way responsible for the failure of the venture and that, but for the alleged breach of warranty on which the respondent relies and subject to proof of his insurable interest at the date of loss, he would be entitled to recover the full amount of the insurance.

The respondent repudiates liability on the ground that all arrangements for conversion had not been made at the inception of the insurance. This raises three questions—(i) To what point of time do the words "at inception of this insurance" refer? (ii) What is the meaning of "all arrangements"? (iii) On the evidence was the learned trial judge right in holding that the appellant was in breach at the material date? At the trial a further question was debated, viz., on whom lay the onus with regard to breach? It is not now, however, disputed that the learned judge was correct in holding that the onus was on the respondent.

On the first point WALSH, J., held that the inception of the insurance meant the moment of time when insurance cover was obtained and not, as contended by the appellant, the date when the vessel sailed. Their Lordships feel no doubt, as a matter of construction, that this is correct. The language is, in their view, quite inappropriate to describe "the date of sailing" which could, and no doubt would, have been the words used if this had been the date intended. In so deciding, it is not necessary to express any opinion on the submission made by counsel for the respondent that, on the language of these policies and having regard to the nature of the insured venture, the risk attached from the moment the contract was made and not from the date of sailing.

With regard to the ascertainment of the precise date on which a contract of insurance was concluded the learned judge said, after considering the documentary evidence on which the parties were content that this commercial case should be decided:

"In my opinion what the [appellant] warranted was that all arrangements for conversion had been made at the time when the certificate was issued. I think it is arguable that the reference was to an earlier time, namely, the time when application for the insurance was first made. This would be on or about Dec. 7. However, having regard to the views I have formed upon other questions yet to be discussed it makes no practical difference whether the critical date is Dec. 7 or 14; and it is sufficient for me to hold that the policy required that at the latest the arrangements should have been made by Dec. 14."

The material on which the learned judge arrived at this conclusion consisted of the certificate given to the appellant by his brokers dated Dec. 13, together with copies of cables passing between the brokers in Sydney and London. Counsel for the appellant criticised the judge's conclusion on the ground that the certificate given by the brokers was not binding on the respondent and was not

A a cover note or equivalent thereto, and that the cables annexed thereto, together with the dates appearing in the schedules to the policies showing the different proportions of the risk taken by the different underwriters, were insufficient to warrant an inference that there was a concluded contract by Dec. 13 or 14, 1955. It is clear from the judgment that the learned judge fully appreciated the nature of the certificate, and merely regarded it as part of the material available
B to him from which he was entitled to draw an inference as to the date on which insurance cover had been obtained. Looking at this material, and referring in particular to the last cable from London which is dated Dec. 14, 1955, and reads "Captarifa arranged without additional exclusion advise sailing date Noumea" and to the letter of the same date written by the appellant to the secretary
C of the Exchange Control in which he says "We have insured against loss from any cause whatsoever should the cattle not be loaded within ninety days from date of purchase of the boat", justifies the inference that cover had been secured by Dec. 13, 1955, and that this was the material date for the purpose of ascertaining whether there had been a breach of the warranty.

Turning now to the meaning of the words "all arrangements for conversion
D of vessel", their Lordships find great difficulty in envisaging what would be the minimum requirements to comply with this warranty short of a contractual arrangement. The word "all" is important, and precludes a construction which would be satisfied by "some arrangement." This is the conclusion reached by the trial judge who said:

E "The conclusion to which this evidence brings me is that what took place on Dec. 14 was no more than explanatory of an arrangement later intended to be made for the carrying out of the work. I think it is clear that, at that time, neither party became contractually forced to proceed with the transaction. It has been submitted that the warranty does not require that there should have been a binding contract for the doing of the work.
F Even if this be so, in my opinion the warranty as to making 'all arrangements' for conversion required something more definite and precise than the tentative undertaking given by Brown and Broad, Ltd., on Dec. 14."

In arriving at this decision, the learned judge had given careful consideration to the contemporary correspondence and certain statutory declarations which
G had been supplied to the respondent by the appellant before the trial, and which were put in evidence by the respondent. These documents showed that, by Dec. 13, no arrangement of any kind had been made for the conversion of the ship, but that, on Dec. 14, Mr. Boal on behalf of Brown and Broad, Ltd., ship repairers of Brisbane, in answer to a telephone inquiry from Mr. Trevis
H on behalf of the appellant whether his company would fit the ship to carry cattle said "We can fit the ship if it arrives about that time (i.e., the first week in January)". Mr. Trevis said "Can we have a quotation?" To which Mr. Boal replied "Brown and Broad do not give firm quotations as materials, wages, etc., vary." There the matter rested until Dec. 23.

It is clear, therefore, that if, as their Lordships think, the decisive date was
I Dec. 13, there can be no question but that the warranty had not at that date been complied with. If, however, the time be extended to Dec. 14, it is equally clear that by then no contractual obligation had been incurred by either party. If something less than a contractual arrangement would suffice, their Lordships would agree with the trial judge that something more definite and precise than the tentative undertaking given by Brown and Broad, Ltd. would be required.

Their Lordships are, accordingly, in agreement with the conclusions reached by the trial judge on these issues.

It is, in these circumstances, unnecessary to express any opinion whether the appellant had discharged the burden of proving an insurable interest at the date of loss or whether, in view of the course of the trial, this was ever a live issue. A

Their Lordships will humbly advise Her Majesty that this appeal be dismissed. The appellant must pay the costs of the appeal.

Appeal dismissed.

Solicitors: *Botterell & Roche* (for the appellant); *Ince & Co.* (for the respondent). B

[Reported by G. A. KIDNER, ESQ., Barrister-at-Law.]

COMPANIA CRYSTAL DE VAPORES OF PANAMA v. HERMAN & MOHATTA (INDIA), LTD.

[QUEEN'S BENCH DIVISION (Devlin, J.), May 20, 1958.]

Shipping—Charterparty—Lay days—Loading—"Weather working days"—Ship ordered by harbour master from berth for six days due to threat of bore tide—Illegality of loading—Whether time when ship absent from berth to be included in assessment of lay-time. C

By a charterparty dated Apr. 24, 1954, the charterers chartered a vessel from the owners to load a cargo at Calcutta for discharge at Kobe. Having arrived at Calcutta on Apr. 26, the vessel was ordered by the charterers to berth at No. 1 Garden Reach Jetty. There was no evidence to show that this was an unsafe berth. Conditions at the port of Calcutta were that, from time to time during the year, there were bore tides of varying severity. Notice of readiness was tendered and lay-time began at 1300 hours on Apr. 29. Loading began on Apr. 27 and continued till noon on Apr. 30, when the harbour master ordered the vessel to leave Garden Reach Jetty, having formed the opinion that, by reason of her overall length and the mooring facilities available at the jetty, she could become a danger during the bore tides which were expected. Loading was discontinued and the vessel shifted to King George Dock Buoys where she remained until May 6 (a period of six days) when she returned to Garden Reach Jetty where loading was resumed. If the six days were included in the lay days the charterers would be liable to pay demurrage. D

Held: lay-time ran during the six days while the vessel was at buoys and the charterers were liable to pay demurrage because they had shown no ground that excused them from their contract to load within the lay-time for the following reasons— E

(i) the expression "weather working days" contemplated that, notwithstanding the safety of the berth which the words assumed, weather might interfere with the actual work of loading, and thus the removal of the vessel from the loading berth for reasons of safety did not exclude the days while she was so removed from being weather working days for the purposes of the computation of lay-time, vicissitudes during this period being *prima facie* at the risk of the charterers. F

Dictum of SIR ERNEST POLLOCK, M.R., in *Cantiere Navale Triestina v. Russian Soviet Naphtha Export Agency* ([1925] 2 K.B. at p. 196) applied. G

(ii) though the removal of the vessel from the loading berth was the act of the shipowners, it was caused by something beyond their control and not by their fault, so that the running of lay-time was not interrupted. H

Principle stated by CHANNELL, J., in *Houlder v. Weir* ([1905] 2 K.B. at p. 271) applied. I

- A (iii) loading was not prevented by illegality since, assuming that the law of the port made it illegal to load during the six days while the vessel was removed from the loading berth, what was prevented was loading during that time, and it had not been rendered illegal to load within the total period for which lay-time might run under the charterparty.

Steamship "Induna" Co., Ltd. v. British Phosphate Comrs. ([1949] 1 All E.R. 522) followed.

Cantiere Navale Triestina v. Russian Soviet Naphtha Export Agency ([1925] 2 K.B. 172) explained and distinguished.

[As to weather working days, see 30 HALSBURY'S LAWS (2nd Edn.) 342, 343, para. 523; and for cases on the subject, see 41 DIGEST 573, 574, 3975-3978.]

- C As to the charterer's liability to pay demurrage, see 30 HALSBURY'S LAWS (2nd Edn.) 346, 347, para. 525; and for cases on the subject, see 41 DIGEST 561-565, 3867-3900.]

Cases referred to:

- (1) *Cantiere Navale Triestina v. Russian Soviet Naphtha Export Agency*, [1925] 2 K.B. 172; 94 L.J.K.B. 579; 133 L.T. 162; 41 Digest 567, 3914.

- D (2) *Ralli Brothers v. Compañia Naviera Sota y Aznar*, [1920] 2 K.B. 287; 89 L.J.K.B. 999; 123 L.T. 375; 25 Com. Cas. 227; 11 Digest (Repl.) 435, 791.

- (3) *Houlder v. Weir*, [1905] 2 K.B. 267; 74 L.J.K.B. 729; 92 L.T. 861; 41 Digest 567, 3916.

- E (4) *Steamship "Induna" Co., Ltd. v. British Phosphate Comrs.*, [1949] 1 All E.R. 522; [1949] 2 K.B. 430; [1949] L.J.R. 1058; 2nd Digest Supp.

Special Case.

- This was an award in the form of a Special Case Stated by an umpire on Feb. 14, 1958, under the Arbitration Act, 1950. By a charterparty dated London, Apr. 24, 1954, the respondents, Herman & Mohatta (India), Ltd., chartered the Maria G., a steamer owned by the claimants, Compania Crystal de Vapores of Panama, to load at Calcutta a cargo of 4,800 tons (ten per cent. more or less at owners' option) of Skullscrap and/or allied scrap not exceeding fifty cubic feet bale per ton deadweight for discharge at Kobe. The cargo was loaded at Calcutta and discharged at Kobe. By cl. 5 of the charterparty: "Cargo to be loaded and stowed free of expense to the ship at the average rate of four hundred tons per weather working day, Sundays and holidays excepted, even if used." The following facts were found by the umpire. The Maria G. was a vessel of 335 feet 6 inches in length with a beam of forty-six feet two inches, 3,594 tons gross 2,360 tons net, registered at the port of Panama. On Apr. 26, 1954, the vessel, on arrival at Calcutta, was ordered by the charterers to berth at No. 1 Garden Reach Jetty which jetty was six hundred feet in length. There was no evidence to justify a finding that that berth was an unsafe berth. It was a normal berth and no objections were raised to it by the Maria G. at any time. On Apr. 27, 1954, notice of readiness was tendered and accepted by the charterers at 1045 hours. Loading commenced during the evening. Lay-time commenced at 1300 hours on Apr. 29, 1954. On Apr. 28 and 29, 1954, the vessel loaded cargo day and night. On Apr. 30, 1954, the vessel loaded until noon when she shifted from No. 1 Garden Reach Jetty to King George Dock Buoys where mooring was completed at 1700 hours. On May 6, 1954, with the approval of the harbour master, the vessel left the moorings at King George Dock Buoys and returned to No. 1 Garden Reach Jetty, in which berth she was secured at 1000 hours, whereupon loading was resumed. The vessel moved about sixty feet along Garden Reach Jetty to enable shore cranes to work Nos. 1 and 2 hatches. On May 19, 1954, loading was completed at 1200 hours. The vessel had been ordered by the harbour

master to shift away from her berth at No. 1 Garden Reach Jetty to King George Dock Buys on Apr. 30 because he was of the opinion that the vessel, by reason of her overall length in relation to the Garden Reach Jetty and the mooring facilities available there, could become a danger during the bore tides which were expected and which, in fact, materialised between May 1 and 5, 1954. The draughts of the vessel at the time of shifting on Apr. 30 were:—Forward, seven feet four inches, aft, sixteen feet five inches, mean, eleven feet ten and a half inches. The master had not expected to be ordered out of the berth. The published information with regard to the port of Calcutta contained in *PORTS OF THE WORLD* (11th Edn.) was as follows:—"The size of a vessel able to enter the River Hooghly is controlled by the available draught which fluctuates daily. Maximum draught is about thirty feet but this only occurs at odd times during the monsoon period and then usually between July and September. Bore tides of varying severity occur throughout the year, the equinoctial ones being most dangerous. Ships are frequently held at Sandheads, at the mouth of the river (128 miles from port) during these tides. Draughts of vessels lying in the river are also restricted then to eighteen feet—twenty feet maximum. Moorings in the stream are laid down for sixty-two ocean-going vessels. Two wet docks at Kidderpore with twenty-five berths. There are five import jetties on the Calcutta side of the River Hooghly and four jetties at Garden Reach also one riverside berth at Garden Reach." Despite the vessel's draught, however, the harbour master would not permit her to remain at the Garden Reach Jetty. The harbour master was in the best position to judge in ordering the vessel away from the Garden Reach Jetty during the bore tides, and the vessel was in a safe position at the buoys in King George Dock. The master of the *Maria G.* was obliged to conform to the orders of the harbour master. The dispute between the parties concerned the period between noon on Apr. 30 and 1000 hours on May 6, during which time the vessel was away from her loading berth at No. 1 Garden Reach Jetty and was at King George Dock Buys whilst the bore tides were on, after which she returned to her loading berth. If the six days while the vessel was at King George Dock Buys were included as part of the lay-time the amount of demurrage payable by the charterers would be £872 ls. 8d.; but if the six days were excluded from lay-time, £76 6s. would be payable to the charterers for despatch. The vessel was not on demurrage on Apr. 30, when she moved to King George Dock Buys. On June 2, 1954, the charterers paid to the owners £867 ls. 9d. in respect of demurrage. The charterers later contended that the time lost by the vessel at King George Dock Buys should not count as lay-time.

The question of law set out in para. 16 of the Case for the opinion of the court was whether the time lost in loading between noon on Apr. 30 to 1000 hours on May 6, was to be included in the assessment of lay-time at the loading port. In para. 17 of the Case, the umpire, subject to the court deciding the question of law in the affirmative, found that the charterers were not entitled to claim a refund of the demurrage already paid by them or to despatch in respect of the loading, and he awarded that the charterers pay to the owners £464 16s. 7d., being (i) £5 the balance of demurrage; (ii) £298 17s. 6d. the expenses incurred in shifting the vessel to King George Dock Buys; (iii) £160 19s. 1d. in respect of other items.

R. A. MacCrindle for the owners.

Basil Eckersley for the charterers.

DEVLIN, J., stated the facts and continued: The question of law which is stated in the Case for my decision is

"whether the time lost in loading between noon on Apr. 30, 1954, to 1000 hours on May 6, 1954, is to be included in the assessment of lay-time . . ."

A The lay days were still running when the vessel was moved. It is expressly found that she was not on demurrage on Apr. 30 when she moved to King George Dock Buys.

I think that, logically, the first question that arises (although it does not appear to have been a point that was expressly taken before the umpire) is on the point that has been argued by counsel for the charterers whether these six days were, or were not, weather working days. He submits that they were not weather working days and, if that be right, then they ought not to be counted as lay-time within the meaning of cl. 5 of the charterparty*. Two questions seem to me to arise there. The first question is: Is a bore tide that is something in the nature of a tidal wave "weather", so that, if the work on a particular day is prevented by a bore tide, it ceases to be a weather working day? The second question is: If the position is, as it is here, not that the bore tide actually prevented the loading of the ship or, indeed, that it would have prevented the loading of the ship if she remained in the berth—there is no finding as to that fact—but that the threat of the bore tide on the safety of the ship was such as to make it reasonable for her to leave the berth, are the days when she is absent from the berth weather working days?

D I have had cases cited to me on both sides as to what is the meaning of "weather" for this purpose, whether surf is "weather" and whether ice is "weather"; but I find it simpler to decide this point on the second of the questions which I have set out and I shall assume, without deciding it, that a bore tide is "weather" within the meaning of this clause. No case has been cited to me in which a mere threat of bad weather has been held to make a day not a weather working day, and certainly no case where the threat of bad weather has affected not the operation of the actual work of loading but the safety of the ship in the particular place in which she was. In my judgment, the expression "weather working days" cannot be construed so widely as to cover the circumstances of this case. The expression is used in relation to a berth, that is, it is assumed that the vessel will be in a safe berth and it is contemplated that, notwithstanding the safety of the berth, the weather may interfere with the actual work of loading.

That point, therefore, fails, and the consequence of its failure is that the familiar principle of law has, *prima facie*, to be applied. That principle is conveniently stated in *Cantiere Navale Triestina v. Russian Soviet Naphtha Export Agency* (1) ([1925] 2 K.B. 172), on which counsel for the owners relied. The Master of the Rolls (SIR ERNEST POLLOCK) in his judgment (*ibid.*, at p. 196) said:

"The contract contained in the charterparty is absolute [that is the contract with the charterer to load within the lay days]. It contains the phrase: 'The laying days shall commence from the time the steamer is ready to receive or discharge her cargo . . . berth or no berth'. Hence the vicissitudes which are incurred are *prima facie* deemed to be at the risk of the charterers . . . The rule as to liability generally is stated . . . by LORD FINLAY as follows†: 'If the charterer has agreed to load or unload within a fixed period of time . . . he is answerable for the non-performance of that engagement, whatever the nature of the impediments, unless they are covered by exceptions in the charterparty or arise through the fault of the shipowner or those for whom he is responsible'."

It was sought to argue in this case that the charterers could be excused on a principle which was set out in SCRUTTON ON CHARTERPARTIES (11th Edn.) art. 129, p. 343, in the following terms:

* See p. 509, letter G, ante.

† In *William Alexander & Sons v. Aktieselskabet Dampskibet Hansa*, [1920] A.C. 88 at p. 94.

"If the ship has to be removed from the port, or becomes unfit for loading or discharging, e.g., by reason of a collision, the period of such removal or unfitness will be cut out from the period of demurrage."

That statement of law was held by the Court of Appeal in *Cantiere Navale Triestina v. Russian Soviet Naphtha Export Agency* (1) to be incorrect. I mention it because counsel for the charterers desired to reserve the point for argument in any court in which he is permitted to argue it that that statement, which has been adopted by ROCHF, J., in the court below*, is a correct statement of law; but he has, of course, accepted that I am bound by the decision in the Court of Appeal. The result is, therefore, that there being nothing in this charter-party which gives the charterers an express exception to the lay-time clause they must show that failure to load within the lay-time arose through the fault of the shipowner or those for whom he is responsible.

Since the ship was in fact removed in the middle of the loading, it is for the owners to show that the removal was justified. They say it was for two reasons: first, it was necessary for her safety because of the danger of the bore tides and, secondly, the harbour master ordered it. As to the first, the charterers replied that it was not necessary for the safety of the cargo and, therefore, not justifiable. As to the second, they say that the harbour master's orders had the force of law. The importance of that point is because of the distinction between illegality at the place of performance as illustrated in *Ralli Brothers v. Compania Naviera Sota y Aznar* (2) ([1920] 2 K.B. 287) and restraint of princes. Was the loading stopped because it would be illegal to continue with it, or was it stopped simply because the harbour master, as a local authority physically in a position to enforce compliance with his orders, decided that it should be? If the latter, it seems that, on the authority of *Cantiere Navale Triestina v. Russian Soviet Naphtha Export Agency* (1), the lay days would continue to run; but if the former, the position in law is still unsettled and counsel for the charterers submits that the point should be decided in favour of the charterers.

Before I deal with these two matters of law, I must consider the relevant findings in the Case. There is a composite finding on both points. The umpire has previously referred† to PORTS OF THE WORLD (11th Edn.) and discussed the vessel's draught. He clearly found some difficulty in understanding why the harbour master thought it would be unsafe for her to remain in No. 1 Garden Reach. In para. 12 he says:

"I have referred to pp. 177-189 inclusive of the BAY OF BENGAL PILOT (7th Edn.), 1940, but without knowledge of the mooring facilities at the Garden Reach Jetty the reasons for the harbour master's actions are not apparent. I find, however, that the harbour master was in the best position to judge and I accept that he was acting reasonably and inter alia for the safety of the vessel in ordering her away from the Garden Reach Jetty during the bore tides: also that the vessel was in a safe position at the buoys in the King George Dock. The master of the Maria G. was obliged to conform to the orders of the harbour master."

These findings are not exactly in point in relation to the two matters I have to consider. The umpire does not find expressly that the threat of the bore tides was such that it was reasonable for the ship to be removed. What he finds is that the harbour master was in the best position to judge and he, the umpire, accepts that he was acting reasonably and, inter alia, for the safety of the vessel in ordering her away from the Garden Reach Jetty during the bore tides. Counsel for the owners has invited me to construe that as a finding that, leaving aside the harbour master's order, the act of the shipowner was in the circumstances

* See [1925] 2 K.B. at p. 187.

† See p. 510, letters B to D, ante.

A reasonable in removing the vessel and that the vessel was, therefore, removed by reason of a cause beyond the shipowner's control, namely, the threat of these tides. I think that I can do so, since the harbour master was in the best position to judge. I am satisfied that, if the Case were to go back to the umpire, he would inevitably find that the shipowners were acting reasonably in withdrawing the vessel in accordance with the harbour master's views.

B On the other point, counsel for the owners points out that there is no finding about the state of the law in the port of Calcutta; there is merely a finding that the master of the *Maria G.* was obliged to conform to the orders of the harbour master. Here again, I am prepared to put what I hope is a reasonable interpretation on the words of that finding, this time in favour of counsel for the charterers. I think that it means more than that the harbour master gave orders which he could only enforce by whatever physical means there might be at his disposal. I think it is implicit in this finding that the law in the port of Calcutta was such as to authorise the harbour master to give orders of this character, and that failure to comply with the order would have been a breach of the law. From this construction of the case I now approach the two matters of law.

C Counsel for the owners submits, in the first place, that, leaving aside the intervention of the harbour master, if the vessel was removed from the berth because it was reasonably necessary for her safety that she should be removed, that was not the fault of the shipowner even if it was his voluntary act, and, consequently, it does not prevent the lay-time from continuing to run. For that proposition he has relied on a decision of CHANNELL, J., in *Houlder v. Weir* (3) ([1905] 2 K.B. 267). The headnote reads as follows:

E "Where the taking in of ballast during the process of discharge of cargo is necessary for the safety of the ship and of the cargo remaining on board, the fact that the taking in of the ballast delays the discharge of the cargo does not relieve the charterer from his obligation to complete the discharge within the stipulated time."

F CHANNELL, J., dealt with that point (*ibid.*, at p. 271) where he said:

G "The remaining question is whether the days on which the vessel was taking in ballast as well as discharging cargo should be reckoned as whole days or not. I think they ought. When LORD ESHER . . . said* that 'if the shipowner by any act of his has prevented the discharge, then, though the freighter's contract is broken, he is excused', he was referring to a case in which the shipowner's act preventing the discharge was in breach of his obligation to give the charterer all facilities for the discharge. But here the act of the shipowner which delayed the discharge was not a breach of any obligation of his. The taking in of ballast in the course of the discharge was a thing necessary to be done. When part of the cargo has been discharged something must be done to keep the ship upright for the safety of the remainder of the cargo as well as of the ship itself. Under those circumstances the case stands on the same footing as that of the discharge of the cargo being prevented by some act beyond the control of the shipowner, and consequently, though the charterers have been prevented from having the full benefit of those days, they must be treated as whole days."

I The principle that CHANNELL, J., is there laying down is not, in my judgment, confined, as counsel for the charterers would have me confine it, to cases where what is being done by the shipowner is necessary for the safety of the cargo as well as of the ship. Of course, the safety of the cargo is threatened by any threat to the safety of the ship, and that is as much true in this case in relation to the cargo that was on board before she was moved as in the case which

* In *Budget v. Binnington*, [1891] 1 Q.B. 35 at p. 38.

CHANNELL, J., was considering. In my judgment, the principle which CHANNELL, J., was laying down is quite independent of that: he is saying that the mere fact that the shipowner had, by some act of his, prevented the discharge is not enough to interrupt the running of the lay days; it is necessary for the charterers to show also that there was some fault on the part of the shipowner and, if the act of removal by the shipowner or the intervention with the lay days is caused by something that is beyond his control and not his fault, then the lay-time is not interrupted. In my judgment, therefore, counsel for the owners is right in his submission that, assuming the act of the shipowner to be a voluntary act, it did not interrupt the running of the lay-time.

The other point is whether, having regard to the fact that the ship was moved by the order of the harbour master, it can be said that the loading was prevented by illegality, that is to say, the loading was prevented by the fact that to continue loading would have been a breach of the law of the port of loading, and whether, if that is established, it excuses the charterers. It has not, I think, yet been decided whether or not illegality at the port of loading would relieve the charterers—would prevent the lay-time from running. The case that is nearest on the point is that to which I have already referred, *Cantiere Navale Triestina v. Russian Soviet Naphtha Export Agency* (1). The decision in that case was that the cause of the ship leaving port which prevented her from loading did not amount to an illegality within the principle of *Ralli Brothers v. Compañía Naviera Sota y Aznar* (2). The headnote reads ([1925] 2 K.B. 172):

“A charterparty of an Italian ship provided that 216 running hours (Sundays and holidays excepted), weather permitting, should be allowed the charterers for loading and discharging, and that the lay days should commence from the time the steamer was ready to receive or discharge her cargo, the captain giving six hours' notice to the charterers' agents, berth or no berth. The exceptions clause excepted 'restraint of princes, rulers and people'. The ship arrived at Batoum, and notice of readiness to load was given, and the lay days began to run. Owing however to a dispute between the Russian and Italian governments the ship was ordered by the port authorities to leave Batoum and also Russian waters, and accordingly the ship went to Constantinople. Subsequently permission was obtained to load the ship at Batoum, and she returned after being absent from the port a little over a fortnight. The owners subsequently claimed demurrage from the charterers, on the basis that the lay days continued to run during the period the ship was absent from Batoum:—*Held*, by the Court of Appeal . . . (1) That the lay days continued to run notwithstanding that the ship was compelled to leave the port by order of the port authorities . . .”

If the order of the harbour master in this case had been a purely executive act, counsel for the owners could have relied on *Cantiere Navale Triestina v. Russian Soviet Naphtha Export Agency* (1) as covering it. I think that counsel for the charterers is right in his submission that the decision in *Cantiere Navale Triestina v. Russian Soviet Naphtha Export Agency* (1) turns on the finding, or on the view, of the Court of Appeal that the orders that were there given to the ship were purely executive orders and had nothing to do with the state of law at the port of Batoum and that it was on that ground that the decision in *Ralli Brothers v. Compañía Naviera Sota y Aznar* (2) was distinguished. The orders that were given by the port authorities were given in response to a command by the Russian government and they were, I think, really an act of the sovereign authority of the government and depended for their virtue on the sovereign authority of the government within the ports of its own country and not on any particular provision of the law in force at Batoum. I think that that is a fair ground of distinction and, consequently, the question of illegality, which depends on the law in force at the place of loading, did not arise and was indeed expressly reserved by ATKIN, L.J. (*ibid.*, at p. 210). I shall

A not decide it because I think that counsel for the owners can succeed on a simpler ground.

Assuming that the law made it an offence for the charterers to attempt to load during the six days in which the vessel was removed from the berth, counsel for the owners argues that that was not the cause of the charterers' failure to load within the lay days. What he submits is this, that, put at its highest, if
 B illegality is an excuse at all, it must operate on the loading. The law that is relied on must be a law that prevents the loading of the vessel—the act of loading. It is not enough to point to a law which makes it an offence to load the vessel during a particular part of the lay days, however large a part they may be, and to say that that prevents the loading of the vessel. What is prevented is not the loading of the vessel but the loading of the vessel within a particular time that is prescribed by the
 C charterparty. That point was considered by SELLERS, J., in *Steamship "Induna" Co., Ltd. v. British Phosphate Comrs.* (4) ([1949] 1 All E.R. 522). That was a case in which the law in force at the port of discharge made it illegal to work at night time between 9 p.m. and 8 a.m. The consequence of that was that it became impossible for the ship to discharge at the prescribed rate and, therefore, to complete the discharging within the lay days. SELLERS, J., dealt
 D shortly with that point (*ibid.*, at p. 525) where he said this:

"*Ralli Brothers v. Compañia Naviera Sota y Aznar* (2) was quoted to support an argument that the illegality of night discharging could be relied on. In my opinion, that case has no application. The contract provided for discharge at the rate of 1,500 tons per working day of twenty-four hours, and it was not illegal to discharge at that rate if it could have been done."

E I respectfully follow and adopt that statement of law, and I am unable to distinguish the position here from the position in SELLERS, J.'s case in any of the ways in which counsel for the charterers has invited me to do so. In that case a period was, as it were, taken out of the lay days because every night was removed. It was not a continuous period as it is here, where six days continuously were
 F removed; but the principle appears to me to be the same and the point is, I think, entirely covered by what SELLERS, J., said.

The result is that the charterers have failed to discharge the ship within the lay days, and have failed to show any ground which excuses them from the performance of their contract. Therefore, I answer the question in para. 16 of the Case* in the affirmative and, consequently, I uphold the award in para. 17† of the Case. The charterers must pay the owners the sums which are there
 G specified. Those sums include an amount of £298 17s. 6d., which relates not to demurrage but to the expenses incurred in shifting the vessel to King George Dock Buoys. I have heard no argument on that. Both counsel are agreed that that being the form in which the Case is stated, it does not enable argument to be raised on it and that, if I answer the question in
 H the affirmative, as I have done, the result set out in para. 17 must follow. But, of course, it does not necessarily follow as a matter of law that, because the time lost in loading has to be included in the assessment of the lay-time, the charterers have to pay the expenses incurred in the shifting of the vessel to King George Dock Buoys. All that I desire to say about that is that the point has not been argued and cannot be taken in this case, and that I must not be regarded
 I as holding as a matter of law that shifting expenses are affected by the interruption of the lay-time.

Solicitors: *Holman, Fenwick & Willan* (for the owners); *Sinclair, Roche & Temperley* (for the charterers).

[Reported by G. A. KIDNER, ESQ., Barrister-at-Law.]

* See p. 510, letter G, ante.

† See p. 510, letter H, ante.

**SILKIN v. BEAVERBROOK NEWSPAPERS LTD.
AND ANOTHER.**

[QUEEN'S BENCH DIVISION (Diplock, J.), June 9, 10, 1958.]

Libel—Fair comment—Test is whether the comment is an honest expression of opinion.

To determine in a libel action whether the defence of fair comment is established where the facts on a matter of public interest have been truly stated, the test is whether the opinion which is expressed in the comment, however exaggerated, obstinate or prejudiced it may be, was honestly held by the writer (see p. 518, letter D; cf. p. 520, letter D, post).

[As to the defence of fair comment, see 20 HALSBURY'S LAWS (2nd Edn.) 486-493, paras. 593-599; and for cases on the subject, see 32 DIGEST 141-151, 1730-1823.]

Action.

In this action the Right Honourable Lord Silkin, the plaintiff, claimed damages against Beaverbrook Newspapers Ltd., the printers and publishers of the "Sunday Express", and John Junor, the editor of the "Sunday Express", the defendants, in respect of an article which appeared in the issue of the "Sunday Express" dated Dec. 16, 1956. The plaintiff was a solicitor, and prior to 1950, was a member of Parliament and a cabinet minister; since 1950 the plaintiff had taken an active part in the legislative business of the House of Lords. The article complained of was in the following terms:—

"Sugar for Silkin. From these humble Tories I turn to a lordly Socialist. Forward, the first Baron Silkin. Observe the return to Britain of the Heinkels. Not in the skies, but on the rolling roads. These economical little runabouts are selling briskly in the petrol famine. They are seen everywhere—even in New Palace Yard, Westminster, where M.P.'s park their cars. What has this to do with Lord Silkin? Why he is chairman of Noble Motors, who market the Heinkels in Britain. And his son, former Socialist candidate Mr. John Silkin, is a director. Oh, the eloquence that solemnly Lord Silkin has churned out in the House of Lords against arming the Germans. He has said that part of his case is 'emotional'. 'I feel it is wrong that, so soon after the events of the war, we should join hands with them today for the purpose of combining our forces'. Of course, when Lord Silkin joins hands with the Germans now, he represses his emotion. It is just good solid business. From which, no doubt, he makes a fine profit."

The plaintiff alleged that by these words the defendants meant and were understood to mean that the plaintiff was an insincere and hypocritical person who was prepared to sacrifice his principles for selfish reasons of personal profit, and that he was unfit to participate in debates in the House of Lords. The defendants denied that the words complained of were defamatory of the plaintiff and alleged that they were fair comment, made bona fide and without malice, on a matter of public interest, viz., the attitude of a member of the House of Lords, as was the plaintiff, to Germany and the Germans. The defendants alleged that the fair comment was based on the following facts. (1) The plaintiff was the first Baron Silkin and was at all material times a member of the labour party. He was the father of John Silkin who was at one time a labour parliamentary candidate. (2) The German firm of Heinkel was during the war with Germany between 1939 and 1945, the manufacturer of bomber aircraft which took a prominent part in offensive operations against the British Isles. In recent years the firm of Heinkel had manufactured, inter alia, a very small motor vehicle which was extremely economical in its use of petrol. (3) In or about December, 1956, there was a threatened shortage of petrol in the United Kingdom and on Dec. 17, 1956, a system of petrol rationing was introduced by H.M. Government.

- A In consequence there was a demand for motor vehicles which were economical in their consumption of petrol and the Heinkel vehicles were frequently seen in London and in New Palace Yard, Westminster, where members of Parliament parked their cars. (4) At all material times the plaintiff was the chairman of the board of directors, and John Silkin was a director of, Noble Motors Ltd. who were at all material times the Heinkel concessionaires for the United Kingdom, U.S.A. and Canada for the Heinkel motor vehicle. (5) The plaintiff on Mar. 1, 1951, made a speech in the House of Lords in which he opposed the re-armament of Western Germany and said inter alia:—"There is also the moral question. After all we know that on two occasions Germany has been guilty of aggressive war. We remember the brutalities, the horrors, the great massacres of millions of people. Are these the people with whom we want to conduct even a defensive war as allies. Does not the whole of the moral sense of the world revolt against our taking them into our hearts once more at the present time?". (6) The plaintiff on Mar. 24, 1954, made a further speech in the House of Lords in which he said with reference to Western Germany:—"There is also the emotional side and in some quarters those of us who take this view have been described as taking an emotional view. I make no apology for doing so and for the fact that at any rate part of my case—I have already given the rest of it—is an emotional case. I feel it is wrong that so soon after the events of the war and the undoubted cruelty and oppression which we suffered and others suffered we should join hands with them for the purpose of combining our forces."

Colin Duncan and A. T. Hoolahan for the plaintiff.

Gerald Gardiner, Q.C., and H. P. J. Milmo for the defendants.

- E **DIPLOCK, J.**, summed up to the jury as follows: This is an important case, for we are here concerned with one of the fundamental freedoms—freedom of speech, the right to discuss and criticise the utterances and the actions of public men. Freedom of speech, like the other fundamental freedoms, is freedom under the law, and over the years the law has maintained a balance between the right of the individual, like the plaintiff, whether he is in public life or not, to his unsullied reputation if he deserves it. That is on the one hand. On the other hand, but equally important, is the right of the public, which means you and me, and the newspaper editor and the man who, but for the bus strike, would be on the Clapham omnibus, to express his views honestly and fearlessly on matters of public interest, even though that involves strong criticism of the conduct of public people. If I spend a little time in talking to you about the law in this matter, I hope you will excuse me, because it is an important matter, not merely to the parties in this case, but to all of us.

Let us look a little more closely at how the law balances the rights of the public man, on the one hand, and the rights of the public on the other in matters of freedom of speech.

- H [HIS LORDSHIP then directed the jury that the facts on which comment was made must not be materially mis-stated, that the subject of the comment must be a matter of public interest, and that the plaintiff's attitude to Germany and the Germans was a matter of public interest. HIS LORDSHIP continued:] Let us turn to see what are the limits of the right of comment. Quite rightly they are very wide. First of all, who is entitled to comment? The answer to that is "everyone". A newspaper reporter or a newspaper editor has exactly the same rights, neither more nor less than every other citizen, and the test is no different whether the comment appears in a Sunday newspaper with an enormous circulation or in a letter from a private person to a friend or, subject to some technical difficulties which you need not be concerned with, is said to an acquaintance in a train or in a public house. So in deciding whether this was fair comment or not you dismiss from your minds the fact that it was published in a newspaper, and you, I am sure, will not be influenced in any way by any prejudice

you may have for or against newspapers any more than you will be influenced in any way by any prejudice you may have for or against the plaintiff's politics. Those are matters which you will, I am sure, all of you, dismiss from your minds. A

I have been referring, and counsel in their speeches to you have been referring, to fair comment, because that is the technical name which is given to this defence, or, as I should prefer to say, which is given to the right of every citizen to comment on matters of public interest. The expression "fair comment" is a little misleading. It may give the impression that you, the jury, have to decide whether you agree with the comment, whether you think that it is fair. If that were the question which you had to decide, you realise that the limits of freedom which the law allows would be greatly curtailed. People are entitled to hold and to express freely on matters of public interest strong views, views which some of you, or indeed all of you, may think are exaggerated, obstinate, or prejudiced, provided—and this is the important thing—that they are views which they honestly hold. The basis of our public life is that the crank, the enthusiast, may say what he honestly thinks just as much as the reasonable man or woman who sits on a jury, and it would be a sad day for freedom of speech in this country if a jury were to apply the test of whether it agrees with the comment instead of applying the true test: was this an opinion, however exaggerated, obstinate or prejudiced, which was honestly held by the writer? B C D

It is because honesty is the cardinal test that very often in cases of this kind you find it alleged that the person who made the comment was actuated by personal spite or by some other ulterior motive so that the comment he made did not express his honest opinion on a matter of public interest, but that is not alleged here. What is said here is that the comment in this article is so strong and of such a kind that it passes out of the domain of criticism and that no one could on these facts honestly hold the views as to the plaintiff's conduct which are expressed in the article. E

On what the true test is I think what I can best do is to repeat to you, adapting it to the facts of this case, a statement made by a judge* some years ago when he said this: F

"When you come to a question of fair comment you ought to be extremely liberal, and in a matter of this kind [a matter relating in this case to views held about Germany and Germans], you ought to be extremely liberal, because it is a matter on which men's minds are moved, in which people ... entertain very, very strong opinions, and if they use strong language every allowance should be made in their favour. They must believe what they say, but the question whether they honestly believe it is a question for you [the jury] to say. If they do believe it, and they are within anything like reasonable bounds they come within the meaning of fair comment. If comments were made which would appear to you to have been exaggerated, it does not follow that they are not perfectly honest comments." G H

That is the test, primarily one of honesty, not whether you yourselves agree with the comment. That is the test which you have to apply. I have dealt at some length with fair comment, because that is the real issue in this case, as counsel told you. You have, of course, first to decide whether the words are defamatory at all, that is to say whether they tend to lower the plaintiff's reputation in the estimation of right thinking people, but you probably have no difficulty in saying, if for example the facts about the plaintiff's connexion with Heinkel cars were quite untrue, that the words would be defamatory, and I do not understand counsel for the defendants to suggest the contrary; so that, in considering your verdict in this case, you will no doubt concentrate your minds primarily on the question of fair comment, with which I have already dealt. I

* The statement was made by BRAY, J., in *R. v. Russell* (Dec. 2, 1905, unreported); see GATLEY ON LIBEL AND SLANDER (4th Edn.), p. 356.

- A It is right that, before I turn to the article, I should remind you of the facts on which the comment was based, because those are the facts which you have got to consider and then say to yourselves: could any man honestly hold the views and express the comment on those facts? I remind you of the facts in this case. In the course of the plaintiff's evidence there was a good deal of cross-examination devoted to exactly how much he made out of his venture in
- B Noble Motors. The exact amount made, whether he made a large amount or a small amount, is not one of the facts commented on and, even if you think, as perhaps you do, that his first answers in the box as to what he made were not particularly candid, dismiss that from your minds in deciding the question whether the comment was fair, because that is not one of the facts on which comment was made.

- C [HIS LORDSHIP then stated the facts* on which the defendants alleged that the fair comment was based and agreed that all these facts were true. HIS LORDSHIP continued:] Those are the facts on which the defendants say that they were commenting in the article, and those are the facts which you will bear in mind when you are asking yourselves the question in the terms in which I put it to you, not whether you agree with the comment made on those facts, but whether you think it is a comment which any man, be he prejudiced or obstinate, could honestly hold.

- I turn now to the article, which starts with the heading "Sugar for Silkin". Quite why it does I do not know, but if you look at the paragraph before which deals with somebody else you will see that it finishes up by saying: "Mr. So and So is pale, slim, quick, energetic. He went to Bootle Grammar School.
- E He limps as a result of polio in his youth, and in Liverpool he makes sweets". It may be that connexion which got "sugar" into the title concerning the plaintiff. However, that is not for me. It is for you to decide what the article means. It reads: "Sugar for Silkin. From these humble Tories I turn to a lordly Socialist. Forward, the first Baron Silkin. Observe the return to Britain of the Heinkels. Not in the skies, but on the rolling roads." That is, of course,
- F the statement which we have already looked at about the importation of Heinkels. "These economical little runabouts are selling briskly in the petrol famine". Again, it is not suggested that is untrue. We have had read a letter from the company of which Lord Silkin was chairman to the motoring correspondent of the "Daily Express", saying that they had had enormous sales as a result of the shortage of petrol, and it is very natural too. "They are seen every-
- G where—even in New Palace Yard, Westminster, where M.P.'s park their cars. What has this to do with Lord Silkin? Why, he is chairman of Noble Motors, who market the Heinkels in Britain." That again is true. "And his son, former Socialist candidate Mr. John Silkin, is a director." That again is true. "Oh, the eloquence that solemn portly Lord Silkin has churned out in the House of Lords against arming the Germans". The plaintiff does not complain about
- H being described as portly. It would not be defamatory. Anyway, some of us are thinner than others and some are not, but that is not what he is complaining about. "He has said that part of his case is 'emotional'". This is the quotation†. "I feel it is wrong that, so soon after the events of the war, we should join hands with them today for the purpose of combining our forces". That is an extract from the last speech. Then come these words which are the words on
- I which you will concentrate:

"Of course, when Lord Silkin joins hands with the Germans now, he represses his emotion. It is just good solid business. From which, no doubt, he makes a fine profit."

* These facts are set out at p. 516, letter I, to p. 517, letter D, ante.

† For the whole article, see p. 516, letters E and F, ante; for the quotation, see p. 517, letters C and D, ante.

The plaintiff has said that he went into the business concerning the concession for the Heinkel cars in the way which he has described with the object ultimately of manufacturing the cars in this country, but he went into it as most people go into business—no one suggests that it is wrong—with the idea of making some money if he could. I will read to you again the words of which the plaintiff complains. The defendants have just quoted from the speech in the House of Lords where the plaintiff said “I feel it is wrong that, so soon after the events of the war, we should join hands with [the Germans] today for the purpose of combining our forces”. The defendants’ article continues:

“Of course, when [the plaintiff] joins hands with the Germans now, he represses his emotion. It is just good solid business. From which, no doubt, he makes a fine profit.”

Those are the words of which the plaintiff complains. You have to consider whether they are fair comment on what has gone before. It is not suggested that what had gone before were not true statements. Although it is a question for you, you will no doubt feel that those last sentences are comment on what has gone before. The matter which you have got to decide, and I emphasise this again, because it is so important, is not whether you, any of you, agree with that comment. You may all of you disagree with it, feel that it is comment that is not correct; but that is not the test. I will remind you of the test once more. Could a fair-minded man, holding a strong view, holding perhaps an obstinate view, holding perhaps a prejudiced view—could a fair-minded man have been capable of writing this? That is a totally different question from the question: Do you agree with what he said?

✓ So in considering this case, members of the jury, do not apply the test of whether you agree with it. If juries did that, freedom of speech, the right of the crank to say what he likes, would go. Would a fair-minded man holding strong views, obstinate views, prejudiced views, have been capable of making this comment? If the answer to that is yes, then your verdict in this case should be a verdict for the defendants. Such a verdict does not mean that you agree with the comment. All it means is that you think that a man might honestly hold those views on those facts. But it is for you, the jury, not for me, the judge, to answer that question, and the answers which juries have given in cases of this kind to that question have formed the law which lies at the basis of freedom of speech in this country. That is why I said to you at the beginning that this case, though it is a comparatively short and simple case, is an important case, to which I am sure you will all give most conscientious thought when you retire from the jury box.

If you take the view that that test is fulfilled, that this does come within the limits of fair comment, as I say, the proper verdict for you to bring in is a verdict for the defendants. If you were to take the view that it was so strong a comment that no fair-minded man could honestly have held it, then the defence fails.

[The jury, having retired to consider their verdict, found for the defendants.]

Judgment for the defendants.

Solicitors: *Blacket Gill & Topham* (for the plaintiff); *Allen & Overy* (for the defendants).

[Reported by WENDY SHOCKETT, Barrister-at-Law.]

A

GREEN v. FIBREGLASS, LTD.

[NEWCASTLE ASSIZES (Salmon, J.), May 14, 15, 23, 1958.]

Invitee—Negligence—Duty of occupier—Employment of independent contractor to do work requiring special skill—Electrical wiring of offices defective—Premises re-wired by reputable electrical engineering company five years before date of accident—Defect not apparent—Whether occupier liable as a consequence of contractor's negligence.

B

In 1951 when the defendants became tenants of certain offices they had the offices re-wired by established electrical contractors of good repute. On July 31, 1956, the defendants being still in occupation of the offices, the plaintiff, their invitee but not their servant, when cleaning a room in the offices touched an electric fire for the purpose of cleaning it. The fire was cold and the switch was in the "off" position. Owing to faulty wiring, however, the plaintiff suffered severe electrical shock and sustained injuries to her hand. The defect in the electrical installation was not apparent and the defendants had no reason to suppose that the installation was defective. The electrical installation at the offices was not regularly inspected. In an action by the plaintiff for damages for negligence,

C

D

Held: the defendants had discharged the duty of care that they, as occupiers, owed to the plaintiff, their invitee, by employing competent electrical contractors to re-wire the premises, because work of electrical wiring required technical knowledge which the defendants could not be expected to possess themselves; the action, therefore, failed.

E

Haseldine v. Daw & Son, Ltd. ([1941] 3 All E.R. 156) followed.

Thomson v. Cremin ([1953] 2 All E.R. 1185) considered and distinguished, and dictum of LORD WRIGHT ([1953] 2 All E.R. at p. 1191) not followed (see p. 526, letters G and H, post).

F

Per CURIAM: *Hughes v. Percival* ((1883), 8 App. Cas. 443), *Honeywill & Stein, Ltd. v. Larkin Bros. (London's Commercial Photographers), Ltd.* ([1933] All E.R. Rep. 77) and *Black v. Christchurch Finance Co.* ([1894] A.C. 48) are exceptional cases because there the defendants were employing contractors to do extra-hazardous acts, viz., acts which in their very nature involved in the eyes of the law special danger to others. It may be that such cases, like cases between master and servant, are an exception to the general rule that persons employing an independent contractor are not vicariously liable for his negligence or for the negligence of his servants (see p. 525, letter G, post).

G

[**Editorial Note.** This case may conveniently be contrasted with *Wells v. Cooper* (p. 527, post), where the nature of the work in question was not such as to require specialised knowledge but might properly be done by the occupier himself. The common law duty of an occupier to his visitors has been replaced by the common duty of care under s. 2 of the Occupiers' Liability Act, 1957, which came into operation on Jan. 1, 1958. By virtue of s. 2 (4) (b) of the Act (37 HALSBURY'S STATUTES (2nd Edn.) 835) the occupier in such a case as the present would not be "treated without more as answerable for the danger if in all the circumstances he had acted reasonably in entrusting the work to an independent contractor and had taken such steps (if any) as he reasonably ought in order to satisfy himself that the contractor was competent and that the work had been properly done."

H

I

As to the common law duty of an occupier to an invitee, see 23 HALSBURY'S LAWS (2nd Edn.) 604, para. 853; and for cases on the subject, see 36 DIGEST (Repl.) 54-56, 291-305.]

Cases referred to:

- (1) *Indermaur v. Dames*, (1866), L.R. 1 C.P. 274; 35 L.J.C.P. 184; 14 L.T. 484; *affd.* Ex.Ch., (1867), L.R. 2 C.P. 311; 36 Digest (Repl.) 46, 246.

- (2) *Haseldine v. Daw & Son, Ltd.*, [1941] 3 All E.R. 156; [1941] 2 K.B. 343; 111 L.J.K.B. 45; 165 L.T. 185; 36 Digest (Repl.) 29, 125. A
- (3) *Woodward v. Mayor of Hastings*, [1944] 2 All E.R. 565; [1945] K.B. 174; 114 L.J.K.B. 211, 218; 172 L.T. 16; 109 J.P. 41; 36 Digest (Repl.) 52, 287.
- (4) *Bloomstein v. Railway Executive*, [1952] 2 All E.R. 418; 3rd Digest Supp.
- (5) *Pickard v. Smith*, (1861), 10 C.B.N.S. 470; 4 L.T. 470; 142 E.R. 535; 36 Digest (Repl.) 72, 384. B
- (6) *Wilkinson v. Rea, Ltd.*, [1941] 2 All E.R. 50; [1941] 1 K.B. 688; 110 L.J.K.B. 389; 165 L.T. 156; 24 Digest (Repl.) 1088, 400.
- (7) *Phillips v. Britannia Hygienic Laundry Co.*, [1923] 1 K.B. 539; 92 L.J.K.B. 389; 128 L.T. 690; *affd.* C.A., [1923] 2 K.B. 832; 36 Digest (Repl.) 92, 497. C
- (8) *Stennett v. Hancock & Peters*, [1939] 2 All E.R. 578; 36 Digest (Repl.) 82, 447.
- (9) *Maclean v. Segar*, [1917] 2 K.B. 325; 86 L.J.K.B. 1113; 117 L.T. 376; 36 Digest (Repl.) 196, 1033.
- (10) *Dalton v. Angus*, (1881), 6 App. Cas. 740; 50 L.J.Q.B. 689; 44 L.T. 844; 46 J.P. 132; 34 Digest 158, 1234. D
- (11) *Quarman v. Burnett*, (1840), 6 M. & W. 499; 9 L.J.Ex. 308; 151 E.R. 509; 34 Digest 23, 29.
- (12) *Hughes v. Percival*, (1883), 8 App. Cas. 443; 52 L.J.Q.B. 719; 49 L.T. 189; 47 J.P. 772; 42 Digest 982, 124.
- (13) *Honeywill & Stein, Ltd. v. Larkin Bros. (London's Commercial Photographers), Ltd.*, [1933] All E.R. Rep. 77; [1934] 1 K.B. 191; 103 L.J.K.B. 74; 150 L.T. 71; Digest Supp. E
- (14) *Black v. Christchurch Finance Co.*, [1894] A.C. 48; 63 L.J.P.C. 32; 70 L.T. 77; 58 J.P. 332; 34 Digest 162, 1266.
- (15) *Thomson v. Cremin*, [1953] 2 All E.R. 1185; 3rd Digest Supp.
- (16) *Wilsons & Clyde Coal Co., Ltd. v. English*, [1937] 3 All E.R. 628; [1938] A.C. 57; 106 L.J.P.C. 117; 157 L.T. 406; Digest Supp. F

Action.

In this action the plaintiff, Annie Thomas Green, claimed damages against the defendants, Fibreglass, Ltd., in respect of personal injuries received by her on July 31, 1956, owing to defective wiring at office premises occupied by the defendants. The offices were in a part of a large building known as 16, Dean Street, Newcastle-upon-Tyne. The plaintiff was the caretaker of the whole building and arranged for the cleaning of the various offices in the building. The work was usually done by charwomen, but at the time of the accident the plaintiff herself was cleaning the defendants' offices owing to the absence of one of the charwomen. When the defendants became the tenants of the premises in 1951 they had them completely re-wired by electrical contractors, a firm long-established and of high repute. G

P. Stanley-Price, Q.C., and *L. Wilkes* for the plaintiff.

G. S. Waller, Q.C., and *J. R. Johnson* for the defendants. H

Cur. adv. vult.

May 23. SALMON, J.: Since 1951 the defendants have been the tenants and occupiers of certain offices at 16, Dean Street, Newcastle-upon-Tyne. 16, Dean Street is a fairly large building containing a number of other offices let to other tenants. The plaintiff is employed by the landlords as caretaker of the whole of 16, Dean Street, and has been so employed since October, 1952. By agreement with various tenants the plaintiff arranges for the cleaning of various offices at 16, Dean Street, and employs for that purpose a number of charwomen. In February, 1953, she agreed with the defendants' manager that she would take over the cleaning of the defendants' offices for the sum of £1 I

- A a week. Ever since that date the defendants' offices have been regularly cleaned by one or more of the charwomen employed by the plaintiff; the work has been done before the offices were opened by the defendants in the morning and after they were closed by the defendants at night. Occasionally, when one of the charwomen was ill or on holiday, the plaintiff would clean or help to clean the defendants' offices herself. In my judgment, the evidence does not establish
- B that the plaintiff was a servant of the defendants. She was not subject to the control or direction of the defendants, and the manner and time in which the work was to be done were entirely within the plaintiff's own discretion.

- On July 31, 1956, owing to the absence of one of the charwomen to whom I have referred, the plaintiff was herself helping to clean the defendants' offices. Whilst engaged on those duties, she noticed that an electric fire standing on the
- C floor required cleaning. While she was attempting to clean this electric fire with a duster, she received very severe electrical burns as a result of which the fingers of her right hand had to be amputated. She is now left with only the thumb and a small stump of one finger on that hand. At the time of the accident, the electric fire was plugged into a wall socket which was controlled by the normal type of switch. I find that at the time of the accident the switch
- D was in the "Off" position and the fire was cold. Nevertheless, the element was alive. This meant that, although it would appear to anyone looking at the fire that it was perfectly safe to clean, yet, if anyone did so, there was grave danger that he or she would receive very severe electrical burns and shock. [His LORDSHIP described what happened after the plaintiff, intending to clean the reflector, touched the element of the electric fire. His LORDSHIP continued:]
- E There was no fault in the electric fire itself. I find, however, that the wiring from the main switch to the socket was faulty. There are three wires concerned: the earth wire, the line or live wire, and the neutral wire. According to good electrical practice, those wires should each be of a different colour so as to avoid confusion; in fact, they were all coloured red. The line wire should go through and be controlled by the switch. I find that at the time of the accident, owing to
- F negligence on the part of the electrical contractor concerned, the neutral wire and not the line wire was connected with the switch. One of the effects of that was that, if the switch was switched on, the element in the electric fire glowed and gave out heat in the usual way, but, when the switch was switched off, the element faded and ceased to give out heat. Nevertheless, with the switch off, the element continued to be charged with electricity. No ordinary person
- G would have any reason to believe that there was any danger, unless he or she happened to touch the element when it was cold.

- The expert witnesses on each side are agreed that, if the plaintiff received the electrical burns when the element was cold and the fire switched off—as I unhesitatingly find that she did—the accident could, in the circumstances of this case, only have been caused by the fault in the wiring which I have described.
- H [His LORDSHIP reviewed the evidence of Mr. Jeffery, a director of the electrical contractors employed by the defendants, and of Mr. Thomson, an electrician employed by the contractors, and, having said that he rejected their evidence in regard to the condition of the wiring after the accident, His LORDSHIP continued:] When the defendants became tenants of these offices in 1951 they took the precaution of having them completely re-wired by Cairns (Newcastle), Ltd., who are electrical contractors. I have no doubt that it was due to the negligence of one of that company's workmen that the switch to which
- I I have referred was, in the first place, negligently and dangerously wired.

The question arises whether the defendants are responsible for the negligent wiring which caused this accident. I have held that the plaintiff was not a servant of the defendants; at the time of the accident she was the defendants' "invitee". It is clearly settled that the defendants, as inviters, owe a duty to exercise due care for the safety of their invitee, the plaintiff. An invitor must use reasonable care to prevent damage from an unusual danger of which he

knows or ought to know: see *Indermaur v. Dames* (1) ((1866), L.R. 1 C.P. 274 at p. 287). What is reasonable care must depend on the circumstances of each particular case. When the defendants took over these offices in 1951 they knew nothing about the wiring; the wiring, for all they knew, might then have been dangerously defective. They took the precaution, however, of having the offices completely re-wired by Cairns (Newcastle), Ltd. I find that this company was, and the defendants reasonably believed them to be, a long-established firm with a high reputation as electrical contractors. It is true that the information before me on this point is not very detailed, but it appears from the documents which have been put in evidence that that company has been in business in Newcastle since 1905 and that its directors are well-qualified electrical engineers. No evidence was called by the plaintiff, nor were any questions put in cross-examination, to suggest that Cairns (Newcastle), Ltd. are other than competent experts, or that the defendants had any reason to doubt that fact. It is obvious that, unless the electrical wiring of any premises is put into a safe condition anyone using the premises may be exposed to danger of an unusual kind. Electrical wiring, however, is a matter for expert electrical contractors and is not ordinarily carried out by the occupier himself.

How were the defendants to fulfil their duty to use reasonable care? I cannot think that it was incumbent on them to send one of their directors or servants to a polytechnic to take a course in electrical engineering and then attempt the re-wiring themselves. In my view, they would discharge their duty of care by employing reputable and competent experts; and this they did. Nor had the defendants at any time thereafter any reason to suppose that the experts had been negligent, or that the electrical installation was unsafe. This case seems to me to be indistinguishable from *Haseldine v. Daw & Son, Ltd.* (2) ([1941] 3 All E.R. 156), in which it was held that the owners of lifts discharge their duty of care to invitees by employing competent experts to attend to the lift for them. In that case, the lift in question became dangerous by reason of the negligence of one of the expert's servants and the plaintiff thereby suffered damage. It was held by the Court of Appeal that the defendants were not liable for the negligence of the servants of their independent contractor experts. SCOTT, L.J., held that the plaintiff was an invitee. GODDARD and CLAUSON, L.JJ., did not decide whether he was a licensee or an invitee, but said that, even if he were an invitee, his claim must still fail against the occupier. Counsel for the plaintiff sought to distinguish that decision on the ground that in the present case the defendants did not employ experts to make regular inspections of the electrical installation. I am not impressed by that point. An ordinarily prudent man, it is true, would have his lift regularly examined and serviced by an expert. I cannot believe, however, that an ordinarily prudent man who had had his premises wholly re-wired by experts would think of having the wiring examined within five years of its installation unless there was any special reason, such as an apparent fault, for him to do so. Here, there was no such reason.

Haseldine v. Daw & Son, Ltd. (2) was distinguished, but no doubt was cast on it, by DU PARCQ, L.J., in *Woodward v. Mayor of Hastings* (3) ([1944] 2 All E.R. 565) and by PARKER, J., in *Bloomstein v. Railway Executive* (4) ([1952] 2 All E.R. 418). Those, as also *Pickard v. Smith* (5) ((1861), 10 C.B.N.S. 470), and *Wilkinson v. Rea, Ltd.* (6) ([1941] 2 All E.R. 50), were cases where the safety of the invitee depended, not on the careful performance of some act which called for technical knowledge or experience, but on acts which the courts held that the invitor could and should have done himself and which he neglected to do. In such cases the invitor is liable for his neglect to do the act. It is no excuse for his failure to do that act that, for purposes of his own, he chooses to employ an independent contractor who has neglected to perform the act or to perform it carefully. DU PARCQ, L.J., and PARKER, J., in *Bloomstein v. Railway Executive* (4) ([1952] 2 All E.R. at p. 419), re-affirmed that in the

- A *Haseldine v. Daw & Son, Ltd.* (2) class of case, to which the present case in my judgment clearly belongs, the invitor, because of his inherent lack of technical knowledge or experience, discharges his duty of care to the invitee, not by attempting to do the act himself, but by employing a properly qualified independent contractor to do it for him. In another context, *Phillips v. Britannia Hygienic Laundry Co.* (7) ([1923] 1 K.B. 539) and *Stennett v. Hancock & Peters* (8) ([1939] 2 All E.R. 578) are illustrations of the same principle.

B It is well settled that generally, in an action for negligence, a man is not vicariously liable for the carelessness of an independent contractor. There are, of course, cases where, by virtue of a contract or by the operation of law, an obligation may be imposed on a man to do an act, or to ensure that it is done and done carefully. In such cases, the defendant cannot shelter behind any independent contractor whom he may have employed. If he is in breach of the obligation he is liable, not in negligence, but in contract, as in *Maclean v. Segar* (9) ([1917] 2 K.B. 325), or by reason of some breach of duty other than a duty to take care, as in *Dalton v. Angus* (10) ((1881), 6 App. Cas. 740). The master, too, owes special duties to his servant which he cannot delegate. Those duties, however, spring from the nature of the contract of service. I can find no authority for holding that an invitor owes the same duty to his invitee as a master does to his servant. In *Dalton v. Angus* (10) LORD BLACKBURN said (6 App. Cas. at p. 829):

E “Ever since *Quarman v. Burnett* (11) ((1840), 6 M. & W. 499) it has been considered settled law that one employing another is not liable for his collateral negligence unless the relation of master and servant existed between them. So that a person employing a contractor to do work is not liable for the negligence of that contractor or his servants. On the other hand, a person causing something to be done, the doing of which casts on him a duty, cannot escape from the responsibility attaching on him of seeing that duty performed by delegating it to a contractor.”

F It is important to observe that the duty cast on the defendant in that case was not a duty to take care, but a duty not to let down the plaintiff's adjoining buildings while excavating his own land, the plaintiff having acquired a right of support by twenty years' enjoyment of such support.

G *Hughes v. Percival* (12) ((1883), 8 App. Cas. 443), *Honeywill & Stein, Ltd. v. Larkin Bros. (London's Commercial Photographers), Ltd.* (13) ([1933] All E.R. Rep. 77) and *Black v. Christchurch Finance Co.* (14) ([1894] A.C. 48) are exceptional cases, because there the defendants were employing contractors to do extra-hazardous acts, that is, acts which, in their very nature, involve, in the eyes of the law, special danger to others. It may be that such cases, like the master and servant cases, are an exception to the general rule that persons employing a contractor are not vicariously liable for his negligence or for the negligence of his servants.

H On Oct. 20, 1941, the House of Lords decided *Thomson v. Cremin* (15) ([1953] 2 All E.R. 1185). The judgment in *Haseldine v. Daw & Son, Ltd.* (2) was delivered on July 31, 1941, that is, nearly three months before the decision in *Thomson v. Cremin* (15). It is argued by counsel for the plaintiff that I ought not to follow *Haseldine v. Daw & Son, Ltd.* (2) because that case is inconsistent with the decision in *Thomson v. Cremin* (15). I do not agree, although it must be conceded that some of the dicta of LORD WRIGHT in *Thomson v. Cremin* (15) are not easy to reconcile with *Haseldine v. Daw & Son, Ltd.* (2). In my judgment, however, *Haseldine v. Daw & Son, Ltd.* (2) is not affected by *Thomson v. Cremin* (15) and is binding on me. Moreover, in my humble view, it is consonant alike with principle, common sense, and, as I have attempted to show, the whole stream of authority. It is to be observed that the point decided in *Haseldine v. Daw & Son, Ltd.* (2) was not even argued in *Thomson v. Cremin* (15) nor did it arise. The appellant shipowner in *Thomson v. Cremin* (15) had

chosen to employ independent contractors to fit and secure a shore in his ship. As a result of the independent contractors' negligence, the first respondent (who was a stevedore's labourer) was injured. The work in question in that case does not seem to me to have called for any special technical knowledge or experience which the ordinary shipowner does not possess. The case, therefore, seems to me to fall within the class of cases illustrated by *Woodward v. Mayor of Hastings* (3) and *Bloomstein v. Railway Executive* (4) rather than by *Haseldine v. Daw & Son, Ltd.* (2). The facts which might have been relevant to the point which I am now considering are not fully set out in *Thomson v. Cremin* (15), as they would have been had the point there been under consideration. It appears, however, from the speech of LORD PORTER ([1953] 2 All E.R. at pp. 1196, 1197) that the appellant may well have been in control of the ship's hold and directing operations at the time of the erection of the shore. VISCOUNT SIMON, L.C. (with whose speech LORD ROMER concurred) and LORD PORTER pointed out ([1953] 2 All E.R. at pp. 1189, 1193), that the case turned almost entirely on questions of fact. I cannot think that they intended, in effect, to alter what I conceive to be the whole current of authority on a point of law which was never argued before them.

Counsel for the plaintiff relied strongly on the observations of LORD WRIGHT in that case, particularly the following passage ([1953] 2 All E.R. at p. 1191):

"It is true that the invitor is not an insurer: he warrants, however, that due care and skill to make the premises reasonably safe for the invitee have been exercised, whether by himself, his servants, or agents or by independent contractors whom he employs to perform his duty. He does not fulfil the warranty merely by leaving the work to contractors, however reputable or generally competent. His warranty is broken if they fail to exercise the proper care and skill. This is only an instance of the general rule which was stated by LORD BLACKBURN in another connexion in *Dalton v. Angus* (10) (6 App. Cas. at p. 829) . . . LORD BLACKBURN again enunciated the same principle in *Hughes v. Percival* (12) . . . More recently this House, again in a different context of fact, applied this rule in *Wilsons & Clyde Coal Co., Ltd. v. English* (16) ([1937] 3 All E.R. 628)."

These observations, although obiter, necessarily carry the greatest weight. Nevertheless, as I have ventured to observe,* *Dalton v. Angus* (10) was not a case where the claim was in negligence, and *Hughes v. Percival* (12) falls into a very special category to which the present case and *Haseldine v. Daw & Son, Ltd.* (2) do not belong. *Wilsons & Clyde Coal Co., Ltd. v. English* (16) was a case of master and servant. With great diffidence, I doubt whether it is helpful to import into this branch of the law the conception of warranty. That seems to me to belong exclusively to the law of contract. The obligation of an invitor to an invitee does not rest on the law of contract or quasi-contract, but on the law of tort. The invitee's cause of action lies in negligence and nothing else. The only obligation of the invitor, in essence, is an obligation imposed by law to take reasonable care and nothing more. In each case the question must be posed: How ought that obligation to be performed? The answer to that question must depend on the particular facts of each case. If, as in this case and in *Haseldine v. Daw & Son, Ltd.* (2), some act is to be performed which calls for special knowledge and experience which the invitor cannot be expected to possess, then, in my judgment, he fulfils his duty of care as a prudent man by employing a qualified and reputable expert to do the act. In my judgment, it follows that the claim fails against the present defendants. I would add that, on the facts as I have found them, it would appear that there could have been no answer to the claim had it been brought against Cairns (Newcastle), Ltd.

* See p. 525, letter F, ante.

A [His LORDSHIP assessed at £3,750 the damages to which the plaintiff would have been entitled if her claim had been successful.]

Judgment for the defendants.

Solicitors: *Gibson, Pybus & Reay-Smith*, Newcastle-upon-Tyne (for the plaintiff); *Ingledeu, Mather & Dickinson*, Newcastle-upon-Tyne, agents for

B *R. H. Eggar*, St. Helens (for the defendants).

[Reported by G. M. SMAILES, ESQ., *Barrister-at-Law*.]

C WELLS v. COOPER.

[COURT OF APPEAL (Jenkins, Parker and Pearce, L.JJ.), April 21, 22, May 5, 1958.]

Invitee—Negligence—Duty of occupier—Occupier carrying out work himself on his own premises—Work not requiring special skill and knowledge—Standard of care and skill required—Outside door handle fixed by householder—Handle coming off door when pulled by tradesman—Tradesman injured—Whether occupier liable.

D In the late summer of 1954 a householder, who was an amateur carpenter of some experience, well accustomed to doing small jobs about the house, fitted a new door handle to the outside of the back door of his house with three-quarter inch screws. The door opened inwards from a small unfenced exterior platform about four feet above ground level. On Dec. 4, 1954, when an exceptionally high wind was blowing against the door, the plaintiff, an invitee, who was leaving the house, gave the door a fairly stiff pull in order to shut it. The handle, which during the previous four or five months had remained secure, came away in his hand, causing him to lose his balance, fall off the platform and suffer injury. A reasonably competent carpenter would not necessarily have appreciated, when doing the work, that screws longer than three-quarter inch screws were necessary to secure the handle to the door. In an action by the plaintiff against the householder for negligence causing personal injury,

E F G **Held:** the defendant had discharged the duty of care which he, as occupier, owed to the plaintiff as invitee, because the fixing of the handle was a trifling domestic replacement well within the competence of the defendant, who exercised the degree of care and skill to be expected of a reasonably competent carpenter in doing the work; the action, therefore, failed.

H Per CURIAM: some kinds of work involve such highly specialised skill and knowledge, and create such serious dangers if not properly done, that an ordinary occupier owing a duty of care to others in regard to the safety of the premises would fail in that duty if he undertook such work himself instead of employing experts to do it for him (see p. 529, letters H and I, post).

Dicta of SCOTT, L.J., in *Haseldine v. Daw & Son, Ltd.* ([1941] 3 All E.R. at pp. 168, 169) applied.

I Appeal dismissed.

[**Editorial Note.** This case may be conveniently contrasted with *Green v. Fibreglass, Ltd.* (p. 521, ante), where the work in question required specialised technical knowledge and the invitor's duty of care was discharged by the employment of competent independent contractors. The standard of work required of an invitor personally doing work such as was in question in the present case is not as high a standard as that of a competent independent contractor doing the same job for reward, but is that of reasonable competence as stated in the holding above (see p. 530, letter C, post).

As to an occupier's duty to take reasonable care that his premises are safe for his invitees, see 23 HALSBURY'S LAWS (2nd Edn.) 604, para. 853; and for cases on the subject, see 36 DIGEST (Repl.) 54-56, 291-305.] A

Cases referred to:

- (1) *Riden v. A. C. Billings & Sons, Ltd.*, [1956] 3 All E.R. 357; [1957] 1 Q.B. 46; *affd.* H.L. sub nom. *A. C. Billings & Sons, Ltd. v. Riden*, [1957] 3 All E.R. 1. B
- (2) *Haseldine v. Daw & Son, Ltd.*, [1941] 3 All E.R. 156; [1941] 2 K.B. 343; 111 L.J.K.B. 45; 165 L.T. 185; 36 Digest (Repl.) 29, 125.
- (3) *Thomson v. Cremin*, [1953] 2 All E.R. 1185; 3rd Digest Supp.

Appeal.

The plaintiff appealed against the judgment of STABLE, J., dated July 18, 1957, dismissing his claim for damages for personal injuries sustained by reason of the alleged negligence of the defendant as his invitor. The facts, which are summarised in the headnote, are fully set out in the judgment. C

Alan Fletcher for the plaintiff, the invitee.

T. Springer for the defendant, the invitor.

Cur. adv. vult. D

May 5. JENKINS, L.J.: The judgment which I am about to read is the judgment of the court in this case.

This is an appeal by the plaintiff in the action, Mr. Albert Ernest Wells, from a judgment of STABLE, J., dated July 18, 1957, dismissing his claim against the defendant, Frederick Albert Cooper, for damages for personal injuries sustained by the plaintiff when leaving the defendant's house by the back door. The defendant's house, of which he is owner-occupier, is known as "Hazelgarth", Friars Hill, Guestling, near Hastings. The plaintiff is a fishmonger who had been for some time in the habit of calling at the defendant's house for orders twice weekly. He made one of these customary calls on Dec. 4, 1954, was given an order, went to fetch it from his van, came back with it to the defendant's kitchen, and was then invited to stay for a cup of tea. Having had his tea, he was making his way out by the back door when the handle on which he was pulling to shut the door after him came away in his hand, with the result that he lost his balance, fell to the ground from a raised concrete platform immediately outside the door, and was injured. The question in the appeal is whether, on the facts of the case, the defendant should have been held liable to the plaintiff for this mishap. E

The concrete platform on which the door opens is reached from the ground by a flight of steps built against the wall of the house to one side of the door, and is four feet six inches in length measured outwards from the door, by three feet in width. It is raised four foot one inch from the ground, and not provided with any railings or fence. The door, which opens inwards, is divided vertically into two leaves after the manner of a stable door. The handle to which this case relates was attached to the bottom corner of the upper leaf, which overlaps the top edge of the lower leaf on the inside, so that in the process of closing the door the upper leaf draws the lower one along with it. The door is, or was at the material time, fitted with an "atomic strip" which made it more difficult to close than it would otherwise have been, and a fairly stiff pull was necessary to shut it properly. On the day of the accident a very strong wind was blowing against the door which made it even stiffer than usual. F

The handle in use at the time of the accident had been attached to the door some four or five months previously by the defendant himself, to replace a bakelite handle which the defendant had decided to discard after a similar bakelite handle on a neighbour's door had broken in his hand. This new handle was made of metal and was of the lever type, mounted in a metal plate attached to the door by four screws inserted through holes, one at each corner of the plate, G

- A** and screwed into the woodwork of the door. The screws used by the defendant for this purpose were three-quarter inch screws. It is not in dispute that the handle came away in the plaintiff's hand because the anchorage afforded by these screws was not strong enough to withstand the force of the pull which the plaintiff found it necessary to exert on the handle in order to shut the door after him. The defendant is an amateur carpenter of some experience, well
- B** accustomed to doing small jobs of replacement and repair about his house, and there is no doubt that he believed that his fixing of the new handle was perfectly secure, and that he was making a decided improvement on the former bakelite handle. The adequacy of his work was to all appearance proved by the fact that during the four or five months which had elapsed between the fixing of the new handle and the time of the accident the new handle had been in
- C** constant use without showing any signs of looseness or insecurity.

- The relationship subsisting between the defendant and the plaintiff at the time of the accident was admittedly that of invitor and invitee. In these circumstances it is sought to make the defendant liable for the accident on two grounds. First, it is said that the defendant was in breach of his duty as invitor to the plaintiff as invitee. The insecure handle was an unusual danger of which the
- D** defendant knew or ought to have known and against which he should consequently have taken reasonable care to guard the plaintiff. Secondly, it is said that in carrying out the work of fixing the handle himself the defendant, irrespective of the invitor-invitee relationship, assumed a duty towards the plaintiff as a lawful visitor to the house to take reasonable care to protect him against any danger created by the insecurity of the handle. See *Riden v. A. C. Billings & Sons, Ltd.* (1) ([1956] 3 All E.R. 357 (Court of Appeal) and, in the House of
- E** Lords, [1957] 3 All E.R. 1). We should have thought that in the circumstances of this case the first of these two possible grounds of liability is the more appropriate. In truth, however, there is little difference between them for the present purpose. Either way the duty owed by the defendant to the plaintiff was a duty to take reasonable care for his safety, and the question is whether on the
- F** facts of this case the defendant did take reasonable care to that end.

- Counsel for the plaintiff formulates the issues (in effect) in this way: First, ought the defendant to have foreseen that if the handle came away when a person pulled it to shut the door as the plaintiff did that person might suffer injury; and secondly, if so, ought the defendant to have known that the screws which he used were not adequate to fix the handle to the door firmly enough to
- G** prevent any likelihood of such an occurrence?

- We think that if the defendant had envisaged the possibility of the handle coming off in the hand of a person pulling on it he could hardly have failed to appreciate the likelihood of untoward consequences such as did in fact occur; and accordingly counsel for the plaintiff's second issue appears to us to be the substantial issue in the case. It involves consideration of the standard of care
- H** to be demanded of the defendant in relation to the fixing of the handle. As above related, the defendant did the work himself. We do not think the mere fact that he did it himself instead of employing a professional carpenter to do it constituted a breach of his duty of care. No doubt some kinds of work involve such highly specialised skill and knowledge, and create such serious dangers if not properly done, that an ordinary occupier owing a duty of care to others in
- I** regard to the safety of premises would fail in that duty if he undertook such work himself instead of employing experts to do it for him (see *Haseldine v. Daw & Son, Ltd.* (2), [1941] 3 All E.R. 156 at pp. 168, 169, per SCOTT, L.J.). But the work here in question was not of that order. It was a trifling domestic replacement well within the competence of a householder accustomed to doing small carpentering jobs about his home, and of a kind which must be done every day by hundreds of householders up and down the country.

Accordingly, we think that the defendant did nothing unreasonable in undertaking the work himself. It behoved him, however, if he was to discharge his

duty of care to persons such as the plaintiff, to do the work with reasonable care and skill, and we think that the degree of care and skill required of him must be measured not by reference to the degree of competence in such matters which he personally happened to possess, but by reference to the degree of care and skill which a reasonably competent carpenter might be expected to apply to the work in question. Otherwise, the extent of the protection that an invitee could claim in relation to work done by the invitor himself would vary according to the capacity of the invitor, who could free himself from liability merely by showing that he had done the best of which he was capable, however good, bad or indifferent that best might be.

Accordingly, we think that the standard of care and skill to be demanded of the defendant in order to discharge his duty of care to the plaintiff in the fixing of the new handle in the present case must be the degree of care and skill to be expected of a reasonably competent carpenter doing the work in question. This does not mean that the degree of care and skill required is to be measured by reference to the contractual obligations as to the quality of his work assumed by a professional carpenter working for reward, which would in our view set the standard too high. The question is simply what steps would a reasonably competent carpenter wishing to fix a handle such as this securely to a door such as this have taken with a view to achieving that object.

In fact the only complaint made by the plaintiff in regard to the way in which the defendant fixed the new handle is that three-quarter inch screws were inadequate and that one-inch screws should have been used. The question may therefore be stated more narrowly as being whether a reasonably competent carpenter fixing this handle would have appreciated that three-quarter inch screws such as those used by the defendant would not be adequate to fix it securely and would accordingly have used one-inch screws instead.

The learned judge saw and heard two expert witnesses called on the plaintiff's side, namely, Mr. Hicks, an architect and surveyor, and Mr. Hall, a builder; and a great deal depends on the value properly attributable to their evidence. [His LORDSHIP here considered in detail the evidence of these two experts, and the finding of the trial judge in relation thereto, and continued:] It follows, if we are right in our understanding of the language used by the learned judge, that he must be taken to have rejected the evidence of the two experts to the effect that any reasonably competent carpenter would or ought to have foreseen that the three-quarter inch screws would prove inadequate, as being in the nature of wisdom after the event. It was for the learned judge to assess the value of the expert evidence. He appears to us to have assessed it as valueless for the purpose of establishing that the defendant, if he had exercised reasonable care and skill in the matter, would or ought to have appreciated, at the time when he did the work, that the three-quarter inch screws would prove inadequate; and on that assessment of this evidence we think that he was well warranted in dismissing the action.

In relation to a trifling and perfectly simple operation such as the fixing of the new handle we think that the defendant's experience of domestic carpentry is sufficient to justify his inclusion in the category of reasonably competent carpenters. The matter then stands thus. The defendant, a reasonably competent carpenter, used three-quarter inch screws, believing them to be adequate for the purpose of fixing the handle. There is no doubt that he was doing his best to make the handle secure and believed he had done so. Accordingly, he must be taken to have discharged his duty of reasonable care, unless the belief that three-quarter inch screws would be adequate was one which no reasonably competent carpenter could reasonably entertain, or in other words an obvious blunder which should at once have been apparent to him as a reasonably competent carpenter. The evidence adduced on the plaintiff's side failed, in the learned judge's view, to make that out. He saw and heard the witnesses, and had demonstrated to him the strength of attachment provided by three-quarter

A inch screws. We see no sufficient reason for differing from his conclusion. Indeed, the fact that the handle remained secure during the period of four or five months between the time it was fixed and the date of the accident, although no doubt in constant use throughout that period, makes it very difficult to accept the view that the inadequacy of the three-quarter inch screws should have been obvious to the defendant at the time when he decided to use them.

B A later passage in the learned judge's judgment has occasioned us some difficulty. He says:

"The result is that in my judgment I find that there has been no act or omission on the part of the defendant amounting to any serious actionable wrong towards the invitee in this case."

C The use in this passage of the words "*serious actionable wrong*" suggests that the learned judge was founding himself on the unforeseeability of any serious injury to an invitee in the event of the handle coming off in his hand. If this was the learned judge's meaning, then, as appears from what we have said above, we cannot agree with this part of his judgment, but we do not think it destroys the effect of the immediately preceding passage to which we have referred.

D Counsel for the plaintiff argued that if the defendant had employed a professional carpenter as an independent contractor to fix the new handle, and the carpenter had used three-quarter inch screws with the same results, the defendant would have been liable to the plaintiff for the carpenter's negligence on the principle enunciated in *Thomson v. Cremin* (3) ([1953] 2 All E.R. 1185) to the effect that the duty of care owed by an invitor to an invitee is personal to the invitor, who cannot escape liability by delegating the performance of his duty of care to an independent contractor. Accordingly, in the submission of counsel for the plaintiff, the defendant must be liable here because it cannot be that the standard of care to be required of an invitor who does the relevant work himself is lower than it would have been if he had employed an independent contractor to do it for him. We think that the fallacy in this argument is that the standard of care is no more than reasonable care, whether an independent contractor is employed or not. The invitor is to take reasonable care and the standard required of him is not raised to anything higher than that by the circumstance that he may choose to employ an independent contractor to do the work for him. As we have said before, it does not follow that because the degree of care and skill exercised by the independent contractor falls short of the standard required of him under his contract with the invitor it also falls short of the standard required of the invitor as between himself and his invitee. The two standards are by no means necessarily the same.

Each case of this kind depends on its own particular facts, to which the broad principle of reasonable care must be applied with common sense. The task of finding the facts and applying the principle to them is eminently a matter for the court of first instance. On the facts of this case, we find it impossible to hold that the learned judge came to a wrong conclusion, having regard in particular to the view which he took, and was entitled to take, of the expert evidence on the strength of which it was sought, after the event, to show that the defendant knew or ought to have known at the time when he fixed the handle that the three-quarter inch screws were inadequate, notwithstanding that they in fact sufficed to hold the handle securely for the four or five months of constant use which preceded the accident.

I Accordingly, we would dismiss this appeal.

Appeal dismissed.

Solicitors: *Collyer-Bristow & Co.*, agents for *Elliott & Gill*, Hastings (for the plaintiff); *Berrymans* (for the defendant).

[Reported by HENRY SUMMERFIELD, ESQ., *Barrister-at-Law*.]

G. L. BAKER, LTD. v. MEDWAY BUILDING AND SUPPLIES, LTD.

[CHANCERY DIVISION (Danckwerts, J.), June 3, 4, 1958.]

Money—Following trust money—Fraudulent payment to innocent third party—Value not given by third party—Whether beneficiary can recover from third party.

Limitation of Action—Trust—Breach of trust—Fraud or fraudulent breach of trust to which trustee a party—Payment by trustee to innocent third party—Whether third party can rely on any period of limitation—When time begins to run in favour of third party—Limitation Act, 1939 (2 & 3 Geo. 6 c. 21), s. 19 (1) (a), (2), s. 26 (a) (b).

B., Ltd. permitted T., its auditor, to receive some £80,000 on its behalf. T., a chartered accountant and a director of M., Ltd., paid the money into his business banking account. On Mar. 4, 1950, and Mar. 22, 1950, respectively T. made two payments by cheque drawn on his business account to M., Ltd., totalling some £6,161. The cheques were met out of the £80,000 belonging to B., Ltd. By a writ issued on May 2, 1957, B., Ltd. claimed the said sum of £6,161 from M., Ltd., on the ground that, without the knowledge and consent of B., Ltd., fraudulently and in breach of trust, T. paid the money to M., Ltd., which through its director, T., had notice of the fraudulent breach of trust thereby committed and was a trustee for B., Ltd. of the money. M., Ltd. in its defence admitted that T. made the payments to it, but said that if the payments were made fraudulently or in breach of trust it had no notice of such fraud or breach of trust. M., Ltd. also relied on the Limitation Act, 1939. The defence did not allege that M., Ltd. acted innocently and in good faith, or that it gave value for the cheques which it received from T. An application made during the hearing on behalf of M., Ltd. to amend the defence to allege that it gave value for the cheques was refused. B., Ltd. did not discover and could not with reasonable diligence have discovered the payments by T. out of B., Ltd.'s moneys until a date within six years before May 2, 1957 (the date of commencement of the action).

Held: B., Ltd. was entitled to recover the £6,161 for the following reasons:

(i) although M., Ltd. received the cheques without notice of T.'s fraud (for knowledge of T.'s fraud could not be imputed to M., Ltd. merely because T. was a director of M., Ltd.) and assuming that M., Ltd. received the £6,161 in good faith, yet M., Ltd. could not establish (having regard to the pleadings) that it had given value, and, therefore, B., Ltd. was entitled to recover its money unless the action were statute-barred.

Dictum of DENNING, J., in *Nelson v. Larholt* ([1947] 2 All E.R. at p. 752) applied.

(ii) (SEMBLE) no limitation period was applicable as the origin of the proceedings against M., Ltd. was T.'s fraudulent payments and the action was in respect of a fraud or fraudulent breach of trust to which the trustee was party or privy within s. 19 (1) (a) of the Limitation Act, 1939 (see p. 536, letters E and F, post).

(iii) assuming, however, that the six-year limitation period enacted by s. 19 (2) of the Limitation Act, 1939, were the relevant limitation period, nevertheless the commencement of the period was postponed under s. 26 (a), as the action was based on the fraud of T. through whom M., Ltd. claimed, until the discovery of the fraud within six years before the action was begun (see p. 537, letters B and C, post).

SEMBLE: the six-year limitation period (if applicable) might also be postponed under s. 26 (b) of the Limitation Act, 1939, the right of action

- A having been concealed by the fraud of T., through whom M., Ltd. claimed (see p. 537, letters D and E, post).

[As to following trust property, see 14 HALSBURY'S LAWS (3rd Edn.) 628-630, paras. 1163, 1164; and for cases on the subject, see 43 DIGEST 1017-1020, 4580-4603.]

- B For the Limitation Act, 1939, s. 19, s. 26, see 13 HALSBURY'S STATUTES (2nd Edn.) 1179, 1188.]

Cases referred to:

- (1) *Nelson v. Larholt*, [1947] 2 All E.R. 751; [1948] 1 K.B. 339; [1948] L.J.R. 340; 2nd Digest Supp.
- (2) *Re Diplock's Estate, Diplock v. Wintle*, [1948] 2 All E.R. 318; sub nom. *Re Diplock, Diplock v. Wintle*, [1948] Ch. 465; [1948] L.J.R. 1670; affd. H.L. sub nom. *Ministry of Health v. Simpson*, [1950] 2 All E.R. 1137; [1951] A.C. 251; 2nd Digest Supp.
- (3) *Jones (R. E.), Ltd. v. Waring & Gillow, Ltd.*, [1926] A.C. 670; 95 L.J.K.B. 913; 135 L.T. 548; 35 Digest 149, 470.
- (4) *Baker v. Barclays Bank, Ltd.*, [1955] 2 All E.R. 571; 3rd Digest Supp.
- D (5) *Beaman v. A.R.T.S., Ltd.*, [1949] 1 All E.R. 465; [1949] 1 K.B. 550; 2nd Digest Supp.

Action.

The plaintiff claimed (a) £6,161 9s. 11d., either (i) as money had and received to the use of the plaintiff; or (ii) as damages for money wrongfully detained alternatively converted by the defendant; or (iii) as the plaintiff's money traceable in equity; and (b) interest on the said sum.

- E George Eric Titley was at all material times a chartered accountant, the auditor of the plaintiff and a director of the defendant, a limited company. The plaintiff, also a limited company, conducted a transport business and on the nationalisation of British transport the plaintiff received compensation in the form of British Transport stock. Part of this stock was sold and on Mar. 1, 1950, the plaintiff entrusted Titley with £47,085 4s. 3d. out of the proceeds, and on Mar. 9, 1950, with £32,384 6s. both of which sums Titley paid into his business account.

The plaintiff's amended statement claim in para. 3 stated:

- G "3. Without the knowledge or consent of the plaintiff company, fraudulently and in breach of trust the said Titley paid part of the said moneys to the defendant which thereby through its said director Titley had notice of the fraudulent breach of trust thereby committed and was and is a trustee for the plaintiff company of the said moneys."

- H Particulars of the payments were given, viz., on Mar. 4, 1950, by cheque £3,268 0s. 5d. and on Mar. 22, 1950, by cheque £2,893 9s. 6d. Both of these cheques were drawn by Titley on his business account in favour of the defendant and were honoured on presentation. The bank statement of the business account of Titley showed that these two cheques must have been paid out of the sums entrusted to Titley by the plaintiff and which he had paid into his business account. By a letter dated Apr. 10, 1957, the plaintiff by its solicitor demanded repayment of the moneys.

- I The defendant in its defence stated:

"3. The defendant admits that Titley paid to the defendant two respective sums of £3,268 0s. 5d. and £2,893 9s. 6d. by two respective cheques on or about Mar. 4 and Mar. 20, 1950, respectively. The defendant does not admit that the said payments were made either fraudulently or in breach of trust . . . the defendant denies that it had notice of any such fraud or breach of trust. The defendant denies that it is now a trustee of the said respective sums of £3,268 0s. 5d. and £2,893 9s. 6d. or either of such sums for the plaintiff.

"4. The defendant admits the letter dated Apr. 10, 1957. The defendant denies that its retention of the said respective sums of £3,268 0s. 5d. and £2,893 9s. 6d. or either of them is or was at any time wrongful.

"5. In addition to all other defences the defendant will rely on the Limitation Act, 1939, s. 2 and s. 3."

The writ in the action was issued on May 2, 1957.

N. N. McKinnon, Q.C., and *M. O. Stranders* for the plaintiff.

C. A. Settle for the defendant.

DANCKWERTS, J., stated the facts and referred to the pleadings and continued: It is not very clear whether the plaintiff alleges that the defendant has still got the moneys and it is not at all clear whether the defendant is not admitting that it has retained the moneys and has still got them. There is no evidence on that matter before me and it would be, I presume, very unusual if the defendant still retained any part of the sums in question after this lapse of time has occurred between the payments and the issue of the writ in the action. This, however, is plain, that though fraud is denied there is not in terms a claim on behalf of the defendant that it acted innocently and bona fide—perhaps it is more a matter of inference—and there is no claim that the defendant gave value for the cheques which were handed by Titley to it. An application was made on behalf of the defendant for leave to amend so as to allege the giving of value. At the date when this application was made, which was only after the point had been realised on the case being opened, it seemed to me that it was not proper for me to allow the amendment, and I refused the application.

One thing is perfectly plain. Titley was fraudulent in his dealings with the balance of these moneys. He did not deal with them in a proper way. It was fraudulent of him to make the payments to the defendant which he made by these cheques and which he no doubt made for purposes which seemed good to him, but were not purposes which were in any way advantageous to the plaintiff. He was dealing with moneys which were the plaintiff's, and he dealt with them in an entirely fraudulent manner. Therefore the case in its essence arises out of frauds committed by Titley, for which he was eventually tried and sentenced to a term of seven years' imprisonment. An action was brought by the plaintiff against Titley and judgment was recovered in July and August, 1950, but that judgment was entirely unsatisfied and the plaintiff has never succeeded in recovering any part of the moneys from Titley. Having discovered that these cheques were received by the defendant, the plaintiff seeks to recover a proportion of its loss in this action against the defendant.

There is one point with which I can deal first of all without very much difficulty. Titley was at the material time a director of the defendant, and the plaintiff's statement of claim relies on that fact as giving notice to the defendant of Titley's fraudulent dealings. On the authorities it seems to me plain that the defendant cannot be fixed with the knowledge that these dealings by Titley were fraudulent, and consequently it must be accepted that it had no notice of Titley's fraud in fact. Apart from the point on the position of Titley as director, no allegations are now made against the defendant that it had knowledge or notice of Titley's fraudulent dealings.

That being the case, does the action lie against the defendant to recover the moneys which it received, whether or not it is to be taken as still retaining the money? The action really is not based on the fact of retention, even if it may be said to be alleged in the pleadings. It seems to me that the plaintiff must be entitled to succeed, unless there is some trouble with the Limitation Act, 1939, and unless the defendant can establish the position which was mentioned by DENNING, J., as a judge of first instance in *Nelson v. Larholt* (1) ([1947] 2 All E.R. 751), which seems to me to be justified also by the decision of the Court of Appeal in *Re Diplock's Estate, Diplock v. Wintle* (2) ([1948] 2 All E.R.

A 318) (affirmed by the House of Lords, [1950] 2 All E.R. 1137). In *Nelson v. Larholt* (1) DENNING, J., said ([1947] 2 All E.R. at p. 752):

B “A man’s money is property which is protected by law. It may exist in various forms, such as coins, Treasury notes, cash at bank, cheques, or bills of exchange, but, whatever its form, it is protected according to one uniform principle. If it is taken from the rightful owner, or, indeed, from the beneficial owner, without his authority, he can recover the amount from any person into whose hands it can be traced unless and until it reaches one who receives it in good faith and for value and without notice of the want of authority.”

C Applying that to the present case, it seems to me that in order to defeat the action the defendant must establish, and the onus is on it to establish, that it satisfies those conditions, viz., that it received the money in good faith and for value and without notice of the want of authority. I will assume that it received the money in good faith and it is plain that it received it without notice of the want of authority, but it has not been able to establish, and it is not entitled to establish on the pleadings, that it gave value. Consequently, it seems to me that the action would *prima facie* succeed unless it is defeated by the Limitation Act, 1939.

D I should add that it appears to me to be well established by *R. E. Jones, Ltd. v. Waring & Gillow, Ltd.* (3) ([1926] A.C. 670), and *Baker v. Barclays Bank, Ltd.* (4) ([1955] 2 All E.R. 571), that the position of the defendant in regard to the cheques which it received from Titley was that it could not claim to be holder for value in due course of negotiable instruments, because it was the payee of those cheques. Whether that makes any particular difference to the action I do not know, E but that seems to be undoubtedly the situation.

In the end the matter turns on the question whether the defendant is in a position to rely on the Limitation Act, 1939, to defeat the plaintiff’s *prima facie* claim. The relevant sections of that Act are s. 19 and s. 26 and possibly sub-s. (4) of s. 31, the definition section. Section 20 has also been referred to, but that seems to me to deal with a subject-matter which has no application to the present case, though arguments were founded on its terms bearing on the proper construction of the sections of the Act which I do have to consider. Section 19 F (1) provides:

G “No period of limitation prescribed by this Act shall apply to an action by a beneficiary under a trust, being an action—(a) in respect of any fraud or fraudulent breach of trust to which the trustee was a party or privy; or (b) to recover from the trustee trust property or the proceeds thereof in the possession of the trustee, or previously received by the trustee and converted to his use.”

Paragraph (b) is not, I think, applicable to the present case, but the question is whether para. (a) applies, and if para. (a) applies the position is that the defendant could not rely on any period of limitation at all. This Act is one which I understand was drafted by a very eminent Chancery lawyer, but none the less it is one which gives considerable difficulties of interpretation whenever the court is concerned with its application. Paragraph (a) does not in terms refer to an action against a trustee, and the first question to consider is: is it a provision which only deals with proceedings against a trustee who has been I guilty of fraud, or does it also apply to a person who was not the original trustee, but a person who has acquired the trust property or payment which was fraudulently made out of the trust property? It does not in terms refer to actions against trustees, but the words used are “in respect of any fraud or fraudulent breach of trust to which the trustee was a party or privy”. It seems to me that the words “in respect of any fraud or fraudulent breach of trust” may be capable of referring to a case where the action of the plaintiffs is based on the fact that their moneys were fraudulently paid away and have reached the hands of an innocent party. That is a possible construction, but

whether it is the right one or not is not at all clear. Section 19 (1) appears to be intended to reproduce the effect of the Trustee Act, 1888, s. 8. It is true that the Act in the preamble is described as a consolidating Act but also with amendments. In *Beaman v. A.R.T.S., Ltd.* (5) ([1949] 1 All E.R. 465), LORD GREENE, M.R., in the Court of Appeal refused to treat it as a purely consolidating Act, because he said it was also an amending Act in regard to certain aspects of the subject under consideration, which adds to one's difficulties. The Trustee Act, 1888, s. 8 (1), provided:

"In any action or other proceeding against a trustee or any person claiming through him, except where the claim is founded upon any fraud or fraudulent breach of trust to which the trustee was party or privy, or is to recover trust property, or the proceeds thereof still retained by the trustee, or previously received by the trustee and converted to his use, the following provisions shall apply . . ."

The later part of this sub-section is presumably intended to be dealt with by s. 19 (2) of the Act of 1939, but s. 19 (1) is apparently designed to reproduce in inverted form the provisions which are contained in the first part of this provision in the Act of 1888, and if it is intended to reproduce the provisions of the Act of 1888 it is quite plain that it is dealing with proceedings not only against a trustee himself who has been guilty of fraud or fraudulent breach of trust, but any person claiming through him.

It seems to me, therefore, that the Act of 1888 was certainly designed to deal with both those cases. It is not at all clear whether the Act of 1939 has the same purpose, but it may be so. The point is taken by counsel on behalf of the defendant that the defendant does not claim through the fraudulent trustee. He also said with regard to s. 19 (1) that the action was not in respect of any fraud or fraudulent breach of trust, because the action against the defendant in the present case is based on the receipt by it without any fraud of moneys which were part of the trust fund belonging to the plaintiff. I think that the words "in respect of any fraud or fraudulent breach of trust" are wide enough to cover the present case, because it is the fraudulent payment by Titley to the defendant which is the origin of the proceedings against the defendant. It is because the defendant received that payment by virtue of Titley's fraudulent breach of trust that the plaintiff is able to bring this action against it. Consequently, so far as those words are concerned the provision seems to me wide enough. I will postpone consideration of the question whether the defendant claims through Titley until I have dealt with s. 26 of the Act of 1939.

Section 19 (2) provides:

"Subject as aforesaid, an action by a beneficiary to recover trust property or in respect of any breach of trust, not being an action for which a period of limitation is prescribed by any other provision of this Act, shall not be brought after the expiration of six years from the date on which the right of action accrued . . ."

The defendant contends that s. 19 (2) applies to it and that, as the action has not been brought within six years from the payments, which were in March, 1950—it was not brought, it will be remembered, until May 2, 1957—the action was outside the period of limitation and therefore is defeated by that sub-section.

Assuming that s. 19 (2) does apply, the matter is not finished, because the provisions of s. 26 of the Act of 1939 must be considered. That section was designed to reproduce, it would appear, the equitable rule which formerly was not the subject of any statutory provision, but now appears in statutory form in this section. The old rule in equity would not allow a claim to be defeated if the defendant were guilty of what was termed concealed fraud. Section 26 provides:

"Where, in the case of any action for which a period of limitation is

- A prescribed by this Act, either—(a) the action is based upon the fraud of the defendant or his agent or of any person through whom he claims or his agent, or (b) the right of action is concealed by the fraud of any such person as aforesaid . . . the period of limitation shall not begin to run until the plaintiff has discovered the fraud or the mistake, as the case may be, or could with reasonable diligence have discovered it . . .”
- B There has been no fraud in this case by the defendant. It is in a way the innocent victim of Titley, in the same way as the plaintiff has been defrauded by him in respect of the moneys in question. Does the defendant claim, however, in regard to the subject-matter of the action, through Titley? In my view, the answer is plainly that it does. How did it come to get the moneys? By means of cheques which were handed to it by Titley in respect of which it was
- C not holder for value in due course, and it received the moneys by cashing those cheques. Its claim to the moneys must be through Titley and through nobody else, and therefore it is plainly within the provisions of s. 26 (a), i.e.,

“the action is based upon the fraud of the defendant . . . or of any person through whom he claims.”

- D It is based on the fraud of Titley, because Titley made the payments in fraud of the plaintiff and, therefore, within those terms.

It also seems to me that in view of *Beaman v. A.R.T.S., Ltd.* (5) there might be an answer under s. 26 (b) to the period of limitation, i.e., that “the right of action is concealed by the fraud of any such person as aforesaid”. “Any such person as aforesaid” must be any person through whom the defendant claims,

- E viz., Titley. In *Beaman v. A.R.T.S., Ltd.* (5), it was held by the Court of Appeal that persons who made away with certain parcels deposited with them were guilty of concealed fraud because they did not tell their victim what they had done. In the present case, of course, Titley did not tell the plaintiff that he had paid its money away wrongfully. It was left to the plaintiff to discover it by such means as were eventually available to the plaintiff, and, if Titley is a
- F person through whom the defendant claims, then the facts fall within the terms of s. 26 (b). I have been referred by counsel for the defendant to the definition of a person through whom a person claims in s. 31 (4), but I do not think it carries the matter any further.

I come to the question whether the plaintiff can succeed having regard to the date at which the action was started, i.e., May 2, 1957. The words in s. 26

- G permit the period to begin to run when

“ . . . the plaintiff has discovered the fraud or the mistake, as the case may be, or could with reasonable diligence have discovered it.”

- A director of the plaintiff, Mr. Littmoden, gave evidence that the plaintiff did not find out about the payment of these cheques by Titley to the defendant until it brought an action against Barclays Bank, Ltd., in January, 1956, when the bank disclosed Titley's account, and then from an examination of the account, which I have before me now, it became plain that payments were debited against the account in favour of the defendant on Mar. 4, 1950, and on Mar. 22, 1950.
- H

- I On the other hand, evidence was given on behalf of the defendant by Mr. Napley, the solicitor who conducted the defence of Titley, and he produced the Information against Titley which was dated in January, 1951, and gave evidence that the bank clerk was called at the hearing on July 15, 1951. It is plain from the Information that the Information itself would not have disclosed payments to the defendant, because one of the cheques in question, though referred to in para. 9 of the Information, is dealt with in this way. It is alleged that Titley had fraudulently converted £3,268 0s. 5d., which is the amount of one of the two cheques mentioned in this action, to the use and benefit of Haddon Products, Ltd., another company associated with the defendant. That would not, as far as I can see, have given anybody who had happened to see the Information

any line on the payments which were made actually to the defendant company. If any director of the plaintiff was in court at the hearing on July 15, 1951, he might have then perceived that the payment was to the defendant and therefore had some knowledge of the payment in question, but there is no evidence that any director did gain such knowledge, though one gave evidence at the trial, and it is not proved that any director of the plaintiff acquired knowledge of the payment at that date. Anyhow, even if he did, it would be within six years before May 2, 1957, and therefore the action would not be defeated by the provisions of the Limitation Act, 1939.

Consequently, it seems to me that the defendant is unable to rely on the Limitation Act, 1939, and the action of the plaintiff is not barred by any period of six years, if s. 19 (2) of the Act of 1939 is the appropriate section. It may be that s. 19 (1) (a) is the appropriate provision in the Act. Then, of course, no period of limitation would apply at all. Consequently, the plaintiff's action succeeds and it is entitled to judgment for the amount claimed.

Judgment for the plaintiff.

Solicitors: *Bell & Ackroyd* (for the plaintiff); *Alfred Neale & Co.* (for the defendant).

[Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.]

POTATO MARKETING BOARD v. MERRICKS.

[QUEEN'S BENCH DIVISION (Devlin, J.), May 21, 22, 23, June 18, 1958.]

Potato Marketing—Charge on registered producers—Powers of Potato Marketing Board to “enter and inspect” and to demand information relating to potatoes—Whether entitled to enter and measure acreage—Whether entitled to demand information of arable acreage—Potato Marketing Scheme, 1955 (S.I. 1955 No. 690), para. 81 (1), para. 82 (1), para. 83 (1) (a).

Potato Marketing—Disciplinary Committee—Chairman to be not a member of the Potato Marketing Board but an “independent person”—Chairman paid a fee by the board—Special Case—Whether jurisdiction to remit award—Agricultural Marketing Act, 1949 (12, 13 & 14 Geo. 6 c. 38), s. 8 (1)—Arbitration Act, 1950 (14 Geo. 6 c. 27), s. 22—Potato Marketing Scheme, 1955 (S.I. 1955 No. 690), para. 83 (2) (a), para. 83 (3).

The power to remit an award of an arbitrator that is conferred by s. 22 (1) of the Arbitration Act, 1950, is not applicable on Case Stated pursuant to s. 8 (1) of the Agricultural Marketing Act, 1949, by the disciplinary committee constituted under the Potato Marketing Scheme, 1955, para. 83 (2), since s. 8 (1) applies only s. 21 and s. 26 of the Arbitration Act, 1950*, and in view of the power for decisions of the committee to be referred under para. 83 (3) of the scheme to arbitration no implication need be made in s. 8 (1) of the Act of 1949 (see p. 550, letters B to F, post).

In 1957 the respondent, a producer registered under the Potato Marketing Scheme, 1955, grew potatoes on land occupied by him. Under the scheme, he was liable to contribute to the funds of the Potato Marketing Board £1 for each acre planted by him with potatoes. He did not inform the board of the acreage of potatoes planted by him in 1957, and persons authorised by the board entered on his land pursuant to power conferred by para. 82 (1) of the scheme that any person authorised might “enter and inspect . . . any part of the land” and attempted to measure the

* The references in s. 8 (1) of the Agricultural Marketing Act, 1949, to s. 12 of the Arbitration Act, 1889, and s. 9 and s. 10 of the Arbitration Act, 1934, refer to s. 21 and s. 26 of the Arbitration Act, 1950, by virtue of s. 44 (3) of that Act.

- A acreage used for producing potatoes. The respondent obstructed them by removing and throwing aside two measuring poles and by refusing to permit the use of a measuring chain. The board, being authorised by para. 81 (1) of the scheme to demand "such . . . information relating to potatoes" as might be specified in the demand, served a demand requiring him to furnish the board with information relating to his potato acreage for 1956 and
- B 1957, and to state the total arable acreage of his farms, which he refused to do. The respondent was charged with obstructing persons duly authorised by the board under para. 82 (1) of the scheme to "enter and inspect" land or premises occupied by a registered producer which those persons had reason to believe was used for producing potatoes, and with failing without reasonable excuse to comply with the demand under para. 81 (1).
- C At the hearing by the disciplinary committee, the chairman of the committee was paid by the board a fee for his services. The disciplinary committee imposed penalties on the respondent conditionally on the court's determinations on Special Case. The respondent contended that the power of entry and inspection conferred under para. 82 (1)* of the scheme did not also confer the power to measure land, that the demand by the board for information under para. 81 (1)* of the scheme was invalid, and that the disciplinary committee had no jurisdiction to hear and determine the charges because the chairman was not "an independent person" within the meaning of para. 83 (2) (a)* of the scheme.
- D

Held: the decision of the disciplinary committee imposing penalties on the respondent would be upheld, because—

- E (i) the power to enter and inspect land given by para. 82 (1) of the scheme included the power to measure land, and, the burden of proving abuse of the power being on the respondent (dictum of BARRY, J., in *Barber v. Manchester Regional Hospital Board*, [1958] 1 All E.R. at p. 329, followed), he had produced no evidence of impropriety.

- F (ii) although the demand for information of the total arable acreage was bad as not being information "relating to potatoes" within para. 81 (1) of the scheme, the ordinary principle of severability should be applied, and the board was entitled to demand the other information.

- (iii) notwithstanding that the chairman of the disciplinary committee received a fee from the board, the committee was properly constituted under para. 83 (2) (a) of the scheme since the word "independent" in that paragraph was used in the sense of bringing an independent mind to the proceedings and not in the sense of being unpaid.
- G

[As to the Potato Marketing Scheme, see 1 HALSBURY'S LAWS (3rd Edn.) 435, 436, paras. 849-851.

For the Agricultural Marketing Act, 1949, s. 8, see 28 HALSBURY'S STATUTES

- H * The terms of para. 81 (1), para. 82 (1) and para. 83 (2) (a) of the scheme are:—
 "81.—(1) The board may, whenever they consider it necessary for the operation of this scheme so to do, serve on any registered producer a demand in writing requiring him to furnish to them such estimates, returns and other information relating to potatoes as may be specified in the demand.
 "82.—(1) Any person authorised in writing by the board may for the purpose of securing compliance with this scheme, enter and inspect at any reasonable time and on production of his authority any part of the land or premises occupied by a registered producer (being a producer specified in the authority) which the person so authorised has reason to believe is used for producing potatoes or for doing either of the following things which is for the time being regulated under this scheme, that is to say, packing and storing potatoes.
 "83.—(2) (a) There shall be a committee of the board, to be known as the Disciplinary Committee, constituted, at each sitting thereof, of not less than four nor more than six members of the board and a chairman who is not a member of the board but is an independent person who is a barrister of not less than seven years' standing, an advocate of not less than seven years' standing, or a solicitor of not less than seven years' standing and is approved by the Minister."
- I

(2nd Edn.) 128; and for the Arbitration Act, 1950, s. 22, see 29 HALSBURY'S A
STATUTES (2nd Edn.) 107.]

Cases referred to:

- (1) *Mutter v. Eastern & Midlands Ry. Co.*, (1888), 38 Ch.D. 92; 57 L.J.Ch. 615; 59 L.T. 117; 28 Digest 462, 757.
- (2) *Barber v. Manchester Regional Hospital Board*, [1958] 1 All E.R. 322; B
122 J.P. 124.

Special Case.

This was a Special Case Stated by the chairman and members of a disciplinary committee of the Potato Marketing Board sitting on Nov. 22 and Dec. 3, 1957. The respondent, Jack Merricks, a registered producer under the Potato Marketing Scheme, 1955, approved by the Potato Marketing Scheme (Approval) Order, 1955 (S.I. 1955 No. 690), was charged before a disciplinary committee of the C
Potato Marketing Board (hereinafter called "the board"), constituted pursuant to para. 83 (2) (a) of the scheme, with the following offences under the scheme:—
(i) that on Sept. 26, 1957, at Lodgeland Farm, Ruckinge, near Ashford, Kent, he obstructed persons duly authorised by the board under para. 82 (1) of the scheme, contrary to para. 83 (1) (a) thereof; and (ii) that he failed without D
reasonable excuse to comply with a demand in writing served on him by the board on or about Oct. 3, 1957, requiring him to furnish to the board information relating to potatoes planted in 1956 and 1957, contrary to para. 83 (1) (a) of the scheme.

As to the first charge, the following facts were found. At all material times the respondent was a producer registered under the scheme. In 1957 he grew potatoes on land occupied by him at Lodgeland Farm. In 1957 each registered E
producer of potatoes was liable to contribute to the funds of the board the sum of £1 for each acre planted by him with potatoes in that year. On Sept. 26, 1957, the board had not been informed by the respondent of the acreage of potatoes planted by him in 1957 at Lodgeland Farm. On the same date four persons authorised by the board in writing entered on the respondent's land and attempted F
by means of ordinary instruments for the measurement of land, to measure the acreage of the respondent's land then used for producing potatoes. The respondent obstructed these persons or some of them by removing and throwing aside two measuring poles which had been placed in the ground, and by refusing to permit the use of a measuring chain. The attempt to measure the land was made for the purpose of securing compliance with the scheme.

As to the second charge, the following facts were found. On Oct. 3, 1957, G
the board served on the respondent a demand in writing requiring him to furnish the board with information relating to potatoes grown by him on land occupied by him in Kent and on land occupied by him in Sussex during each of the years 1956 and 1957. The respondent refused to comply with this demand. There was no reasonable excuse for the respondent's failure to comply with the demand. H
By reason of his failure to comply with the demand, the board suffered £25 loss. By inference the disciplinary committee found that the board considered it necessary for the operation of the scheme to serve the demand on the respondent. None of the members of the disciplinary committee had at any material time played any part in the events giving rise to the charge.

It was contended on behalf of the respondent that:—

(i) The disciplinary committee had no jurisdiction to hear and determine the I
charges brought against him, because (a) the scheme was invalid, in that it empowered the board to exercise control over the production of potatoes and to discriminate financially between one registered producer and another, and was, accordingly, beyond the powers conferred by the Agricultural Marketing Acts, 1931 to 1949; and/or (b) the disciplinary committee was not constituted in accordance with the requirements of para. 83 (2) (a) of the scheme, in that, as was the fact, the chairman received a fee from the board for his services and was,

- A therefore, not an independent person as was required by para. 83 (2) (a). (ii) Paragraph 82 (1) of the scheme conferred no power to measure land of a registered producer used for producing potatoes. (iii) If, contrary to contention (ii), the power to enter and inspect given by para. 82 (1) of the scheme did include a power to measure, the power given under that paragraph was discretionary and, on the evidence, the board attempted in this instance to use it for a purpose
- B other than that for which it was given, in that the attempt to measure was made as a test of strength rather than for the purpose of securing compliance with the scheme. (iv) There was no evidence on which the disciplinary committee were entitled to find that the persons who attempted on Sept. 26, 1957, to measure the respondent's land used for producing potatoes were so doing for the purpose of securing compliance with the scheme. (v) The demand in writing served on
- C the respondent on Oct. 3, 1957, was invalid, in that it required him to supply information to which the board was not entitled and information which was already known to the board and/or to supply the information in a form to which the board was not entitled and the demand accordingly exceeded the powers conferred on the board by para. 81 (1) of the scheme; further or alternatively, for these reasons the respondent had reasonable cause for not complying with the demand. (vi) There was no evidence on which the disciplinary committee were
- D entitled to find that the board considered it necessary for the operation of the scheme to serve on the respondent the demand in writing.

The questions for the decision of the court were:—

- (1) Whether the disciplinary committee had jurisdiction to hear and determine the charge brought against the respondent. (2) Whether para. 82 (1) of the scheme conferred power to measure the land of a registered producer
- E used for producing potatoes. (3) Whether, if para. 82 (1) of the scheme did confer power to measure the land of a registered producer used for producing potatoes, the attempt to measure made in this instance was a proper exercise of the power so given. (4) Whether there was any evidence on which the disciplinary committee could find that the persons who attempted on Sept. 26,
- F 1957, to measure the respondent's land used for producing potatoes were so doing for the purpose of securing compliance with the scheme. (5) Whether the demand in writing served on the respondent on Oct. 3, 1957, requiring him to furnish the board with information relating to the potatoes grown by him was valid. (6) Whether the disciplinary committee was entitled to find that the respondent had no reasonable cause for not complying with the demand of
- G Oct. 3, 1957. (7) Whether there was any evidence on which the disciplinary committee could find that, on Oct. 3, 1957, the board considered it necessary for the operation of the scheme to serve on the respondent the demand of Oct. 3, 1957, in writing.

- By para. 11 of the Special Case, (a) if the court should answer question (1) in the negative, the disciplinary committee made no award in the premises.
- H (b) If the court should answer questions (2), (3) and (4) in the negative, the disciplinary committee dismissed the first charge brought against the respondent. (c) If the court should answer each of the questions (2), (3) and (4) in the affirmative, the disciplinary committee awarded and adjudged that the first charge was proved and imposed on the respondent a penalty of £50, but made no order as to costs. (d) If the court should answer either questions (5), (6) or (7)
- I in the negative, the disciplinary committee dismissed the second charge brought against the respondent. (e) If the court should answer each of questions (5), (6) and (7) in the affirmative, the disciplinary committee awarded and adjudged that the second charge was proved and imposed in respect thereof a penalty of £20 on the respondent but made no order as to costs; and, further, decided that the respondent's contravention of the scheme as set out in the second charge caused loss to the board, and that £25 justly represented the amount of such loss, and required that the respondent should pay such sum to the board in addition to the penalty.

B. J. M. MacKenna, Q.C., and R. I. Threlfall for the complainants, the Potato Marketing Board.

Ian Percival and M. D. Thomas for the respondent.

Cur. adv. vult.

June 18. **DEVLIN, J.**, read the following judgment: This is a Special Case in which a disciplinary committee of the Potato Marketing Board states seven questions of law arising out of their decision to impose penalties on the respondent, Mr. Jack Merricks, who is a producer of potatoes at Lodgeland Farm, Ruckinge, near Ashford, in the County of Kent. The charges against the respondent were that on Sept. 26, 1957, he obstructed officers of the board in their attempts to check the acreage of potatoes grown at his farm, and that on Oct. 3, 1957, he failed to comply with a demand requiring him to furnish to the board information relating to potatoes planted in 1956 and 1957.

The first question stated raises matters which go to the jurisdiction of the committee. Strictly speaking, as counsel for the board has pointed out, an objection to the jurisdiction should be taken by way of motion to set aside the award; but, since the facts which do or do not give rise to the jurisdiction are not in dispute, the point is a technical one and he does not take it. I hold that the committee had jurisdiction. Counsel for the respondent has not pursued before me the first objection to the jurisdiction because he says that he is precluded from doing so by authority binding on me. His second objection is based on the admitted fact that the chairman of the committee was paid by the board a fee for his services, and so is not, counsel contends, "independent" within the meaning of the legislation whereunder the committee derives its powers. I shall, at the end of this judgment, give my reasons for holding that this contention is unsound, but I shall consider in the first place the main matters which have been developed in argument before me. These raise the questions whether power to "enter and inspect" includes a power to check or measure acreage, and whether in the forms of demand which the board sent out they were asking for information to which they were not entitled.

The Potato Marketing Board was created under a scheme made by virtue of the Agricultural Marketing Acts, 1931 to 1949. The Act of 1931 provides for the preparation of schemes for regulating the marketing of agricultural products, and s. 5, s. 6 and s. 7 specify a number of matters for which the scheme may provide. These include provisions (s. 5 (g))

"for empowering any person authorised in writing by the board, for the purpose of securing compliance with the scheme, to enter and inspect, at any reasonable time and on production of his authority, any part of the land or premises occupied by any registered producer (being a producer specified in the authority) which the person so authorised has reason to believe is used for producing the regulated product or for doing any of the following things which is regulated by the scheme, that is to say, grading, marking, packing, or storing the regulated product or adapting it for sale"

and (s. 5 (h))

"for requiring registered producers to furnish to the board such estimates, returns, accounts and other information relating to the regulated product as the board consider necessary for the operation of the scheme."

Section 6 (1) (d) says that the scheme shall provide for securing that any producer who is aggrieved by any act or omission of the board may refer the matter to arbitration. Section 7 (1) says that the scheme shall provide for the establishment of a fund to be administered and controlled by the board, and for the payment by producers of contributions to the fund of such amounts as may be necessary for the operation of the scheme and for the assessment of contributions in such manner as may be provided by the scheme. Section 5 (1) of the Act of 1949 requires the scheme to set up a disciplinary committee of the

- A board, consisting of between four and six members of the board and a chairman who is not a member of the board but is an independent person who is a barrister, advocate or solicitor of not less than seven years' standing. Decisions of the committee are taken by a majority, and s. 8 applies to those decisions the provisions of the Arbitration Act, 1889, and the Arbitration Act, 1934*, which require a Case to be stated if requested. Section 6 allows the committee, in addition
- B to the imposition of penalties, to award compensation for any loss the board has sustained, for example, by failure to collect contributions, and to arrive at such sums on the basis of an estimate presented by the board.

- The Potato Marketing Scheme, 1955, provides for all these matters, and in most of them it follows almost exactly the relevant wording of the statutes. The power of entry and inspection is given in para. 82 (1) of the scheme and in
- C the same words as those used in the statute, and para. 81 (1) follows the words of the statute in allowing the board, whenever they consider it necessary for the operation of the scheme so to do, to serve on any registered producer a demand in writing requiring him to furnish to them such estimates, returns and other information relating to potatoes as may be specified in the demand. The power to raise contributions is exercised by para. 84 of the scheme, which
- D provides that the board may from time to time by a prescriptive resolution require the contribution of sums which are not to exceed 20s. per acre of the acreage of potatoes planted by the registered producer. At all material times there was in force a resolution requiring each producer to contribute £1 per acre. Paragraph 83 (2) of the scheme sets up the disciplinary committee in accordance with the Act of 1949. Paragraph 83 (3) of the scheme preserves in relation to
- E the decisions of the disciplinary committee the right of arbitration given by s. 6 (1) (d) of the Act of 1931, so that a producer who is aggrieved by a decision of the committee has the choice either of requiring the committee itself to state a Case or of referring the whole matter to an arbitrator to be determined by him afresh. The respondent did not in this case exercise his right of choice and, in fact, the Case Stated by the disciplinary committee was at the request of the
- F board. Finally, para. 83 (1) (a) creates the two offences with which the respondent was charged, namely, failing without reasonable excuse to comply with a demand or requirement made by the board in pursuance of para. 81 of the scheme (that is, the demand for particulars relating to his potato acreage) and, secondly, obstructing or interfering with any person duly authorised by the board to enter and inspect his land and premises.

- G The headquarters of the board in London are under the direction of a registrar, and the board also employs divisional supervisors. The supervisor for the division in which the respondent farms is Mr. Grimmer. The respondent did not grow any potatoes in 1956, but he did in 1957, and on Aug. 14, 1957, Mr. Grimmer observed the crop. The Case states that the board had not been informed by the respondent of the acreage of his crop, though it does not appear
- H whether any demand for information was served on him before Oct. 3, 1957. At any rate, on Aug. 15, Mr. Grimmer made a report to the board which shows that he regarded the respondent as a defaulter, and that he estimated his potato acreage at 25½ acres. On Aug. 23 Mr. Grimmer wrote to the respondent saying that he was instructed by the board to check his potato acreage. On Sept. 13, Mr. Grimmer went to the farm, together with a chartered surveyor who was
- I equipped with measuring poles and a chain. It is plain that the respondent had grievances against the board with which this dispute is in no way concerned, and that he was disposed to show his resentment by standing on all his rights. He objected to a measuring pole being placed on his land. The board's party withdrew to a local public-house where they were joined by the respondent a little later for a pleasant discussion about politics and agriculture—an episode which earned Mr. Grimmer a rebuke from headquarters for fraternising. The

* See footnote, p. 538, ante.

campaign was resumed on Sept. 26. On this occasion, Mr. Grimmer read his authority to enter and inspect and the respondent said that he was advised that it did not include authority to measure. A pole was inserted and the respondent, after expressing his regret in suitable terms, removed it. The ceremony was repeated and this time the respondent, perhaps for the benefit of the Press photographers who were in attendance, cast the pole across a ditch. There was then a production of a measuring chain, to which the respondent objected, and the board's party then retired. This affair on Sept. 26 constitutes the obstruction with which the respondent was charged. Thereafter, on Oct. 3, Mr. Grimmer wrote to the respondent enclosing the board's forms demanding a return of his potato acreage for 1956 (although, as Mr. Grimmer knew, the respondent had not in that year grown any potatoes) and 1957. On Oct. 8 the respondent replied that the board was not entitled to their demands, and this is the basis for the other offence with which he is charged.

The second question in the Case (the first is the one relating to jurisdiction) inquires whether para. 82 (1) of the scheme, which confers the power of entry and inspection, confers also the power to measure land. Counsel for the respondent has submitted that powers of entry and inspection, because they are an interference with the right of property, should be narrowly construed. But interference with rights of property is now such a common result of legislation that I do not think it is sensible to attribute to Parliament any special reluctance in the grant of such powers. I think that provisions of this sort should be construed in the same way as any other provisions and a fair and full meaning given to the words used. At the same time, if the board has gone beyond the powers which a fair construction of the words confers on them, it does not matter that they have done so in a small particular which most people would consider unimportant or harmless. Whenever a man claims to enter another's land without permission, there is a principle at stake.

It is, of course, undisputed that, before determining the limits of the power that Parliament has conferred, one must have regard to the objects and scope of the legislation in which they are contained. These powers are contained in a scheme which provides for contributions to be made according to acreage. Inevitably, therefore, anyone inspecting the land on behalf of the board must want to check the acreage; and it seems at first sight unreasonable to construe the words in such a way as to permit a rough check by eye and forbid an accurate one by measurement. But counsel for the respondent has advanced an argument which greatly weakens the force of this contention. While conceding that one must have regard to the objects of the power as ascertained from the legislation as a whole, he begins with a submission that a power to inspect, unless extended by reference to its objects, does not, in its natural meaning, include the power to measure. He fortifies this submission by citing a number of statutes in which a power to measure is expressly granted in addition to a power of inspection. He relies also on the language used in *Mutter v. Eastern & Midlands Ry. Co.* (1) ((1888), 38 Ch.D. 92). In this case, the Court of Appeal held that a power to inspect a register included a power to take copies. But, in the language of LINDLEY, L.J. (*ibid.*, at pp. 105, 107), the power to take copies was justified as something incidental to the power of inspection because, without it, the right of inspection would be illusory. Counsel argues that the board can succeed only if they can show that a power to measure is necessary in order to achieve the presumed object of the inspection. He then submits that the object of the inspection must be ascertained by looking at the Act rather than at the scheme. The conferment of the power in para. 82 (1) of the scheme is done in words which follow almost exactly those used in the authorising section of the Act of 1931, and the power conferred cannot be construed as any wider than the power authorised. There is nothing in the Act to show that, when authorising the power of inspection, Parliament had it in mind that it might be used for the measurement of land or for the checking of acreage. Section 7 (1) of the Act

A of 1931 allows contributions from producers to be assessed in such manner as may be provided by the scheme. The framers of the Potato Marketing Scheme chose to assess contributions by reference to acreage. They might equally well have done it by reference to the tonnage of potatoes harvested or sold. There are many agricultural products within the scope of the Act in respect of which contributions could not be assessed on an acreage basis; for example, milk and
B eggs. Counsel asserts that in the several schemes prepared under the Act the Potato Marketing Scheme is, in fact, the only one in which acreage is relevant. If, he submits, Parliament had intended that the power of inspection should be used as a means of determining the exact contribution due from any producer, Parliament would not have limited the power, as it has done, to the inspection of land but would have allowed all commodities produced to be inspected and
C checked for quantity.

In any event, counsel denies that a power to measure as well as to inspect is necessary for the effective working of the scheme. I think it is true that the scheme could be made to work satisfactorily enough without the power to check acreage. Paragraph 5 (1) provides that a part of an acre is to count as a whole, so that there is no need for exact measurement in poles, perches or rods. The
D producer is obliged to declare his acreage under penalty of prosecution for any deliberate or reckless misstatement. An inspection without measurement can check whether the declaration is approximately correct. If the producer fails or refuses to declare his acreage, the board can estimate it and recover the contribution on the basis of the estimate unless it is displaced. It is under powers analogous to these that the income tax laws are satisfactorily worked,
E without the power of entering on a tradesman's premises and going through his books. Presumably, the other schemes under the Acts are made to work without the power to check the quantity of the products concerned.

I have given to all these arguments the most careful consideration, which, indeed, they deserve. But, in the end and after hesitation, I have come to the conclusion that the more general arguments presented by counsel for the board ought to prevail. I do not think it is possible to draw a hard and fast line
F between a power to inspect and a power to measure. I have to answer the question addressed to me in the light of all the facts set out in the Case; and, substantially, the question is whether, in doing what they did, the board's officials went beyond what can reasonably be termed inspection of land. I do not say that every sort of measurement of land is authorised by a power to
G inspect land, but some forms of measurement must be. An inspector cannot be prevented from walking or become a trespasser because he counts his paces. The question is one of degree, and in the end it comes down to this: If a man is authorised to inspect land and he takes measuring instruments with him and he uses them in the ordinary way to get an accurate idea of the size of the land as a whole, can he reasonably be regarded as a trespasser? I do not think he
H can. I think that power to inspect land must, unless the contrary is indicated, include the power to survey and this, in reality, was all that was being done here. Thus, whether the checking of acreage was contemplated or not—and, for my part, I think that counsel for the respondent has made good his point that the scheme should not be construed as if it were—the words used in the scheme are wide enough to permit it.

I The third and fourth points can be taken together and they deal with the propriety of the board's acts, granted that they are within the letter of the scheme. Paragraph 82 (1) of the scheme provides, as does the Act of 1931, that the power of entry may be used only "for the purpose of securing compliance with this scheme". It is submitted that measuring the acreage was unnecessary for this purpose. There seems to be no doubt that proceedings could have been taken quite satisfactorily without the inspection. Without it the board could easily have formed—and, in fact, formed—an estimate of the acreage which was sufficient to enable them to recover what was due, together

with appropriate penalties for the failure or refusal to declare the acreage. The officials of the board who were called before the committee said that the inspection was made on the instructions of headquarters and were not themselves able to say why it was thought to be necessary. Mr. Grimmer said in his opinion it was unnecessary but that his headquarters had a different opinion. Counsel for the respondent submits that the real object of the inspection was to make a display of bureaucratic power and to bring the respondent to heel. I do not think that the words "for the purpose of securing compliance with this scheme" do more than express a limitation which is implied on all statutory powers of this sort. Statutory powers are always coupled with statutory duties, and the powers must be used only for the purpose and with the object of discharging the duties imposed. It is for the authority to whom the power is granted and on whom the duty is imposed to decide in the first instance what steps it is necessary to take under the power for the achievement of the object; the exercise of its discretion in making that decision will not be reviewed by the courts, and the decision itself will be impugned only if an abuse of power can be shown. I adopt what has recently been said on this point by BARRY, J., in *Barber v. Manchester Regional Hospital Board* (2) ([1958] 1 All E.R. 322 at p. 329), and follow, as he did, the authority of the cases to which he refers. The burden of proving bad faith or the like is on the person asserting it.

The action of the board in this matter may be criticised as unnecessarily heavy-handed. But there is no sign of bad faith; and, if the board wanted to be on the safe side and obtain a professionally accurate measurement, that cannot be said to be wholly without reason. There is not in the Case any express finding of fact on this point based on the whole of the evidence. I imagine that the committee, which, except for the independent chairman, consisted entirely of members of the board, may have found themselves in some difficulty in passing judgment on what was in the mind of the board as a whole. What they have stated is simply that they infer that the attempt to measure was made for the purpose of securing compliance with the scheme. I take this to mean that they inferred from the doing of the act without more, or presumed, that it was done for a proper purpose and that they found no evidence to rebut that presumption. Such an approach would be correct in law and such a finding would, I think, be unimpeachable. But, in any event, I am prepared to hold that, the burden of proof being on the respondent, he produced no evidence of impropriety. I, therefore, answer the third and fourth questions in the affirmative.

I turn now to consider the validity of the demand for information served on the respondent on Oct. 3, 1957, which is the subject-matter of the fifth question. The demand is contained in four documents, two of them (the respondent had, apparently, two farms) relating to the 1956 crop, and two relating to the 1957 crop. These forms require the producer to state to the nearest quarter of an acre the acreage of each variety of potato, then to state the acreage of all the potatoes and, finally, to state the total arable acreage of the farm. The chief attack on the validity of the demand is that the board has no power to require information under the last head about the total arable acreage of the farm. I have not had to consider whether it is reasonable or unreasonable for the respondent to refuse this figure, any more than I have had to consider whether it is reasonable or unreasonable of him to have objected to the measurement of his land. The board have demanded the information not as a matter of courtesy but as of right and under threat of penalties to which they draw attention in large type and they must prove their right. They have the right under para. 81 (1) to demand information "relating to potatoes". I cannot see how information about the acreage of land on which *ex hypothesi* potatoes are not being grown can be information "relating to potatoes". At any rate, the relationship is not apparent; and, if there is a connexion which could be shown by outside evidence, it is for the board to adduce such evidence, which they have not done. I can quite see that, in the operation of the scheme, or at any rate for the purposes

A of the trade, it may be useful to the board to know what proportion of his total arable acreage each producer devotes to potatoes, but they are not empowered under para. 81 (1) to demand information simply because it is useful for the operation of the scheme. The power to obtain, and use such information if they can get it, is given under para. 79, and this is to be contrasted with the more limited class of information which they can get under threat of penalties by virtue of para. 81 (1).

But it does not follow that, because a composite demand asks in one particular for information to which the board is not entitled, the demand as a whole is invalid, with the result that no part of it need be complied with, good or bad. There does not appear to be any authority on the point whether a demand is, in such circumstances, invalidated. I must, therefore, find the right answer as a matter of principle, and I think that the principle to be applied is that which is applied to all classes of documents which are partly good and partly bad because, for example, they are in part illegal or ultra vires. In all these cases, the question to be asked is whether the bad part can be effectively severed from the good. I think that the demand relating to total arable acreage of the farm can be struck out from the form without altering the character of the rest of it. Accordingly, I hold that the respondent, while not bound to supply that particular piece of information, was in breach of the scheme by ignoring the rest of the form, and I answer the fifth question in the affirmative. I do not wish thereby to give any encouragement to authorities like the board to fill up their forms with questions which they are not entitled to ask, reckoning that it is the recipient's business to sort out the good from the bad. The sender of the form knows, or ought to know, exactly what his powers are; the recipient rarely does, and may find it more of a nuisance to go and look them up than it is to go and get the bit of information required. The board can fairly be criticised for being careless in the exercise of its powers; and because of this and because of the quasi-criminal character of the matter, counsel for the respondent has invited me to treat the demand as in some way tainted and so wholly unenforceable. If there were a deliberate abuse of power, it might be so; but I see no evidence of that and I think, therefore, that the ordinary principle of severability should be applied.

I need not take up much time over the last two questions. The sixth involves only a finding of fact and no argument has been pressed on it. The seventh involves the same considerations as those I have already dealt with in answer to the third and fourth. It is said that the demands were unnecessary because the board was already aware from Mr. Grimmer's observations of the acreage of potatoes grown in 1957, and they were also aware that no potatoes had been grown by the respondent in 1956. But they might reasonably have thought it desirable to have their information confirmed by the respondent himself, and I see no grounds for interfering with the finding of fact that the board considered the information necessary for the operation of the scheme.

As the result of the answers I have given, I uphold the awards in para. 11 (c) and (e) of the Case Stated*. Under these awards, a penalty of £50 is imposed on the respondent for his acts of obstruction; and for failing to comply with the demand for information there is a penalty of £20 and also an award of £25 representing the contribution due in respect of the 1957 acreage of potatoes. These penalties of £50 and £20 respectively might be thought excessive if the view is held that the respondent had genuine grounds—even though, after consideration, they are found to be insufficient—for challenging the legality of the board's acts. I have no jurisdiction whatever over the amount of the penalties and no cause for commenting on them, except in so far as the comment draws attention to matters of law. It appears to me that these very substantial fines may have been inflicted because the committee took the view that there was

* See p. 541, letters H and I, ante.

nothing whatever in the legal objections taken by the respondent and his advisers, and that the argument about them was merely an extension of a policy of unreasoning obstruction. I have made it plain that that is not my view of the arguments to which I have listened. In particular, I held that the demand for information made by the board was partly bad; and the question whether the respondent was bound to comply with it has turned out to be a novel one on which no direct authority could be cited. Whatever may have been the motive for the respondent's attitude, as things have turned out he has done no disservice to the body of producers who are the board's constituents by having these matters clarified. If an application is made to me for the purpose, I am prepared to consider whether I have power to remit these awards to the committee, in order that they may determine, the matter being entirely for them, whether in the light of this judgment the penalties remain appropriate.

I must now state my reasons for holding that the committee had jurisdiction for determining this dispute. What is meant by (para. 83 (2) (a) of the scheme)

"a chairman who is not a member of the board but is an independent person who is a barrister of not less than seven years' standing",

etc. ? Counsel for the board submits that the clause "who is not a member of the board but is an independent person" is to be read as constituting one requirement, and that the second part of it is there only to emphasise what is the essence of the requirement, namely, that the chairman is not to be a member of the board. I cannot accept this construction. I think that the provision that the chairman is to be independent adds something; for example, I think that a competing producer might be held not to be independent. I agree with counsel for the respondent that independence ordinarily denotes financial independence, but I do not think that is the only sense in which the word can be used. I think that the word may be used to refer to a person who is permitted—and, perhaps, indeed required—by the man who employs or retains him to bring an independent mind to bear on a particular problem; for example, a solicitor. The term "independent contractor" conveys what I mean. I have no doubt that it is in this latter sense—independent in the sense of being detached and not in the sense of being unpaid—that the word is used in para. 83 (2) (a) of the scheme; and I have two reasons for so thinking. The first reason is that Parliament, by the Act of 1949, has imposed on the board the duty of setting up a disciplinary committee with an independent chairman. It follows that the board must have the duty of paying the chairman a fee if he requires one. Counsel for the respondent was driven to argue that the board could discharge its duty only by finding a chairman who would give his services free, but I do not think that Parliament can have meant to narrow the choice in that way. The second reason is that the disciplinary committee is not an independent tribunal in the full sense of the word. If it were, it would, no doubt, be surprising before it, was expected to pay the chairman. But this tribunal set up pursuant to the Agricultural Marketing Act, 1949 (which does not, it must be remembered, exclude the right to a wholly independent arbitration) is a committee of the board itself. If the independent chairman were to differ from the other members of the board who sit on the committee, he could easily be outvoted. Since this is the chairman's position, it is ridiculous to suppose that it can matter much that he should be paid a fee by the board. I think that what is contemplated is that the chairman should be a person who will be able to bring an entirely independent mind to bear on any case that is presented to the committee, and who, because of his legal experience, will be able to guide the committee and ensure that they approach the cases which they have to decide in a true judicial spirit. Accordingly, I hold that, notwithstanding that its chairman received a fee from the board, the committee was properly constituted under the provisions of the scheme.

A [Counsel for the respondent applied to HIS LORDSHIP to remit the award to the disciplinary committee under the Arbitration Act, 1950, s. 22 (1).]

DEVLIN, J.: In this matter, counsel for the respondent has, pursuant to an intimation which I gave in the course of my judgment that I would entertain such an application*, applied to me to remit this award to the disciplinary committee of the Potato Marketing Board in order that they may re-consider, in the light of the principles of law which I expressed in my judgment as being the correct ones, the assessment of penalties which they imposed on the respondent. He makes that application under s. 22 (1) of the Arbitration Act, 1950, which is in wide terms and gives power to the court in all cases of reference to arbitration to remit the matters referred, or any of them, to the re-consideration of the arbitrator or umpire. While there is that wide power giving a jurisdiction to the judge, it is also clear that it is a discretion which has to be judicially exercised; and, if I had entertained the exercise of it in this case, I should have wanted to consider the matter very carefully, and I should have given to counsel for the respondent an opportunity of drawing my attention to some of the authorities that might be relevant. But I do not think it is a case for the exercise of my discretion. I do not think that my discretion arises at all, because counsel for the board has satisfied me that s. 22 does not apply to this award and I have no power to remit this award. He submits that this is not an arbitration in the full sense of the term; it is not an arbitration to which all the provisions of the Arbitration Act, 1950, apply; it is only made an arbitration, or made akin to an arbitration, for very limited purposes by s. 8 of the Agricultural Marketing Act, 1949. That section refers to sections of the Arbitration Acts, 1889 and 1934, which are no longer part of the law; but, paraphrased, it provides that s. 21 and s. 26 of the Arbitration Act, 1950,

“shall apply in relation to the hearing and determining of the matters which by virtue of any of the preceding provisions of this Act are referred to the disciplinary committee of a board . . . as if the proceedings were an arbitration under a submission to which the board and the producer were parties and as if the disciplinary committee were the arbitrator or umpire under the submission.”

In truth, then, this is only a quasi-arbitration; “as if” are the operative words in the section. Two sections of the Act are specifically applied, and s. 22 is not one of them. Therefore, *prima facie*, I have no power to make any order which would derive its virtue from s. 22.

Counsel for the respondent has submitted that, because s. 21 applies, which is the section which deals with the stating of a Case in the form of a Special Case for the decision of the High Court, therefore those sections which he submits are ancillary to it, of which s. 22 is one, must (although not specifically mentioned in s. 8 of the Act of 1949) be taken by implication to apply, as otherwise the court would be bereft of the powers which it would have to have in order to deal with such matters adequately. One point in support of that occurs to the mind at once. Suppose the court thought that the Case and the facts had not been sufficiently stated. Could it not, in such circumstances, follow the usual course of remitting the award to the arbitrator in order that he might state the facts which were necessary, so that the decision of the court could be given? Counsel for the board has answered that satisfactorily to my mind by saying that that power is not strictly (although it is not generally necessary to consider it strictly) derived from s. 22; it is derived from s. 21 (1), which says

“An arbitrator . . . may, and shall if so directed by the High Court, state—(a) any question of law arising in the course of the reference . . .”
and so on; and he submits, I think rightly, that there must be power under that

* See p. 548, letter B, ante.

section, if the Case is not adequately stated, for the court to direct a further statement of the Case to be made. A

The other sections that are, as counsel for the respondent puts it, ancillary are all sections of the sort, so far as I have been referred to them, which give the court powers to deal with what is sometimes called misconduct on the part of the arbitrators, in order to see that justice is done, if the arbitrators are biased or otherwise misconduct themselves in the technical sense. Again it would be surprising, if this were an ordinary arbitration, if no provision were made for the court to have such powers. Counsel for the respondent submits that they must have such powers, and that that must include the power to remit in proper cases under s. 22 (1) in order that justice may be done. I do not find it necessary to draw that inference. If I did, it would assist me, perhaps, to state that some implications must be made in s. 8 of the Act of 1949; but I see no reason in this case to say that s. 8 is not by itself quite adequate for the purposes which counsel has in mind, because it is to be remembered that this is not in any sense of the term a full arbitration or a final decision on the facts. Paragraph 83 (3) of the scheme which I have been considering—and this paragraph is there by virtue of statutory provisions—permits, in effect, any decision given by the disciplinary committee to be dealt with by the producer by his giving notice to the board referring the matter to arbitration under the provisions of the scheme and that, if the matter is so referred, no proceedings should be taken by the board otherwise than for the purposes of the arbitration. The right to independent arbitration that is given by the Acts under which the scheme is made is preserved, and this award of the disciplinary committee is not, therefore, a final decision on the facts. If it is right to question it on any grounds, whether the grounds of irregularity or technical misconduct or because the penalties are thought to be excessive, that can be done by the producer taking action under the paragraph of the scheme which I have read. There is no need, therefore, to read into s. 8 anything that is not there, and there is no reason to suppose that the framers of s. 8 did not consider that it was quite adequate for the purposes they had in mind, that s. 21 and s. 26 only of the Arbitration Act, 1950, should be applied, and that there was no necessity to apply s. 22. B C D E F

For these reasons, I think that counsel for the board is right in submitting that I have no jurisdiction and no power to remit this case. Accordingly, I refuse the application.

Award upheld.

Solicitors: *Ellis & Fairbairn* (for the complainants, the Potato Marketing Board); *Collyer-Bristow & Co.*, agents for *Elliott & Gill*, Hastings (for the respondent).

[Reported by G. A. KIDNER, ESQ., Barrister-at-Law.]

A

GRANADA THEATRES LTD. v. FREEHOLD INVESTMENT (LEYTONSTONE) LTD.

[CHANCERY DIVISION (Vaisey, J.), June 3, 4, 5, 6, 13, 1958.]

Landlord and Tenant—Repair—Covenant—Construction—“Structural repairs of a substantial nature.”

B

By cl. 2 (3) of a lease of a cinema, the tenants covenanted to keep the demised premises in good and substantial repair and condition and properly decorated “but nothing in this clause contained shall render the [tenants] liable for structural repairs of a substantial nature to the main walls roof foundations or main drains of the demised building”. By cl. 3 (2) the landlords covenanted, except so far as the tenants were liable under their covenants, to “repair maintain and keep the main structure walls roofs and drains of the demised premises in good structural repair and condition”. The roof being in disrepair and the cement rendering and brickwork of a front main wall being defective, the tenants served a schedule of dilapidations on the landlords in respect of the roof and front wall, but the landlords did not execute the repairs. The tenants themselves had the roof repaired at a cost of £961, the work done including stripping slates at the front of the roof and substituting corrugated asbestos sheeting. The landlords alleged that they had obtained a tender for doing the work at a cost of £130 10s. and that £961 was excessive. The tenants claimed damages for breach by the landlords of their covenant to repair the roof and a declaration that the landlords were liable to repair the front wall.

C

D

E

Held: the landlords were liable (a) in damages for breach of covenant to repair the roof, to assess which an inquiry would be directed, and (b) to repair the front wall, for the following reasons:—

(i) the roof and main walls were part of the structure and the repairs were structural repairs within cl. 2 (3) and cl. 3 (2) of the lease.

F

(ii) the question whether the structural repair was “of a substantial nature” (within cl. 2 (3)) must be determined by reference to the antecedent state of disrepair rather than to the amount spent on work of repair, and in the present case the disrepair was “substantial,” treating that word as equivalent to “considerable”.

G

Palser v. Grinling, Property Holding Co., Ltd. v. Mischeff ([1948] 1 All E.R. 1) applied.

[As to covenants by a landlord to repair, see 23 HALSBURY'S LAWS (3rd Edn.) 586, para. 1268; and for cases on the subject, see 31 DIGEST (Repl.) 344, 345, 4752-4766.]

Cases referred to:

H

(1) *Terry's Motors v. Rinder*, [1945] S.A.R. 167.

(2) *Palser v. Grinling, Property Holding Co., Ltd. v. Mischeff*, [1948] 1 All E.R. 1; [1948] A.C. 291; [1948] L.J.R. 600; 31 Digest (Repl.) 651, 7541.

(3) *Thorneloe & Clarkson, Ltd. v. Board of Trade*, [1950] 2 All E.R. 245; 2nd Digest Supp.

I

(4) *Taylor v. St. Helen's Corp.*, (1877), 6 Ch.D. 264; 46 L.J.Ch. 857; 37 L.T. 253; 17 Digest (Repl.) 279, 849.

(5) *Dickinson v. St. Aubyn*, [1944] 1 All E.R. 370; [1944] K.B. 454; 113 L.J.K.B. 225; 170 L.T. 287; 31 Digest (Repl.) 350, 4812.

Action.

This action was brought by the tenants of a cinema on the landlords' covenant to repair contained in the lease of the premises. The tenants claimed £961 as damages for breach of the covenant to repair being the cost incurred by the tenants in executing repairs to the roof, and a declaration that, on the true

construction of the lease, repairs to the front elevation were the liability of the landlords. The material clauses of the lease (viz., cl. 2 (3) and cl. 3 (2)) are set out in the judgment. A

On or about Jan. 31, 1955, the tenants served on the landlords a schedule of dilapidations and want of repairs and (according to the statement of claim) required the landlords in accordance with the covenants to carry out (a) structural repairs to the roofs of the cinema, and (b) structural repair to the front elevation of the cinema. During May and June, 1955, the tenants redecorated and refurnished the interior of the cinema, and alleged that owing to the defective condition of the roofs damage by rain was caused to the redecorations and refurnishings. The tenants further alleged that, in spite of repeated requests, the landlords neglected or refused to execute the roof repairs and, in order to prevent further damage to the redecorations and refurnishings, in or about October, 1955, the tenants at a cost of £961 repaired the roofs of the cinema (i) as to the front part of the roof of the auditorium by stripping the existing slates and by providing and fixing thereon corrugated asbestos sheeting, (ii) as to the rear part of the roof of the auditorium by executing certain other specified repairs. The landlords did not deny service of the schedule of dilapidations or that the tenants had done work of repair to the roof, but did deny that the tenants had requested the landlords to do the work and that the work done was necessary. B C D

The landlords contended (i) that some of the roof repairs were not and none of the front elevation repairs were repairs within the landlords' covenant in cl. 3 (2) of the lease; (ii) that such of the roof repairs as fell within cl. 3 (2) were not necessary in order to repair, maintain and keep the main structure, walls, roof and drains of the cinema in good structural repair and condition; (iii) alternatively, that such of the roof repairs and of the front elevation repairs as were repairs within cl. 3 (2) had become such repairs by reason of the neglect or failure of the tenants to carry out from time to time, as and when necessary, such repairs as ought to have been carried out by the tenants under cl. 2 (3) of the lease; (iv) that they were not liable for the cost of the repairs carried out to the roof by the tenants; and (v) that their refusal to carry out repairs to the front elevation was not a breach of their obligations under cl. 3 (2). E F

R. E. Megarry, Q.C., and Oliver Lodge for the tenants.

H. Heathcote-Williams, Q.C., and J. E. Vinelott for the landlords.

Cur. adv. vult.

June 13. **VAISEY, J.**, read the following judgment: This is a dispute between the tenants (plaintiffs) and the landlords (defendants) of a cinema now known as the Century Cinema and formerly as the Academy Cinema, situate in the High Road, Leytonstone, in the County of Essex. The lease is dated June 12, 1941, and made between parties who are respectively the predecessors in title of the defendants and the plaintiffs. The question which I have to decide is: Which of the parties, the tenants or the landlords, are responsible to the others of them for certain external repairs to the building, some of which have already been carried out and others of which remain to be carried out in and to the building of the cinema, as I will presently explain. G H

The case is not without difficulty, and I confess that I have changed my mind more than once during the hearing, which has lasted for no less than four days of the present term. I have first to construe, and secondly to apply to the particular facts of the case some words which at first sight might seem to be reasonably easy to interpret. They are these: "structural repairs of a substantial nature". I

It appears, rather surprisingly, that the expression "structural repairs" has never been judicially defined, a fact to which attention is drawn in *WOODFALL ON LANDLORD AND TENANT* (25th Edn.) at p. 770, para. 1732, and counsel in the present case have accepted that statement as correct. The writer of the textbook submits on the same page that "structural repairs" are those which

A involve interference with, or alteration to, the framework of the building, and I would myself say that "structural repairs" means repairs of, or to, a structure. It is sometimes said that repairs must always be either structural or decorative, and if that is the simple criterion, we are in this case certainly not dealing with decorative repairs.

Next, what is meant by the words "of a substantial nature"? In a South Australian case, *Terry's Motors v. Rinder* (1) ([1945] S.A.R. 167), the word "substantial" is pilloried as a word devoid of any fixed meaning and as being an unsatisfactory medium for conveying the idea of some ascertainable proportion of a whole. In *Palser v. Grinling, Property Holding Co., Ltd. v. Mischeff* (2) ([1948] 1 All E.R. 1) a question arose as to what was a "substantial portion" of a rent, and the decision is summarised (not perhaps very helpfully) in the headnote ([1948] A.C. 291), saying that "substantial" does not mean "not unsubstantial", but is equivalent to "considerable", and that the judge of fact must decide the matter according to circumstances in each case; see also *Thorneloe & Clarkson, Ltd. v. Board of Trade* (3) ([1950] 2 All E.R. 245).

Again, what is a "structure"? And what ought to be regarded as part of a structure? We are dealing here with (i) the roof, and (ii) one of the main walls of a cinema, and surely those are parts of the structure of the building. Indeed, it seems to me that the roof is an even more important part of a cinema than it is in the case of an ordinary dwelling-house, because any leakage of rain into the auditorium of a cinema is likely to be a much more serious matter than water coming into an attic or other upstairs apartment. I refer, of course, to a cinema on what I may call the ground floor.

E With those preliminary observations, I turn to the lease, cl. 2 of which contains the lessee's covenants. By cl. 2 (3) the lessee is placed under an obligation:

F "To keep the demised premises and the sanitary and water apparatus and all additions and improvements thereto in good and substantial repair and condition and properly decorated and in a state in every respect fit for cinematograph entertainments but nothing in this clause contained shall render the lessee liable for structural repairs of a substantial nature to the main walls roof foundations or main drains of the demised building."

That seems to place a general obligation on the lessee to effect all repairs excepting "structural repairs of a substantial nature to the main walls roof", etc., of the demised building.

G Clause 3 contains the landlords' covenants, and sub-cl. (2), beginning with a heavily split infinitive, reads as follows:

H "To (except so far as the lessee is liable under the lessee's covenants hereinbefore contained) repair maintain and keep the main structure walls roofs and drains of the demised premises in good structural repair and condition at all times during the said term."

I That seems to impose a general obligation on the landlords to effect all repairs other than those to which the lessees are liable under cl. 2 (3)—a singularly awkward piece of drafting.

Considering at this point the relevant words of the lease, I think that it must be the nature of the disrepair rather than the nature of the repair which is the relevant matter. A comparatively small and unsubstantial or inconsiderable amount of structural disrepair might well be repaired so extravagantly as to make the repair of a substantial nature, and I think that the obligation here must be measured not so much by the nature of the repair as by the nature of the preceding or antecedent disrepair.

On the facts of the case I have to consider first certain repairs to the roof, some of which have been carried out and some of which still remain to be done; then I have also to consider certain repairs to a nine-inch brick wall and the cement rendering on it. Of the antecedent disrepair of the roof and of the

wall there can be no doubt at all. As regards the roof, the slated portion of it has in fact been repaired by the tenants at a total cost of £961, and they claim to be repaid this sum by way of damages. The landlords disclaim responsibility altogether, but say that in any case this figure, £961, is excessive and represents an unreasonable, uneconomical and extravagant treatment of what was really quite an inconsiderable disrepair. They (the defendants) have obtained a tender for doing the same work for a sum of £130 10s.; whether £961 is too much, or £130 10s. is too little, or what the right figure is, I do not know. The other part of the roof covered with asbestos sheeting still remains unrepaired, and no satisfactory estimate of the probable cost of repairing it is before me. I hold that so far as the roof is concerned, it is plainly a part of the structure, and any repairs to it are necessarily, in my judgment, structural repairs. Are they, however, substantial? Treating that word as equivalent to "considerable", and measuring the liability more by reference to the antecedent disrepair than by the repairs themselves, I think that they plainly are; with the result that they are excluded from the tenants' obligations under cl. 2 (3), and fall into the landlords' obligations under cl. 3 (2).

It was not disputed and must be taken to be admitted, that the nine-inch wall is one of the main walls of the building; that being so, it is in my judgment part of the structure of the building. The facts here are that a cement rendering has been applied to the front of that wall and it is now peeling or falling or stripping off owing to the intrusion of damp or for some other reason; not only so, but the cement has taken away with it parts of the bricks to which it was intended to adhere, and here again we have, I think, a structural disrepair calling for a structural repair of a considerable or substantial and not a trifling or inconsiderable nature. I hold that the repairing of the nine-inch wall by replacing the now detached rendering and restoring or replacing the bricks injured by the coming away of the rendering, is also excluded from the tenants' obligation (cl. 2 (3)), and falls within the obligation of the landlords (cl. 3 (2)).

In my judgment the structure, both as to the roof and as to the wall, is or was in a state of disrepair calling for structural repairs which I cannot regard as other than substantial. Not being able to accept either the £961 or the £130 10s. as an adequate measure of the damages recoverable in regard to the slated portion of the roof, I must refer the ascertainment of the proper amount to an official referee or to the master, if the parties prefer, who will be asked to quantify the amounts properly to be allocated in the shape of damages to the disrepair of the slated roof and the asbestos roof, the costs of the said reference to be reserved.

Two points remain to be noticed. First, it is suggested that the items of serious disrepair which have given rise to the landlords' liability have been built up out of, and are the accumulated consequence of, a series of trifling wants of repair which ought to have been attended to from time to time as such by the tenants against whom the landlords could set off claims for damages sufficient to wipe out the landlords' liability for the resultant items of serious disrepair. No authority for such a proposition has been found, and I express no opinion on it because of the very short interval which elapsed between the tenants' acquisition of the property on Dec. 13, 1954, and the service of the schedule of dilapidations on Jan. 31, 1955. Secondly, where, in this case, does the onus of proof lie? A lease is normally liable to be construed contra proferentem, i.e., against the lessor by whom it was granted: see *Taylor v. St. Helen's Corpn.* (4) ([1877], 6 Ch.D. 264 at p. 270), and *Dickinson v. St. Aubyn* (5) ([1944] 1 All E.R. 370). On the other hand, there is the usual onus imposed on every plaintiff, resting in the present case on the tenants. Assuming, without deciding,

A that the tenants as plaintiffs have an onus to discharge, I think that they have in fact discharged it.

[HIS LORDSHIP accordingly directed an inquiry as to the amount of damages due to the disrepair of the roof and, with regard to the front elevation, made the declaration claimed.]

B Solicitors: *E. F. Turner & Sons* (for the tenants); *Harewood & Co.* (for the landlords).

[Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.]

C

WIGGINS v. WIGGINS (otherwise BROOKS) AND INGRAM.

[BIRMINGHAM DISTRICT REGISTRY (His Honour Judge Carr, sitting as a Special Commissioner in divorce), June 9, 1958.]

D

Nullity—Re-marriage—Wife granted decree nisi of nullity, on the ground of husband's incapacity—Re-marriage of wife before decree made absolute—Whether second marriage bigamous.

On Oct. 4, 1954, a wife was granted a decree nisi of nullity on the ground of her husband's incapacity. On Oct. 16, 1954, before the decree was made absolute, she went through a ceremony of marriage with the petitioner.

E

Held: the marriage of Oct. 16 was a bigamous marriage, despite the fact that the decree absolute annulling the former marriage was for some purposes retrospective to the date of the former marriage.

[As to the effect of a decree of nullity of a voidable marriage, see 12 HALSBURY'S LAWS (3rd Edn.) 226, para. 423, and 10 HALSBURY'S LAWS (3rd Edn.) 664, para. 1268.]

F

Cases referred to:

(1) *Mason v. Mason* (otherwise *Pennington*), [1944] N.I. 134; 27 Digest (Repl.) 690, 2308.

(2) *De Reneville v. De Reneville*, [1948] 1 All E.R. 56; [1948] P. 100; [1948] L.J.R. 1761; 11 Digest (Repl.) 479, 1075.

G

(3) *Inverclyde* (otherwise *Tripp*) v. *Inverclyde*, [1931] P. 29; 100 L.J.P. 16; 144 L.T. 212; 95 J.P. 73; 11 Digest (Repl.) 478, 1070.

Petition.

The petitioner prayed for a decree of nullity of his marriage with the respondent on the ground that the marriage was bigamous because, at the time of the ceremony, the respondent's former marriage was still subsisting. Alternatively, the petitioner prayed for a decree of divorce on the ground of the respondent's adultery. The facts appear in the judgment.

H

D. T. Hallchurch for the petitioner.

The respondent was not represented and did not appear.

I

MR. COMMISSIONER CARR: This is an interesting case which raises a somewhat difficult point. The facts are that the respondent, Thelma Marketa Wiggins, was married to a man named Brooks on Aug. 23, 1952. On Oct. 4, 1954, she obtained a decree nisi against Mr. Brooks on the ground of his incapacity, a decree nisi of nullity. On Oct. 16, 1954, before the decree absolute in that case, she went through a form of marriage with the present petitioner. I am satisfied that, since then, she has committed adultery with the co-respondent in this case, Leonard Roy Ingram, and, in those circumstances, the petitioner brings these proceedings, and prays, first, that the marriage shall be declared null and

void on the ground that it was a bigamous marriage in that the respondent was at the time of the marriage married to her first husband. In the alternative, the petitioner prays for the dissolution of this marriage on the ground of the respondent's adultery with the co-respondent. In the absence of authority, I should have held without any question that at the time of this marriage the respondent's first marriage was subsisting, and, therefore, this marriage was bigamous, but counsel for the petitioner has been good enough to refer me to all the authorities which he knows on the matter, and particularly to *Mason v. Mason (otherwise Pennington)* (1) ([1944] N.I. 134), a decision of the Court of Appeal of Northern Ireland. In that case ANDREWS, L.C.J., found, in effect, that, when a decree was made absolute for nullity, it was retrospective to the time of the purported marriage for all purposes, and, therefore, although the marriage which was afterwards nullified was apparently subsisting when the second marriage was entered into, it was not really subsisting because it had never existed. It would follow that, in the present case, the petitioner's marriage would not be bigamous, and the appropriate relief today would be, not a decree of nullity, but a decree of dissolution on the ground of adultery.

Counsel for the petitioner, however, also referred me to a decision of the English Court of Appeal, *De Reneville v. De Reneville* (2) ([1948] 1 All E.R. 56), which was heard after *Mason v. Mason* (1), and in which LORD GREENE, M.R., and BUCKNILL, L.J., dealt with this point*. It had already been considered by BATESON, J., in *Inverclyde (otherwise Tripp) v. Inverclyde* (3) ([1931] P. 29). The effect of the judgments of BATESON, J., and of the Court of Appeal in *De Reneville v. De Reneville* (2) is this: although for certain purposes, indeed for most purposes, a decree absolute of nullity acts retrospectively to the date of the purported marriage, nevertheless one must look at the existing facts at the time of an alleged bigamous marriage and must not be deceived—if that is the right word—by the terms of the decree absolute. Applying that principle, it follows in my view that, at the time when the petitioner entered into the marriage which he now seeks to dissolve or to have declared null and void, the respondent was married. It is true that her first marriage was later on declared null and void and that, for some purposes the decree absolute was retrospective, but I do not think that that has the effect of making the present marriage a good marriage.

I am not attaching any blame to the parties in this case for the marriage which I hold to be bigamous. They may well have been, and probably were, perfectly innocent in entering into the marriage, and nobody should think that they were to blame without any further evidence, but they entered into a marriage which, in law, they were not entitled to do because, in my view, the respondent was, at the time of this marriage, a married woman. In those circumstances, I think that the appropriate remedy is that I should declare this present marriage null and void.

Decree accordingly.

Solicitors: *Bickley & Co.*, Birmingham (for the petitioner).

[Reported by GWYNEDD LEWIS, Barrister-at-Law.]

* See [1948] 1 All E.R. at pp. 60, 64.

A ATTORNEY-GENERAL (at the relation of EGHAM
URBAN DISTRICT COUNCIL) v. SMITH AND OTHERS.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J.), June 5, 1958.]

Town and Country Planning—Enforcement notice—Use of machinery of Town and Country Planning Act, 1947, for purpose of delay—Injunction—Town and Country Planning Act, 1947 (10 & 11 Geo. 6 c. 51), s. 12.

Injunction—Statute—Procedure provided by statute misused for delay—Penalty provided by statute—Restraining infringement of public right.

In March, 1955, the first defendant started to use certain land as a caravan site. In April, 1955, the local planning authority served an enforcement notice on him under the Town and Country Planning Act, 1947, requiring him to remove the caravans. The first defendant applied for planning permission to use the land as a caravan site but this was refused in May, 1955. In July, 1955, he appealed to the Minister, in September, 1955, an inquiry was held and at the end of December, 1955, the appeal was dismissed. The first defendant continued to use the land as a caravan site and in May, 1956, the local planning authority served another enforcement notice. In June, 1956, he made a further application for permission which was refused in August, 1956. In September, 1956, he was fined £25 for failing to comply with the enforcement notice of May, 1956. As he still continued to use the land as a caravan site, the local planning authority took out a summons for the daily penalty. In October, 1956, he moved the caravans to a second site, the adjoining field, and in November, 1956, applied for permission in respect of that site, which was refused in January, 1957. In February, 1957, an enforcement notice was served in respect of the second site and the first defendant moved the caravans from the site in March, 1957. In January, 1957, the defendants began to use a third site for caravans. Planning permission was applied for which was refused in February, 1957, and an appeal was made to the Minister which, after an inquiry, was dismissed in July, 1957. In August, 1957, planning permission was again sought to put the caravans on another part of the third site, which was refused in September, 1957. Further enforcement notices were served in October, 1957, and in November, 1957, an appeal was made to the Minister which was dismissed. In a relator action brought by the Attorney-General against the defendants at the relation of the local planning authority for an injunction restraining the defendants from using as a caravan site any land within the boundaries of the local planning authority without the prior grant of planning permission,

Held: the court had jurisdiction to grant an injunction when the Attorney-General was suing for the purpose of enforcing a public right, although that right was conferred by a statute that prescribed penalties for acts done in breach of it (*A.-G. v. Wimbledon House Estate Co., Ltd.*, [1904] 2 Ch. 34, and *A.-G. (on the relation of Hornchurch Urban District Council) v. Bastow*, [1957] 1 All E.R. 497, followed); and an injunction would be granted in the present case since the defendants had shown an intention to act in breach of the Act of 1947 so far as they could and for so long as they could.

[As to circumstances in which the Attorney-General may take proceedings for an injunction to restrain an illegal act, see 21 HALSBURY'S LAWS (3rd Edn.) 403, 404, para. 845; and for a case on the subject, see 28 DIGEST 367, 36.]

For the Town and Country Planning Act, 1947, s. 12, see 25 HALSBURY'S STATUTES (2nd Edn.) 506.]

Cases referred to:

- (1) *A.-G. v. Wimbledon House Estate Co., Ltd.*, [1904] 2 Ch. 34; 73 L.J.Ch. 593; 91 L.T. 163; 68 J.P. 341; 28 Digest 368, 42.

- (2) *A.-G. (on the relation of Hornchurch Urban District Council) v. Bastow*, A
[1957] 1 All E.R. 497; [1957] 1 Q.B. 514; 121 J.P. 171.

Action.

This was an action by the Attorney-General at the relation of the Egham Urban District Council, to whom the local planning authority, the Surrey County Council, had delegated the functions of the local planning authority under the Town and Country Planning Act, 1947, s. 34, as regards the urban district of Egham, for an injunction restraining the three defendants, Joseph Sidney Claude Smith, Modern Trailer Homes, Ltd., and Beatrice Pearlberg, and each of them by themselves, their servants or agents or otherwise from using or causing or permitting to be used as a caravan site any land within the boundaries of the Urban District Council of Egham without the prior grant of planning permission under the Town and Country Planning Act, 1947. The facts appear in the judgment.

R. E. Megarry, Q.C., N. N. McKinnon, Q.C., and A. P. Leggatt for the Attorney-General.

J. R. Willis, Q.C., and B. S. Wingate-Saul for the defendants.

LORD GODDARD, C.J.: This is an action by the Attorney-General, at the relation of the Egham Urban District Council, claiming an injunction restraining the defendants from using or causing or permitting to be used as caravan sites any land within the boundaries of the Urban District Council of Egham without previous planning permission.

The matter arises out of the provisions of the Town and Country Planning Act, 1947. Before I proceed to deal with the facts, let me say a word or two with regard to the Act itself. It is (as I think everybody knows) a somewhat difficult Act in many respects; and the procedure which is laid down under it is such that a very considerable time must very often elapse before questions whether there has been "development" or whether permission will be granted can be finally determined. A resolute defendant can make use of that state of affairs and may very likely develop land for certain purposes—and in this case we are concerned only with caravans, which seem to continue to have a particular attraction for the provisions of the Act—and be able to take advantage of the delays which the Act permits, so as to use land, contrary to the terms of the Act, for a very considerable period before the matter is finally decided.

The machinery provided by the Act is this. Section 12 (1) provides that:

"Subject to the provisions of this section and to the following provisions of this Act, permission shall be required under this Part of this Act in respect of any development of land which is carried out after the appointed day."

The sense of that sub-section is perfectly obvious, so it seems to me, and is that development of land carried out without permission is unlawful; it is contrary to the Act. It does not follow, because it is contrary to the Act, that a penalty is incurred at once.

The scheme of the Act is this. Before one develops land one must apply for permission, and if one does not apply for permission but nevertheless does any work on the land or makes any use of it which can amount to "development" within the meaning of the Act, one does it at one's own risk. An application for permission has to be made. If that permission is refused—and, no doubt, some time must elapse between the time when it is applied for and the time when the planning authority comes to a decision—an appeal lies to the Minister; and there are then provisions requiring the Minister to send an inspector to hold an inquiry. That takes time. Then the inquiry is held; the inspector has to make a report; the report has to be considered by the Minister; and then a decision has to be given. The time which all these things take is well illustrated by what happened with regard to the first of the sites with which we are dealing.

- A The matter first started about Apr. 12, 1955, when an enforcement notice was served alleging that the land had been used without permission—as it had been—since Mar. 28, 1955. The final decision was not given until Dec. 31, 1955, so that nine months elapsed between the time when this site was first used without permission and the time when the Minister decided the matter in favour of the Egham Urban District Council—for what the Minister decided did amount to a decision that the council were justified in refusing permission.

B Section 23 of the Town and Country Planning Act, 1947, provides that, if the planning authority consider that any work does amount to development for which no permission has been given, they may serve an enforcement notice requiring the owner or occupier of the land to cease from putting the land to the use to which it is being put, or to cease from doing the particular acts which amount to development. But directly an application* is lodged, the enforcement notice is stayed until after the appeal has been heard, so that in this case the enforcement notice was suspended for nearly nine months, the Minister's decision being given on Dec. 31, 1955. If the Minister finally dismisses the appeal, the enforcement notice, however, remains good, and then, if the land continues to be used in contravention of the enforcement notice, the planning authority may issue a summons on which the magistrates can impose a fine of up to £50 for the breach and a fine of £20 for every day on which, after the conviction, the use of the land continues without permission†.

It seems that in March, 1955, the first defendant conceived the idea of using his farm, called Retreat Farm, in Chertsey, for the purpose of a caravan site. It was not only going to be a site for a few caravans, but was obviously going to be for a great many caravans. These caravans were not being put there for the purpose merely of holidays, but for the purpose of people living in them permanently.

E By art. 3 of the Town and Country Planning General Development Order, 1950‡, the Minister granted a general permission to use land for certain purposes (as, for instance, the siting of caravans) for a period of not more than twenty-eight days. Therefore, if a farmer allows somebody to use land as a caravan site for a month during the summer holidays he will not be brought within the Act. But art. 4 (1)‡ of the order gives the planning authority power to give a direction excluding that permission with regard to any particular district or place. In fact, such an order was made here.

G It is perfectly obvious that the policy of the Egham Urban District Council, this district lying, as it does, within what is known as the "Green Belt", is to prohibit the use of land for caravan sites, or caravan towns, or whatever one may like to call them, within their district. I have not the least doubt, in the circumstances of this case, that the defendants knew that perfectly well. The first defendant may not have known it when he first started, in March, 1955, to bring caravans on to the land, but I am quite sure that within a very short time he must have known that that was the deliberate policy of the district council, and he set himself out to ignore that policy. If he could legally do that, he would be entitled to, and one would not attach any moral blame to him for that. At the same time, he was taking on a very considerable risk, not only for himself

I * The application in the present case was an application for planning permission to use the land as a caravan site and was made by the first defendant on Apr. 23, 1955, viz., within twenty-eight days of the service of the enforcement notice. Consequently the matter was brought within s. 23 (3) (a) of the Town and Country Planning Act, 1947, by which the enforcement notice "shall be of no effect pending the final determination of that application". The final determination was the decision of the Minister on appeal to him which decision was given on Dec. 31, 1955. The course of the appeal is stated at p. 560, letters E to G, post.

† Town and Country Planning Act, 1947, s. 24 (3).

‡ For the terms of art. 3 (1) and of art. 4 (1) of the Town and Country Planning General Development Order, 1950 (S.I. 1950 No. 728), see 21 HALSBURY'S STATUTORY INSTRUMENTS 146, 147.

but also for the people who were living in these caravans as permanent dwellings. A
It is a very serious thing, if planning permission is required and has not been
obtained, to be letting these sites to unfortunate individuals who come there,
presumably in the belief that there is power to have the caravans where they
are, and then find themselves, having moved into them, in jeopardy of being
turned out.

The history of the defendants' efforts to establish these caravan sites in face B
of the refusal of planning permission is this. The first piece of land with which
we are concerned, Retreat Farm, was first used, apparently, on Mar. 28, 1955,
when five caravans were brought there. On Apr. 12, 1955—within a fortnight—
an enforcement notice, to expire on May 16, 1955, was sent, requiring the C
removal of these caravans. Section 18 of the Town and Country Planning
Act, 1947, provides that, if a person carries out any development without
permission (or in ignorance, as he may easily do, of the requirements of the Act),
retrospective permission can be given; so the first defendant applied, on Apr.
23, 1955, for permission to use the land, and to continue to use it, for a caravan
site. On May 25, 1955, that permission was refused. So he knew then, at
any rate, that that was the attitude which the district council were likely to
take up. There was nothing to show that that was anything to do with this D
particular site. It may be that he thought at the time that it was something
to do with the particular site, although he has not told us that. It must have
become perfectly clear to him that the objection of the district council was much
more than to any particular site; it was because they are within the Green Belt
and they were, therefore, determined not to have one of these mushroom towns
springing up. E

On July 18, 1955, the first defendant appealed to the Minister; and on Sept.
20 an inquiry was held. On Dec. 31, 1955, the appeal was dismissed by the
Minister, who made it quite clear that he was not upholding the decision on the
ground that there was some particular objection to the particular site, but that
there was an objection to these caravan towns, or caravan settlements, or
whatever one may call them, going up in the Egham Urban District Council's F
district near Chertsey because of it being in the Green Belt. The Minister, in
dismissing the appeal, expressed the hope—he did not make it any condition
—that the district council would act reasonably and not too precipitately,
because it involved the dispersal of these unfortunate people who had taken
themselves to this caravan site and found that the planning authority would not
allow them to remain. The district council certainly did act with great restraint, G
because it was not until May 3, 1956, that they served another enforcement
notice expiring on June 30, 1956. So that the first defendant had had from
Dec. 31, 1955, to June 30, 1956, to comply with the notice; he had six months
in which to get the land cleared of these caravans.

On June 20, 1956 (hope, I suppose, springing eternal in the human breast),
he made a further application for permission. He did not know, but quite H
obviously he could expect, that it would be refused, as it was on Aug. 9, 1956.
The district council by this time thought, no doubt, that the first defendant was
simply defying them, and so they issued a summons on Aug. 14, 1956, which
was returnable on Sept. 5, 1956. The magistrates imposed a fine of £25 and
costs—which was certainly, I think, considering the defiance (practically)
which the first defendant had shown here, a very moderate fine. I

As the first defendant did not pay any attention to that at the time but still
kept the caravans on his land at Retreat Farm, on Sept. 26, 1956, the district
council took out a summons for the daily penalty. As the daily penalty was
£20, a very considerable sum had already mounted up. So he got his caravans
out. On Oct. 7, 1956, he moved them to the next-door field. That simply
meant that he was going to keep the caravans. As he had been turned off
one site he was going to take another site. So he moved from one field to
another and there, on Oct. 7, on a site called Maindy, he installed the caravans.

- A On Nov. 6, 1956, after they had been there for a month without permission, he applied again for permission; and on Jan. 15, 1957, it was refused. He no doubt thought (or I will assume that he thought) that he could use Maindy for a further twenty-eight days under the general permission. On Jan. 21, 1957, the direction issued by the district council under art. 4 (1) of the General Development Order came into force.
- B On Feb. 9, 1957, the first defendant appealed to the Minister against the refusal of planning permission in respect of the Maindy site. On Feb. 13, 1957, an enforcement notice was served, taking effect on Mar. 16, 1957. But on Mar. 23, 1957, the caravans had gone. The first defendant said that he had parted with any interest that he had in the land, because by this time, apparently, he had got the idea of going to another adjoining site which is referred to as Royal Hythe Farm. The history with regard to Royal Hythe Farm is this. The defendant company, of which the first defendant was a director, had now come into the picture, and on Jan. 26, 1957, applied for planning permission. It was here that the warning notices, saying that the site was not an authorised site, were put up. On the very day on which permission was applied for, the caravans started to move in. A very considerable number had moved in by Feb. 6, 1957, the date when planning permission was refused. That did not daunt the defendants, because, by Mar. 28, 1957, there were 119 caravans there and by Apr. 3, 1957, there were 156. By this time an appeal had been made to the Minister, and on Mar. 11, 1957, a writ had been issued, the planning authority being relators, and application had been made to the court for an interim injunction. When the summons came before the judge in chambers, no order was made, because counsel gave an undertaking that no more caravans would be moved on to this site. But there they were: there were 156. On June 14, 1957, another public inquiry was held; and on July 26, 1957, the appeal to the Minister was dismissed.

On Aug. 29, 1957, planning permission was again sought, this time to put the caravans on another part of Royal Hythe Farm, moving them quite a short distance. This really shows that it was getting to be, I might almost say, something in the nature of a scandal, because everybody knew at this time that it was not the particular field that was objected to but it was that the district council were not going to have these sites. On Sept. 18, 1957, that application was refused.

- I have mentioned the matters which happened after that date as showing that the defendants intended to hold the Act at defiance as far as they could by going on making these repeated little moves from one field to another, or from one part of the farm to another part of the farm, and then applying for permission which they knew they would not get, and then appealing to the Minister and getting an inquiry, so that they could get fifteen or sixteen months' grace in which they could let caravans on the site and could take the profits for them.
- H On Oct. 23, 1957, further enforcement notices were served. On Nov. 30, 1957, there was an appeal to the Minister, and that appeal has followed the way of all the other appeals and the Minister has refused to disturb the decision of the district council.

It has been submitted to me that, because the Act provides penalties and because no offence is committed before the enforcement notice has been disregarded, I ought not to grant an injunction. I think that the cases which have been cited, particularly *A.-G. v. Wimbledon House Estate Co., Ltd.* (1) ([1904] 2 Ch. 34), and which was cited and followed by *DEVLIN, J.*, in *A.-G. (on the relation of Hornchurch Urban District Council) v. Bastow* (2) ([1957] 1 All E.R. 497), show that, although a statute may provide a penalty for acts done in breach of it, or in respect of acts done for which it provides a penalty, if it is a matter of public right then the Attorney-General is entitled, on behalf of the public, to apply for an injunction. Of course, the Town and Country Planning Act, 1947, is an Act which is designed to confer a benefit on the public; it is for

the orderly development of the countryside, to prevent unsightly development, to prevent the development of too crowded areas, to prevent the development taking place of industrial buildings and plant in what should be a residential district, and for the mapping out of residential districts and industrial districts, and so forth. It is obviously an Act which is designed for the public good, and can be used for great public advantage. Therefore, if a defendant shows by his conduct that he intends to avoid the Act and act in breach of it so far as he can and for as long as he can, then the Attorney-General is entitled to an injunction such as was granted in the cases which have been cited to me.

Here, I think it is quite clear that the defendants, having got their caravans on to a particular site, started by carrying on a fight with regard to that site for a good many months. They carried on that fight from March to December, 1955. Then, although the appeal had been dismissed, they took no notice but because the Egham Urban District Council acted reasonably so as to allow the unfortunate people living in the caravans time to get out, they managed to carry on the fight for another six months. So that from March, 1955, to the end of September, 1956, the defendants had the advantage of letting caravan sites, which they had developed without permission and permission for which had been withheld all the way through. They got a run, therefore, of somewhere near eighteen months. It is clear that, by moving the caravans to the field next door, they meant to continue using land for this purpose, which was a development for which they had no permission. It was only when they found that they could not get any further with that site—although they managed to keep their caravans there from Oct. 7, 1956, till Mar. 22, 1957, so they had another pretty good run—that they decided to go to the Royal Hythe Farm site, and they have been using that site for caravans from Jan. 26, 1957, and I understand the caravans are still there, although the Minister dismissed the appeal on July 26, 1957. That shows an intention by the defendants, who have been refused permission time and again, to act in defiance of the Act and to use its machinery not for the purpose of making genuine application for permission but for the purpose of delay. In the first instance I would not say they were not perfectly entitled to appeal to the Minister. When they got the result of their appeal to the Minister, they knew quite well that the Minister was upholding the policy which this planning authority were evidently following—that is to say, not to permit the use of land for caravans within their area because of the considerations relating to the Green Belt. The Minister upheld them, and yet the defendants went on in this way.

I think, therefore, that this is a case in which I have jurisdiction to grant an injunction; and, if I have jurisdiction to grant an injunction, I most certainly as a matter of discretion will grant it. There will be judgment for the Attorney-General for an injunction and the defendants must pay the costs of the action.

Order accordingly.

Solicitors: *Champion & Co.* (for the Attorney-General); *Clarke & Co.* (for the defendants).

[*Reported by G. A. KIDNER, Esq., Barrister-at-Law.*]

A UNIVERSAL CARGO CARRIERS CORPORATION
v. CITATI (No. 2).

[COURT OF APPEAL (Lord Goddard, C.J., Parker, L.J., and Lloyd-Jacob, J.),
June 17, 1958.]

B Arbitration—Case Stated by arbitrator—Power of court to draw inferences of fact
—Arbitration Act, 1950 (14 Geo. 6 c. 27), s. 21—R.S.C., Ord. 34, r. 1, r. 7.

C On a Special Case stated by an arbitrator under the Arbitration Act, 1950,
s. 21, the court has power, by virtue of R.S.C., Ord. 34, r. 1*, and r. 7* to draw
from the facts and documents stated in the Special Case inferences of fact,
provided that no inference so drawn conflicts with a fact found or inference
drawn by the arbitrator; but (per PARKER, L.J.) this power must not be
used as a convenient method of avoiding the necessity of remitting an
award to the arbitrator in a case where there is doubt what fact the arbi-
trator would have found or what inference he would have drawn (see p. 566,
letters G to I, and p. 567, letter C, post).

Williams v. Manissalian Frères ((1923), 17 Lloyd's Rep. 72) applied.
Appeal allowed.

D [As to Special Case for the opinion of the court, see 2 HALSBURY'S LAWS
(3rd Edn.) 38-41, paras. 88-94; and for cases on the subject, see 2 DIGEST (Repl.)
579-583, 1114-1144.]

Case referred to:

(1) *Williams v. Manissalian Frères*, (1923), 17 Lloyd's Rep. 72; 29 Com. Cas.
42; 2 Digest (Repl.) 580, 1121.

E Appeal.

F This was an appeal by shipowners, claimants in an arbitration in which they
claimed damages from the charterer for loss of freight, from an order dated
Feb. 22, 1958, of DEVLIN, J., on a Special Case stated by the arbitrator directing
the shipowners, who had succeeded in the arbitration, to pay the costs. The appeal
was on the question of costs and by leave of the judge. The facts are stated in
the judgment of LORD GODDARD, C.J.

Ashton Roskill, Q.C., and *H. V. Brandon* for the claimants, the shipowners.
The respondent, the charterer, did not appear and was not represented.

G LORD GODDARD, C.J.: This is an appeal on a question of costs on which
the learned judge gave leave to appeal. I must state, as briefly as I can, how the
point arises which this court has to determine. There was a charterparty in
respect of a ship belonging to the appellant owners, which was chartered to the
respondent for the purpose of proceeding to the Persian Gulf and there loading
a cargo of scrap iron to be taken to Buenos Aires. The ship arrived at Basrah.
She was never given a loading berth, because the respondent charterer never
nominated anybody to ship the scrap iron. The charterer had no scrap iron to
ship. A few days before the lay days had expired, the shipowners, having come
to the conclusion that there was never going to be a cargo (and there never was),
sailed the ship to Bombay, where they rechartered the ship at a lower rate of
freight; and they claimed damages in this arbitration.

H The arbitration seems to have taken a very considerable time before a well-
known legal arbitrator. The case presented by the shipowners was based on two
contentions: first, that the charterer had by his conduct shown that he did not
intend to perform the contract and had therefore committed what is called an
anticipatory breach; or, secondly, a point introduced in the pleadings no doubt
at a very late stage but before the arbitration began, that circumstances were such
that it was clear when the ship arrived at the port that it was impossible to carry
out the contract by reason of there being no scrap iron available and that,
therefore, the adventure was frustrated.

I The arbitrator made an award of very considerable length. It may be that, if

* These rules, so far as relevant, are printed at p. 566, letters F and H, post.

the award had not been as long as it was, some of the trouble might not have arisen, but I am not criticising the award. The arbitrator held that there had been an anticipatory breach and he set out the following facts in para. 33 of his award:

"(i). On July 18, 1951, there was no person or shipper in Basrah or elsewhere in Iraq who was prepared to ship any scrap iron on board the vessel, but the [charterer] was not aware that this was so; (ii). The only person in Iraq who had scrap iron in his possession or control which could have been used for shipment on board the vessel was Vassos and the [charterer] by July 18, 1951, was aware that this was so; (iii). On July 18, 1951, Vassos was not prepared to ship any scrap iron on board the vessel: the [charterer] on July 18, 1951, was aware that Vassos had refused so to ship, but then hoped that Vassos might relent and agree thereafter to ship on board the vessel: the [charterer] was encouraged in this hope by Chbib; (iv). Vassos in fact was not prepared at any time after July 18, 1951, to sell any scrap iron which he owned or controlled either to the [charterer], Haddad or Chbib, but the [charterer] until about July 23 or 24, 1951, continued to hope, and was encouraged by Chbib to hope, that Vassos might relent and agree to ship on board the vessel; (v). Even if Vassos had relented and agreed to ship on board the vessel, such shipment on board the vessel on and after July 18, 1951, could only have taken place if the [shipowners] had been prepared to break the fresh charterparty into which they had entered on July 18, 1951: there was no evidence before me from which I can find or infer that the [shipowners] would have been prepared to do this; (vi). Even if Vassos had relented and agreed to ship, such agreement would in all probability have been conditional upon Vassos receiving a greatly enhanced price which, together with the freight payable under the charterparty, would have exceeded the \$375,000 for which the [charterer] held permission to open and had opened the letter of credit: I do not think it would necessarily have been impossible for the [charterer] to make fresh arrangements regarding payment both for the goods and for freight, but at best it would have taken a very considerable time indeed for such fresh arrangements to have been made; (vii). The [charterer] on July 18, 1951, was not able to perform the charterparty; (viii). The [charterer] on July 18, 1951, was willing to perform the charterparty if and when cargo became available to load on the vessel".

It was not stated in so many words that the arbitrator so found, but the shipowners contended that that paragraph amounted to a finding that impossibility had occurred which frustrated the adventure.

The Special Case came before DEVLIN, J.* The learned judge differed from the arbitrator in finding that there had been an anticipatory breach. I need not go into that matter, because in the events which have happened, it does not become necessary to do so. The learned judge was pressed by counsel for the shipowners to uphold the award in their favour on the second ground, that impossibility had been shown, viz., that there was no scrap iron at Basrah which could be shipped within the time; but the learned judge found that there was no finding of fact to support that. He was asked to draw an inference of fact, but he declined to draw an inference of fact and, indeed, he held that he could not. Thereupon, counsel for the shipowners asked him, as one can well understand that he would, to remit the case to the arbitrator for him to find whether or not performance was impossible. The learned judge acceded to that application, but on very stringent terms, viz., that in any event the shipowners should pay not only the costs of remitting or any further costs which were incurred but also the whole of the costs of the Special Case. He did so because, as he said, he was of opinion that, unless the arbitrator did find this extra fact, the charterer would be successful in

* The case before DEVLIN, J., was reported at [1957] 2 All E.R. 70.

A the arbitration. The learned judge said that he thought that the point had never been raised in the arbitration and that, therefore, if he was being asked, as he put it, at the last moment to remit the award, it was only fair that the costs should remain as they would have been if the arbitrator had not found, if he did find, the necessary fact, which he could only find if the matter was remitted to him.

B The next step that was taken was that the charterer appealed to this court and submitted that the order that the learned judge had made was wrong, because he had no power to remit. This court upheld* the order to remit, but expressly left open the question whether the judge had power to draw the inference which he was asked to draw, which would have obviated the necessity of remitting. The matter was remitted to the arbitrator. The arbitrator found, and it was quite obvious that he could have made no other finding—indeed from reading this award

C I think that, with respect to the learned judge, the arbitrator had all along intended to find—that impossibility had occurred. If one reads para. 33 of the award, to which I have already referred, it will be seen that the arbitrator had always taken the view that, by July 17, 1951, there was no scrap iron that could be shipped from Basrah.

D The shipowners, having succeeded in the arbitration, have appealed to this court, by leave of the learned judge, because in giving his final decision in favour of the shipowners, he adhered to his view that they should pay the whole of the costs. In my opinion, this court cannot support the order of the learned judge with regard to the costs.

E Two points have been taken by counsel for the shipowners. The first point was that, on re-consideration, especially when taking into account the reasons which had influenced the Court of Appeal, the learned judge should not have made the order that he did. The second point was that the learned judge was wrong in the view that he took that he had no power to draw an inference of fact. If he had considered that he had that power, he would have drawn the inference of fact and found exactly in the same way as the arbitrator found; and, therefore, there would have been no need to remit the case to the arbitrator. Counsel said

F that he contended before the learned judge that the case need not be remitted to the arbitrator and the learned judge made the shipowners pay the costs because they applied to remit and were out of time and ought to pay all the costs as they were applying for an indulgence. Counsel maintains that the learned judge was wrong and that he ought to have drawn the inference for himself, there being no need for him to remit the case at all.

G That second contention raises a point of some importance, and I propose to base my decision on that. That relieves me of having to consider the question whether or not an appeal would lie on the other ground, as it might be said that it was entirely a matter of discretion for the learned judge. I have already pointed out that the arbitrator in para. 33 of the Case found certain facts, from which the learned judge could have drawn an inference. There is no doubt, from certain

H passages in his finding that have been read to us, that the learned judge would have drawn the inference, and, when one considers all the facts of this case, there is only one inference that could be drawn, viz., that it was impossible to ship the cargo within the stipulated time.

I The learned judge, however, said that it was well settled that he had no power to draw inferences of fact. The learned judge did not cite any authority for that proposition; he laid it down as an indisputable fact that he could not draw inferences of fact which had not been drawn by the arbitrator. With respect to the learned judge, I think that he was wrong on that point. No case has ever laid that down, and the cases which were cited to the learned judge, and no doubt considered by him, really turned on a different point, viz., that if an arbitrator has drawn an inference of fact from the matters before him, it is not open to the court on a Special Case to disregard the fact which the arbitrator has inferred

* The decision of the Court of Appeal was reported at [1957] 3 All E.R. 234.

and substitute for it a fact which the court has inferred, because that would be differing from the arbitrator's finding of fact. The law is perfectly clear that all facts are for the arbitrator and not for the court. If, therefore, the arbitrator has found a fact by inference, it is not open to the court by inference to find the contrary fact; but it has never been held in any of the cases to which reference has been made that the court cannot draw an inference of fact if there is what I may call a hiatus, viz., that some fact ought to have been found which has not been found, but which the court can see from the facts which have been found must be inferred. There is authority directly in point, which, curiously enough, is not mentioned in any text-book, but which the industry of counsel has found, in *Williams v. Manissalian Frères* (1) ((1923), 17 Lloyd's Rep. 72). In that case SCRUTTON, L.J., drew inferences of fact; he pointed out in his judgment that there was a missing fact and that, although the case had been sent back to an arbitrator, there still was a missing fact; and he proceeded to draw an inference which supplied that omission. He said (*ibid.*, at p. 73):

"For this reason [the fact that something had not been found] we asked the arbitrator to say whether the shortage which he found was commercially substantial, but for some reason or another he did not answer the question, and his recent and lamented death prevents us from asking the question now. This court has power under R.S.C., Ord. 34, r. 1, to draw inferences of fact from the facts stated; and I draw the inference that to ship 2,578 tons at the Danube ports, out of a total final cargo of 5,225 tons, is commercially to ship half the cargo . . ."

There is clear authority that, in the opinion of the learned lord justice giving the judgment of the Court of Appeal in that case, the court has power to draw inferences of fact, provided, of course, that he does not draw an inference of fact in conflict with a fact found, whether by inference or not, by the arbitrator.

The learned judge in that case referred to and relied on R.S.C., Ord. 34, r. 1, which provides:

"The parties to any cause or matter may concur in stating the questions of law arising therein in the form of a Special Case for the opinion of the court. Every such Special Case shall be divided into paragraphs numbered consecutively, and shall concisely state such facts and documents as may be necessary to enable the court to decide the questions raised thereby . . . and the court shall be at liberty to draw from the facts and documents stated in any such Special Case any inference, whether of fact or law, which might have been drawn therefrom if proved at a trial."

When counsel for the shipowners showed that order to us first, I had some doubt whether that would apply to a Special Case stated under the Arbitration Act, 1950, s. 21, because such a Case is a Case Stated by an arbitrator and not a Case which any parties to a cause or matter have concurred in stating. R.S.C., Ord. 34, r. 7, however, states:

"This order shall apply to every Special Case stated in a cause or matter, or in any proceeding incidental thereto."

An arbitration is a "matter" and, therefore, it seems clear that the order does apply to a Case Stated under the Arbitration Act, 1950, as well as to a Case Stated between the parties by agreement. Further there is the direct authority of the Court of Appeal in *Williams v. Manissalian Frères* (1) that the court has power to draw an inference.

It seems to me, therefore, that the result is that the learned judge, in declining to draw the inference which he might have drawn and in thinking it was necessary to remit the Case to the arbitrator for him to find the fact or draw the inference, was in error. He had power to draw the inference and should have drawn the inference.

That being so, it seems to me that the reasons that he gave for ordering the

A successful shipowners to pay all the costs do not hold good. There was no necessity for this Case to have been remitted to the arbitrator; there was no necessity for the shipowners to have taken proceedings within six weeks or any particular time to get the Case remitted to the arbitrator. Speaking for myself, I think that the arbitrator had found enough facts without it being necessary to draw any inference. It is unfortunate that all these proceedings and expense have been incurred in this case. I think that the reason on which the learned judge based his order with regard to the costs has been shown to be erroneous; accordingly, in my judgment it should be set aside. The costs must follow the event and, therefore, the shipowners are entitled to costs.

PARKER, L.J.: I so entirely agree with everything that my Lord has said that I only desire to add one word as a word of caution. This power to draw inferences, in my judgment, undoubtedly exists, but, as my Lord has said, it must not be used to interfere with an inference drawn by the arbitrator in the sense of substituting the court's inference for that of the arbitrator. Also it must not be used as a convenient method of avoiding the necessity of remitting to an arbitrator. If there is any conceivable doubt as to what the arbitrator would find or what inference he would draw, then the matter must be remitted; but if, as I think is the case here, the inference is irresistible, then the court can draw its own inference. Accordingly, I would allow this appeal.

LLOYD-JACOB, J.: I agree.

Appeal allowed.

Solicitors: *Constant & Constant* (for the claimants, the shipowners).

[*Reported by F. GUTTMAN, Esq., Barrister-at-Law.*]

R. v. NOSEDA. R. v. FIELD.

R. v. KNIGHT. R. v. FITZPATRICK.

[COURT OF CRIMINAL APPEAL (Lord Goddard, C.J., Barry and Ashworth, JJ.), June 9, 23, 1958.]

Criminal Law—Sentence—Borstal training—Further offences committed while on licence from, absconded from, or absent without leave from, Borstal—Appropriate sentences for further offences.

Though there is no general principle applicable whether a second or third sentence of Borstal training is appropriate, the occasions on which a third sentence of Borstal training is appropriate are likely to be rare. The first factor to consider is whether the offender is (i) a person released on licence from Borstal, or (ii) an absconder from Borstal, or (iii) a person who has remained absent without leave from Borstal.

(i) Where a person released from Borstal on licence commits a further offence while so released, the appropriate order to be made in respect of that offence is, generally, a short term of imprisonment with a view to his being recalled to Borstal under s. 45 (4) of the Prison Act, 1952, it being made clear in passing sentence that recall to Borstal is intended.

(ii) Where an absconder from Borstal commits a further offence while at large then, if the absconding and further offence took place early in his Borstal training, e.g., within twelve months of the original sentence of Borstal training, a short term of imprisonment may well be imposed for the further offence with a view to his being recalled to Borstal under the Prison Act, 1952. If, however, the absconding and further offence took place after a period of more than twelve months of Borstal training, a sentence of imprisonment for the further offence is likely to be the appropriate sentence.

(iii) Where a person who has already received a sentence of Borstal

training is absent without leave from Borstal and commits a further offence while so absent, he should, ordinarily, be treated as an absconder.

[Editorial Note.] Recall to Borstal training under s. 45 (4) of the Prison Act, 1952, is effected by the Prison Commissioners and attention is drawn in the judgment (p. 569, letter I, post) to the practice of the commissioners and to consequences of views that they may indicate regarding recall. On the imposition of a second or subsequent sentence of Borstal training on an offender on release from Borstal or under recall the former sentence ceases to have effect (s. 45 (5)).

As to Borstal training, see 10 HALSBURY'S LAWS (3rd Edn.) 517, paras. 943-945. For the Prison Act, 1952, s. 45, see 32 HALSBURY'S STATUTES (2nd Edn.) 650.]

Appeals.

These were appeals against sentences of Borstal training passed on the appellants at quarter sessions. In each case the appellant on a previous occasion, or occasions, had been sentenced to Borstal training and the appellants' grounds of appeal were that further sentences of Borstal training would not benefit them. The first two appellants, George Edward Nosedá and Michael Frederick Field, were now respectively aged twenty and nineteen. Nosedá was first sentenced to Borstal training on May 23, 1955, for the offences of officebreaking and larceny; previously he had been put on probation on three occasions and fined once. Nosedá was released on licence from Borstal on Nov. 7, 1956, and on Apr. 1, 1957, he received a second sentence of Borstal training for housebreaking and larceny. Field was first sentenced to Borstal training in January, 1957, for the offence of taking and driving away a motor car without the owner's consent, previously having been before a juvenile court on three occasions, the last of which resulted in his being sent at the age of thirteen to an approved school; he was put on probation in January, 1956, for three years and was fined in November, 1956, for driving a motor car without a licence or insurance policy. In June, 1957, Field absconded from Borstal but was recaptured and sent for a time to a Borstal corrective centre; thereafter he was sent back to the Borstal training centre from which he absconded to resume his training. In January, 1958, Nosedá and Field together absconded from Borstal, broke and entered a dwelling-house and stole a cigarette lighter and took and drove away a motor car without the owner's consent. They were brought before Middlesex Quarter Sessions on Mar. 6, 1958, where they pleaded guilty to these offences. The report of the Prison Commissioners on Nosedá stated it was the commissioners' view that he should continue his Borstal training under his existing sentence but that a fresh sentence of Borstal training would not be of advantage. The commissioners' report in Field's case stated that it would be better for him to continue Borstal training, but that if the court thought the unexpired portion of his sentence insufficient he was suitable for a further sentence. Nosedá and Field were sentenced by quarter sessions to further periods of Borstal training, two other offences committed by them being taken into consideration, from which they now appealed; this was Nosedá's third sentence of Borstal training and Field's second.

The third appellant, John Knight, was now aged eighteen and previously had been before juvenile courts and had been sent to an approved school and a detention centre. Knight was first sent to Borstal in January, 1957, for the offences of garage breaking and larceny, larceny of a motor car and possessing housebreaking implements by night, three other offences being taken into consideration. He absconded from Borstal on May 7, 1957, but was recaptured and returned there on May 9, 1957. On Jan. 21, 1958, he failed to return to Borstal from home leave and while at large he committed over twenty offences. On Mar. 21, 1958, he was brought before Surrey Quarter Sessions and convicted of taking and driving away a motor car without the owner's consent and of possessing housebreaking implements by night, for which offences he received

A a second sentence of Borstal training; and on Mar. 27, 1958, he was brought before the County of London Quarter Sessions and convicted of shopbreaking and larceny and taking and driving away a motor car without the owner's consent for which a third sentence of Borstal training was passed on him from which he now appealed.

The fourth appellant, George Peter Fitzpatrick, was now aged nineteen, and B had a bad record as a juvenile. He received his first sentence of Borstal training in January, 1956, for shopbreaking and larceny; he was released on licence on Sept. 5, 1957, and on Mar. 28, 1958, he was convicted at Salford Quarter Sessions of attempted burglary, being in possession of housebreaking implements by night, housebreaking and larceny and received a second sentence of Borstal training, one other offence being taken into consideration. The C report of the Prison Commissioners on Fitzpatrick stated that the commissioners would be prepared to recall him for a period of special training at the Borstal recall centre. He now appealed against sentence to undergo Borstal training.

The appellants were not represented.

Cur. adv. vult.

June 23. LORD GODDARD, C.J., read the following judgment of the D court: In each of these cases leave had been granted to the appellant to appeal from an order made by a court of quarter sessions that he should be sent to Borstal for training and in each case a similar order had been made by a court on a previous occasion. The question which arises in each case is whether it is desirable that a person should be sent to Borstal for training on a second, or possibly a third, occasion, and as this is a problem which quite frequently arises, E the court decided to determine the appeals but to put into writing the reasons for its decision, in the hope that they may be of some guidance to courts which are required to deal with similar problems in the future.

In the first place, although it is hardly necessary to say so, each case must be considered on its own particular facts, and there is no general principle applicable to all cases under which a second or indeed a third sentence of Borstal training is to F be regarded either as appropriate or inappropriate. The most that can be said is that the occasions on which a third sentence is appropriate are likely to be rare.

In our view, the first factor to consider is whether the offender is (a) a person who had been released from Borstal on licence or (b) an absconder from Borstal or (c) a person who had remained absent without leave from Borstal, for example, after a visit to his home.

G (a) We deal first with the case of a person released from Borstal on licence. He may fairly be said to have shown some response to his training and is prima facie in a different class from a person who either absconds from Borstal or is absent without leave. When a person is released from Borstal on licence, he is liable to recall to Borstal to complete his training and under s. 45 (4) of the H Prison Act, 1952, remains so liable for a period of four years from the date of his sentence. Then he may be detained till the expiration of three years from the date of his sentence or for a period of six months from the date when he is taken into custody under the order of recall whichever is the later. If such a person commits an offence or offences while on licence and is brought before a court which has jurisdiction to send him to Borstal, it is in our view important that the court should know what period of his original training is outstanding in I the event of his being recalled to Borstal and whether he will in fact be recalled to Borstal. As we understand it, the practice of the Prison Commissioners is to recall to Borstal a person who has committed an offence while released on licence, unless the court imposes a fresh sentence of Borstal or imposes a substantial sentence of imprisonment.

For a person in this class we think that, as a general rule, the appropriate order in respect of the offence committed by him while released on licence is a short term of imprisonment with a view to his recall to Borstal. The short sentence of imprisonment is required so that he may be detained in custody pending his

recall to Borstal and, in passing sentence, the court should make it clear that recall to Borstal is intended. This course would not, however, be appropriate if the Prison Commissioners indicate that the accused person would not be recalled to Borstal. Nor would recall be appropriate if the nature of the further offence was so serious as to call for a substantial sentence. On the other hand, if the commissioners report that the offender did make a good response to training but appears to need a longer period of training than the remaining part of his sentence would provide, a further sentence of Borstal may be appropriate.

(b) A person who absconds from Borstal thereby indicates his unwillingness to respond to the discipline and training provided in Borstal but that is not of itself a valid reason why he should not be required to submit to them. If an absconder is brought before a court for a further offence committed while at large, we think that if the absconding and further offence take place early in his training, say within twelve months or so of the original sentence, a short term of imprisonment with a view to recall is desirable. We assume that in such cases absconders will be sent to the correction centre before resuming training. On the other hand, if the person absconds after undergoing more than twelve months of training and commits an offence, the court which has to deal with him, or the Prison Commissioners, may take the view that further Borstal training is unlikely to be of benefit and accordingly that imprisonment is the only alternative.

(c) A person who is absent without leave from Borstal and commits a further offence should ordinarily be treated as an absconder.

Before preparing this judgment the court has had the advantage of ascertaining the practice of the commissioners in regard to these varying types.

The first two appeals before us were those of Nosedá and Field, and they were heard together. Nosedá is now twenty years of age and Field nineteen. Nosedá was first sent to Borstal in May, 1955, and was released on licence in November, 1956. In April, 1957, he was again sentenced to Borstal and in January, 1958, he absconded with Field and in his company committed four offences for which he received in March, 1958, a third sentence of Borstal training. Field was first sent to Borstal in January, 1957, and after absconding and being recaptured he absconded again with Nosedá in January, 1958. Having regard to the ages and histories of these two appellants, and having considered the Prison Commissioners' reports on them, we decided that a further period of Borstal training was not likely to be of value and accordingly we substituted in respect of each of them a sentence of eighteen months' imprisonment.

The appellant Knight is eighteen years of age and was first sent to Borstal in January, 1957. He absconded in May, 1957, but was recaptured. In January, 1958, after completing twelve months of his sentence he failed to return from home leave and committed over twenty offences. In March, 1958, he received a fresh sentence of Borstal training at Surrey Quarter Sessions for offences committed in that county and six days later he also received a sentence of Borstal training at the County of London Quarter Sessions for offences committed in that county. In our view the course taken by Surrey Quarter Sessions was entirely justified and although in the circumstances the third sentence of Borstal training passed at the County of London Sessions was in a sense unnecessary, we saw no reason to alter it and dismissed the appeal.

The appellant Fitzpatrick is nineteen and was first sent to Borstal in January, 1956. He was released on licence in September, 1957, but in February, 1958, he committed further offences and was again sentenced to Borstal training. In our view this is a case in which completion of the original Borstal training should be enforced and accordingly we substituted a sentence of three months' imprisonment with a view to the appellant's recall to Borstal.

[Reported by WENDY SHOCKETT, Barrister-at-Law.]

A AIREY v. AIREY.

[COURT OF APPEAL (Jenkins, Parker and Pearce, L.JJ.), May 9, 12, 13, June 13, 1958.]

Limitation of Action—Negligence—Death of tortfeasor—Action brought after lapse of more than six years after accident but within six months of administration—Whether action against tortfeasor's administrator barred—Law Reform (Miscellaneous Provisions) Act, 1934 (24 & 25 Geo. 5 c. 41), s. 1 (3) (b)—Limitation Act, 1939 (2 & 3 Geo. 6 c. 21), s. 2, s. 32.

On Feb. 24, 1951, the respondent sustained injuries in an accident caused by the negligent driving of a car by the deceased who was killed in the accident. On Mar. 18, 1957, more than six years after the accident, the appellant took out letters of administration to the deceased's estate.

On Sept. 9, 1957, within six months of the letters of administration being taken out, the respondent issued a writ claiming damages for negligence against the appellant. The defendant pleaded that the action was barred by reason of the Limitation Act, 1939, s. 2, which imposed a period of limitation of six years from the date on which the cause of action accrued. On appeal from a decision that the action was maintainable as it was brought within the six months from the date of representation limited by s. 1 (3) (b) of the Law Reform (Miscellaneous Provisions) Act, 1934*, the six years' period limited by s. 2 of the Limitation Act, 1939, being excluded by s. 32† of that Act,

Held: the action for negligence was not statute-barred for the following reasons—

(i) the sole period of limitation applicable after the death of a tortfeasor to a surviving cause of action for tort involving personal injuries, for which no proceedings were pending at the tortfeasor's death, was the period (limited originally by s. 26 (5) of the Administration of Estates Act, 1925, and subsequently by s. 1 (3) (b) of the Law Reform (Miscellaneous Provisions) Act, 1934) of six months after representation to his estate was taken out; this limitation period was exhaustive and prior to the Limitation Act, 1939, excluded the six years' period under s. 3 of the Limitation Act, 1623, in cases to which it otherwise might have been applicable (see p. 578, letter A, and p. 577, letter D, post).

(ii) accordingly the six years' limitation period under s. 2 of the Limitation Act, 1939, for an action for tort involving personal injuries was excluded by s. 32 of that Act from applying to the cause of action in the present case (see p. 577, letter H, and p. 578, letter B, post).

Decision of DIPLOCK, J. (ante, p. 59), affirmed on different grounds.

[**Editorial Note.** So much of s. 1 (3) (b) of the Law Reform (Miscellaneous Provisions) Act, 1934, as provided that an action in tort should not be maintainable unless the cause of action arose within six months before the deceased's death was repealed by the Law Reform (Limitation of Actions, etc.) Act, 1954, s. 4. The Court of Appeal expressly refrain from intimating any view on whether the consequence of this repeal is that actions on statute-barred causes of action in tort become maintainable if brought within six months of representation to the deceased tortfeasor's estate being taken out (see p. 578, letter G, post; compare, p. 59, letters F-G, ante). The Act of 1954 also reduced the limitation period for actions of negligence causing personal injuries from six to three years; but this amendment was irrelevant to the present case because s. 7 (1), (3) of the Act of 1954 resulted in the six years' limitation period not being curtailed.]

* The terms of s. 1 (3) of the Law Reform (Miscellaneous Provisions) Act, 1934, are printed at pp. 572, 573, post.

† The relevant terms of s. 32 of the Limitation Act, 1939, are printed at p. 573, letter E, post.

For the Law Reform (Miscellaneous Provisions) Act, 1934, s. 1, see 9 HALSBURY'S STATUTES (2nd Edn.) 792. A

For the Limitation Act, 1939, s. 2, s. 32, see 13 HALSBURY'S STATUTES (2nd Edn.) 1160, 1194.]

Interlocutory Appeal.

The defendant, the administrator of a deceased tortfeasor, appealed against the decision of DIPLOCK, J., on a preliminary point of law that the plaintiff's action in tort, which had been commenced within six months of the defendant taking out administration but more than six years after the cause of action in tort accrued, was not barred by s. 2 of the Limitation Act, 1939. The decision against which the appeal was brought was made on Mar. 28, 1958, and is reported at p. 59, ante. B

P. M. O'Connor and E. W. Eveleigh for the defendant. C

Roy Wilson, Q.C., and Paul Curtis-Bennett for the plaintiff.

Cur. adv. vult.

June 13. JENKINS, L.J.: The judgment I am about to read is the judgment of the court in this case.

This appeal arises in an action brought by Mrs. Elizabeth Scott Airey against her husband John Calvert Airey, as administrator of the estate of their son Isaac Airey deceased, for damages for personal injuries sustained by the plaintiff in an accident brought about by the negligent driving of the son of a motor car in which the plaintiff was a passenger. The son was unfortunately killed in the accident, and the plaintiff accordingly sued his administrator in reliance on s. 1 of the Law Reform (Miscellaneous Provisions) Act, 1934. D

The accident happened on Feb. 24, 1951. Letters of administration to the son's estate were granted to the defendant on Mar. 18, 1957, and the writ in the action was issued on Sept. 9, 1957, which date, it will be observed, was less than six months after the grant of representation but more than six years after the accident. In these circumstances the defendant raised a defence to the effect that the action was statute-barred by virtue of s. 2 of the Limitation Act, 1939, inasmuch as it had not been brought within the period of six years from the date on which the cause of action accrued. This plea of limitation was set down for hearing as a preliminary point of law, and came before DIPLOCK, J., who by his judgment dated Mar. 28, 1958, rejected the defence based on s. 2 of the Limitation Act, 1939. From that judgment the defendant (with the leave of the learned judge) now appeals to this court. E

The question whether an action such as this is subject to the period of limitation (six years at the material time) imposed on actions in tort by s. 2 of the Limitation Act, 1939, turns first on the provisions of s. 1 of the Act of 1934, by which the right to bring an action such as this was conferred, and in particular the position in regard to limitation under those provisions and (if and so far as applicable) the provisions of the Limitation Act, 1623, as the law stood when the Act of 1934 came into force; and, secondly, on the effect of certain provisions of the Act of 1939 on the position previously obtaining in regard to the limitation of an action such as this under the provisions of s. 1 of the Act of 1934, and (if and so far as applicable) those of the Act of 1623. The relevant provisions of the Law Reform (Miscellaneous Provisions) Act, 1934, are these. Section 1 (1): F

"Subject to the provisions of this section, on the death of any person after the commencement of this Act all causes of action subsisting against or vested in him shall survive against, or, as the case may be, for the benefit of, his estate."

Then below there are some specific exceptions in the proviso which I need not now read. Sub-section (3) is the next material one: G

"No proceedings shall be maintainable in respect of a cause of action in tort which by virtue of this section has survived against the estate of a H

I

A deceased person, unless either—(a) proceedings against him in respect of that cause of action were pending at the date of his death; or (b) the cause of action arose not earlier than six months before his death and proceedings are taken in respect thereof not later than six months after his personal representative took out representation.”

Then sub-s. (4) is:

B “Where damage has been suffered by reason of any act or omission in respect of which a cause of action would have subsisted against any person if that person had not died before or at the same time as the damage was suffered, there shall be deemed, for the purposes of this Act, to have been subsisting against him before his death such cause of action in respect of that act or omission as would have subsisted if he had died after the damage was suffered.”

C It should also be noted that s. 1 (7) of the Act of 1934 repealed sub-ss. (1), (2), (5) and (6) of s. 26 of the Administration of Estates Act, 1925.

The relevant provisions of the Limitation Act, 1939, are these. Section 2 (1) provides:

D “The following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued, that is to say:—
(a) actions founded on simple contract or on tort.”

Then I should refer to s. 32 which provides:

E “This Act shall not apply to any action or arbitration for which a period of limitation is prescribed by any other enactment . . .”

That is the material part of s. 32. Then s. 34 (4) effects certain repeals of enactments, mentioned in the schedule to that Act, which “are hereby repealed to the extent specified in the third column of that schedule”. The enactment referred to in the schedule is the Limitation Act, 1623, and the extent of the repeal is ss. 3, 4 and 7.

F We need hardly say that the law as enacted by s. 1 (1) of the Act of 1934 was not by any means wholly new. The sub-section brings together all causes of action (whether in contract or in tort) subsisting against or vested in any person at the time of his death and provides that (with certain specific exceptions not material for the present purpose) all such causes of action shall survive against or as the case may be for the benefit of his estate. So far as causes of action in contract were concerned, this was merely declaratory of the existing law, inasmuch as the maxim *actio personalis moritur cum persona* had never been applicable to causes of action in contract. So far as causes of action in tort were concerned, statutory provision had already been made for the survival against the estate of the deceased tortfeasor of causes of action in tort involving injury to property. To carry this aspect of the matter no further back, we would refer to s. 2 of the Civil Procedure Act, 1833, which was repealed as regards deaths after 1925 by s. 56 of the Administration of Estates Act, 1925, and the part of which here relevant was substantially re-enacted as regards such deaths by s. 26 (5) of the same Act, which sub-section was in turn repealed by s. 1 (7) of the Act of 1934.

H The substantial change in the law brought about by s. 1 (1) of the Act of 1934
I was the extension of the principle of survival to causes of action in tort involving personal injuries as in the present case. Section 1 (1) deals *uno flatu* with all causes of action whether they survived under the previous law or not. The category of those which already survived is typified by causes of action in contract. The category of those which did not previously survive but were made to survive by the Act is typified by causes of action in tort involving personal injury. This sub-section is silent as to the period of limitation to be applied to actions by or against personal representatives in respect of surviving causes of action, but, apart from any special provision as to limitation, the only period of limitation

which could be applicable in 1934, if there was to be any limitation at all, was, so far as causes of action in simple contract or tort were concerned, the period of six years prescribed by the Limitation Act, 1623. It had been established long before the Act of 1934 that so far as causes of action in contract were concerned the six years' period of limitation applied whether the action was between the original parties to the contract or between one of such parties and the personal representative of the other or between the personal representatives of both. It is, therefore, not open to doubt that surviving causes of action in contract remained after the Act of 1934, as they had previously been, subject to the six years' period of limitation prescribed by the Act of 1623, computed from the date of the breach.

But what was the bearing of the Act of 1623 on causes of action which did not previously survive but were for the first time made to do so by the Act of 1934?

On the defendant's side it may be said that s. 1 (1) of the Act of 1934 created no new causes of action in tort but merely invested causes of action in tort formerly subject to the maxim *actio personalis moritur cum persona* with the quality of survival for the purposes of suit by and against the personal representatives of the original actors, and accordingly that the Act of 1623 applied to such surviving causes of action just as it would have done if both the original actors had remained alive, subject of course to any provision to the contrary contained in the remainder of s. 1 of the Act of 1934.

On the other hand, it may be said on the plaintiff's side with some plausibility that (so far at all events as actions involving injury to the person are concerned) the right to bring proceedings against the personal representatives of a deceased tortfeasor, which s. 1 (1) of the Act by making the cause of action survive impliedly confers on the injured party or his personal representative, and also the right to bring proceedings against the tortfeasor himself, similarly conferred on the personal representative of a deceased injured party, are entirely new rights of action created by the Act of 1934. How, it may be asked with some force, can the Act of 1623 be held applicable to a statutory right of action such as this, which could not possibly have been in contemplation when the Act of 1623 was passed, and was indeed a right of action unknown to the law until the Act of 1934 ordained otherwise some three hundred years later?

We think that the former argument should prevail. It appears to us to be reasonably plain that the intention of s. 1 (1) of the Act of 1934 was (subject to any provision to the contrary elsewhere in the section) to place the personal representative of any person who at the time of his death had any cause of action vested in or subsisting against him in the same position as nearly as may be with respect to that cause of action, for all purposes including limitation, as that person would have been in if he had not died. Thus each surviving cause of action must be taken to have survived with and subject to the same right to plead or liability to be barred by the relevant Limitation Act as was applicable to it in the lifetime of the deceased, save in so far as any provision to the contrary is to be found in the remainder of s. 1 of the Act of 1934. It is unnecessary to enlarge on the absurdities which would result from the adoption of the opposite view.

But, says the plaintiff, even if it is right to hold that, subject to any provision to the contrary in the rest of s. 1 of the Act of 1934, sub-s. (1) has the effect of preserving with respect to surviving causes of action the same periods of limitation as would have been applicable if there had been no death, the section does contain, in sub-s. (3), a provision to the contrary so far as an action such as the present one is concerned, that is to say, an action brought against the estate of a deceased tortfeasor in respect of a tort committed in his lifetime. That special provision, in the plaintiff's submission, must be considered as exhaustive so far as an action such as this is concerned, and as ousting the application of the six years' period prescribed by the Limitation Act, 1623, if and so far as that period would otherwise have been applicable. Sub-section (3) of s. 1

- A provides that no proceedings shall be maintainable in respect of a cause of action in tort which by virtue of s. 1 has survived against the estate of a deceased person unless the conditions in one or other of sub-paras. (a) and (b) of the sub-section are fulfilled. Sub-paragraph (a) requires that proceedings in respect of that cause of action should have been pending at the date of the death of the deceased. That of course was not the case here, but in cases in which sub-para. (a) did apply the pending proceedings would, as we think, in conformity with the view above expressed, remain subject to any defence of limitation which would have been open to the deceased in his lifetime. The vital provision for the purposes of this case comes in sub-para. (b) which, in cases where proceedings are not pending at the date of the death of the deceased, imposes the twofold condition that:

- C “the cause of action arose not earlier than six months before his death and proceedings are taken in respect thereof not later than six months after his personal representative took out representation.”

The maximum period of six months before the death within which, under sub-para. (b), surviving torts must have been committed in order to be actionable

- D at all after the death is not, we think, strictly a period of limitation. It is 1 of a period within which action must be taken. It is an ambulatory restriction on the injured party's right to proceed against the estate of a deceased tortfeasor after his death, whenever he may die. In other words, it imposes as a condition precedent to the maintainability of an action against the estate of a deceased tortfeasor the requirement that the tort should have been committed within
- E six months of his death.

The second branch of sub-para. (b), on the other hand, to our minds, clearly imposes a period of limitation. It provides that the action is not to be maintainable unless proceedings are taken in respect of the cause of action in question not later than six months after the personal representative of the deceased tortfeasor took out representation. The plaintiff, as we have said, contends

- F that this special provision as to the limitation of actions of this particular kind is exhaustive, and had the effect of ousting the application of the six years' period prescribed by the Act of 1623 if otherwise applicable. On the other hand, the defendant says that this special provision is in addition to and not in substitution for the six years' period so prescribed, and this is the view which commended itself to the learned judge.

- G We cannot agree. The defendant's construction involves the reading of the condition in question as requiring not simply that the proceedings should be taken not later than six months after the personal representative took out representation, but that the proceedings should be taken not later than the expiration of six months from the taking out of representation or the expiration of six years from the date on which the cause of action arose, whichever is the earlier. We see no sufficient warrant for attributing this effect to s. 1 (3) (b). If it had been intended that actions such as this should be subject not only to the special period of limitation expressly prescribed, but also to an overriding limitation period of six years from the accrual of the cause of action, s. 1 (3) (b) would surely have contained some reference to the latter. Prima facie if it is enacted that a particular kind of action is only to be maintainable if brought
- H within a specified time, that means that it is, so far as time is concerned, to be
- I maintainable if it is brought within that specified time.

In the present instance, there appear to us to have been perfectly good grounds for limiting actions against the estates of deceased tortfeasors in the special way adopted in s. 1 (3) (b). One may talk loosely of the bringing of an action against the estate of a deceased tortfeasor, but of course such an action is in truth an action against his personal representative as representing his estate, and until a personal representative is duly constituted no such action can be brought. It is therefore perfectly appropriate to make any period of limitation applicable to

such an action run from the date when representation to the estate of the deceased tortfeasor is taken out, as the earliest date on which the injured party might have brought his action against the personal representative. That is the principle of limitation adopted here, and it seems to us inconsistent with that principle to import an overriding fixed period of six years from the date when the cause of action arose. If the principle is that time is to run in favour of the personal representative from the earliest date on which the injured party might have brought his action against the personal representative, then the expiration of the fixed period of six years from the date when the cause of action accrued appears to us to be an irrelevant consideration. If the fixed period was applied as an overriding period of limitation, it would only have operated in the very rare cases (of which this is one) in which (having regard to the first branch of s. 1 (3) (b)) representation was not taken out until as long as five-and-a-half to six years from the date of the death, and when it operated would have had the effect of barring the injured party's right to sue the personal representative before there was any personal representative to be sued. The persons interested in the estate of the deceased tortfeasor could not, so far as we can see, be prejudiced by the exclusion of the fixed six years' period of limitation in favour of a period of six months running from the date on which representation was taken out, for it would be open to them at any time to obtain a grant, thus compelling the injured party to bring his action within the ensuing six months on pain of its becoming statute-barred. Moreover, until representation is taken out there cannot be any lawful administration or distribution of the deceased tortfeasor's estate, so it cannot be said that in the interval (however long) between the death of the tortfeasor and the grant of representation the absence of a fixed period of limitation would result in the administration and distribution of the deceased's estate being held up by reason of the injured party's outstanding claim.

In sum, we think that the intention of the second branch of s. 1 (3) (b) of the Act of 1934 was first to give the injured party a reasonable chance of bringing his action against the personal representative of the deceased tortfeasor by making time run against the injured party only from the date on which representation to the estate of the deceased tortfeasor was taken out, so as to constitute a personal representative for the injured party to sue; and secondly to obviate delay in the administration and distribution of the deceased tortfeasor's estate by fixing the short period of only six months from the grant as the period within which the injured party must bring his action on pain of its becoming statute-barred. It appears to us that, at all events when taken in conjunction with the restriction of the right to bring such an action to torts committed within six months of the death of the tortfeasor contained in the first branch of s. 1 (3) (b), the second branch so construed provided a perfectly fair and adequate mode of limitation.

If it is asked why s. 1 of the Act of 1934 should in this matter of limitation treat surviving causes of action in tort differently from surviving causes of action in contract, the short answer is that for whatever reason s. 1 (3) (b) did, according to its plain terms, make special provision in this respect for actions in tort brought after the death of the deceased tortfeasor. But it is, we think, possible to go further than that. The position as regards the limitation of actions against the estates of deceased contractors was well settled before the Act of 1934 came into force, and it may well have been thought advisable to leave that position undisturbed. On the other hand, until the Act of 1934 came into force, the only provisions operative as regards the limitation of actions brought against the estates of deceased tortfeasors were those contained in s. 26 (5) of the Administration of Estates Act, 1925 (re-enacting the relevant part of s. 2 of the Civil Procedure Act, 1833), in relation to the survival of causes of action in tort involving injury to property. Section 26 (5) of the Act of 1925 was in these terms:

- A "An action may be maintained against the personal representative of a deceased person for any wrong committed by the deceased within six months before his death to another person in respect of his property, real or personal, but the action shall be brought within six months after the personal representative of the deceased has taken out representation."
- B That is the relevant part of sub-s. (5). One may compare the relevant part of s. 2 of the Civil Procedure Act, 1833, which was in these terms:
- C "and further, an action of trespass, or trespass on the case, as the case may be, may be maintained against the executors or administrators of any person deceased for any wrong committed by him in his lifetime to another in respect of his property, real or personal, so as such injury shall have been committed within six calendar months before such person's death, and so as such action shall be brought within six calendar months after such executors or administrators shall have taken upon themselves the administration of the estate and effects of such person; and the damages to be recovered in such action shall be payable in like order of administration as the simple contract debts of such person."
- D There was no provision extant as regards the limitation of surviving causes of action in respect of torts involving injury to the person for the simple reason that causes of action in tort of that description did not survive. The language of s. 26 (5) of the Act of 1925 and its precursor s. 2 of the Act of 1833, quoted above, closely resembles the language of s. 1 (3) (b) of the Act of 1934. We think that it is reasonably plain that the period of limitation provided for in the two earlier of these enactments must be taken to have been exhaustive, and
- E to have excluded any application of the six years' period of limitation to the cases to which it applied.
- F As we have said, s. 1 (7) of the Act of 1934 repealed s. 26 (5) of the Act of 1925, which had itself repealed s. 2 of the Act of 1833. Next, one may observe that the Act of 1934, having by s. 1 (1) made all causes of action in tort whether to property or person survive against the estate of a deceased tortfeasor, treats them all alike for the purposes of the limitation imposed by s. 1 (3) (b), and frames the limitation provision in terms closely resembling those used in the Acts of 1833 and 1925 in relation to surviving torts against property. We think that these circumstances, which seem to us to provide a sufficient explanation of the special treatment as regards limitation accorded to actions against the estates of deceased tortfeasors, can legitimately be taken into account for the
- G purpose of resolving any doubt as to the exclusion of the six years' period of limitation under the Act of 1623 in cases to which s. 1 (3) (b) of the Act of 1934 applies, and in our judgment they tend to support the view that it was excluded.
- H If we are right so far, it appears to us to be really clear beyond argument that the six years' period of limitation imposed by s. 2 of the Limitation Act, 1939, with respect to actions in tort cannot be applicable to the present action any more than the like period imposed by the Act of 1623 would have applied if the Act of 1939 had not been passed.
- I The repeal effected by s. 34 of the Act of 1939 of the old six years' period of limitation did not, *ex hypothesi*, affect actions such as the present one, because that period of limitation had never applied to them. If the Act of 1939 had imposed its own substituted six years' period of limitation on all actions of tort without saving or qualification it might have been found, surprisingly enough, to have applied for the first time *sub silentio* to actions such as the present one a six years' period of limitation to which they had never before been subject. That curious result is, however, to our minds wholly excluded by the saving provision in s. 32, which, so far as material for the present purpose, provides that:
- "This Act shall not apply to any action . . . for which a period of limitation is prescribed by any other enactment . . ."

If our view as to the exclusion of the old six years' period of limitation is accepted, then it follows that before the Act of 1939 came into force actions such as the present one were subject to one period, and one period only, of limitation, namely, the period of six months from the taking out of representation to the estate of the deceased tortfeasor imposed by s. 1 (3) (b) of the Act of 1934. This was, in our view, a period of limitation prescribed by another enactment, namely, the Act of 1934, with the result that the actions to which it applies were excluded from the operation of the Act of 1939 by s. 32 of that Act, and that the status quo with regard to the limitation of such actions was thus preserved.

The learned judge, while holding, contrary to our view, that actions to which s. 1 (3) (b) of the Act of 1934 applied were before the Act of 1939 came into force subject to the six years' period of limitation under the Act of 1623, nevertheless came to the conclusion that since the Act of 1939 came into force neither the old nor the new six years' period has been applicable to such actions. He reached this conclusion (in effect) on the grounds (i) that s. 3 of the Act of 1623, which imposed the old six years' period, was repealed by s. 34 of the Act of 1939 and so ceased to apply; and (ii) that the new six years' period introduced by s. 2 of the Act of 1939 did not apply either, because an action of this kind was one for which a period of limitation (namely, the period of six months from the taking out of representation) was prescribed by another enactment (namely, s. 1 (3) (b) of the Act of 1934) and was consequently excluded from the operation of the Act of 1939 by the saving provision contained in s. 32. We confess that if we agreed with the learned judge that the old six years' period was applicable to actions of this class before the Act of 1939 came into force we would be reluctant (as he clearly was himself) to hold that the Act of 1939, which does not even mention the Act of 1934, had the apparently accidental effect of abrogating for no discernible reason the six years' period of limitation previously applicable to them. But on the view we take that the old six years' period never applied to actions such as this, further discussion of this hypothetical aspect of the case is unnecessary.

We also find it unnecessary to discuss the effect of the repeal by s. 4 of the Law Reform (Limitation of Actions, etc.) Act, 1954, of so much of s. 1 (3) of the Act of 1934 as provides that an action is not to be maintainable in respect of a surviving cause of action in tort unless the cause of action arose not earlier than six months before the death of the deceased, which has no bearing on the present case. We mention it only for the purpose of disclaiming any view one way or the other on the question whether the conclusion we have reached in this case involves the corollary that actions which were statute-barred in the lifetime of a tortfeasor become once more maintainable after his death provided that they are brought within six months of the taking out (at any distance of time) of representation to his estate.

For the reasons we have stated we would dismiss this appeal.

Appeal dismissed. Leave to appeal to the House of Lords refused.

Solicitors: *L. Bingham & Co.* (for the defendant); *Theodore Goddard & Co.*, agents for *Swinburne & Jackson*, Gateshead (for the plaintiff).

[Reported by HENRY SUMMERFIELD, Esq., Barrister-at-Law.]

A BYRNE AND ANOTHER v. KINEMATOGRAPH
RENTERS SOCIETY, LTD. AND OTHERS.

[CHANCERY DIVISION (Harman, J.), March 11, 12, 13, 14, 17, 18, 19, 20, 21, 24, 25, 26, 27, 28, 31, April 1, 2, May 15, 1958.]

B *Tribunal—Decision—Natural justice—Remedies for conduct of proceedings being contrary to natural justice—Whether contractual relationship necessary—Whether proceedings of joint investigating committee of film renters protection society and trade union of exhibitors conducted in accordance with natural justice.*

Trespass—Cinema—Inspector of trade association buying tickets for purpose of calculating number of patrons—Whether entry on premises a trespass.

C The plaintiff was the lessee of the C. cinema: the plaintiff company, of which he was managing director, owned the K. theatre. Contracts for films shown in the cinema and the theatre were negotiated by the plaintiff in the company's name. The week-day terms on which films were rented to exhibitors were based on a sharing of the day's takings. In consequence of a complaint made by a film renter inspectors of the investigation department of the first defendant, K.R.S., a company formed for the protection of film renters, visited the K. theatre and the C. cinema to make a check on the exhibitor's returns. For this purpose two methods were employed, viz., counting the number of patrons entering the cinema, and buying a ticket early in the day's performance and another ticket towards the end of the day and calculating the number of patrons on that day from the numbers on the tickets. In pursuance of instructions from K.R.S., inspectors paid some twenty-three visits to the C. cinema between Sept. 16, 1955, and Apr. 30, 1956, without the plaintiff's knowledge for the purpose of gathering material from which to check the returns. Only on two occasions, viz., Saturday, Dec. 3, 1955, and Saturday, Feb. 18, 1956, were any serious discrepancies from the returns found, but on each of those occasions some of the Saturday takings had been omitted from the Saturday returns and included in the Sunday returns. This resulted in a loss to the Saturday's renter (estimated at rather less than £35) and some advantage to the plaintiff as the Sunday films were rented at a flat rate. The inspectors also visited the K. theatre but discovered no discrepancies from the returns. On Apr. 30 the plaintiff was interviewed by the two inspectors and subsequently was again interviewed by them on May 3, a date arranged with him for the purpose. He and his wife explained to the inspectors that he never supervised the returns, but that the returns at the C. cinema were handled by his wife, that any irregularities were due to staff difficulties (at the K. theatre there had been a competent cashier throughout), and that, as the cashiers employed at the C. cinema at the relevant time had both left, no further explanation of the discrepancies could be given. On June 26, 1956, the matter was brought by K.R.S. before a joint investigation committee consisting of three members of the K.R.S. and three members of C.E.A. (a trade union of exhibitors to which the plaintiff did not belong), the chairman of the committee being a member of K.R.S. The plaintiff attended this meeting, having previously been told of it in a letter from the head of the investigation department of K.R.S. which explained the nature of the matters to be referred to the committee. The only document put before the committee at the meeting was a summary prepared by the investigation department of K.R.S., which referred to the two occasions on which discrepancies had been found but did not refer to the twenty-one occasions on which no discrepancies were found. The summary contained no other matters of complaint against the plaintiffs than were apparent from the letter sent to the plaintiff before the meeting, and the summary did briefly indicate the

account of the cause of the irregularities which he and his wife had given; but, though no allegation was made against the plaintiff's integrity, the impression made by the summary was that dishonesty was involved. The committee made a recommendation to K.R.S. that no further contracts should be entered into with the plaintiff or the plaintiff company for the supply of films pending the result of an investigation by independent auditors. The recommendation was approved by K.R.S. on Aug. 9, 1956, but was acted on by that body before that date. It was the practice of K.R.S. to allow an exhibitor a limited number of bookings pending a proposed investigation, conditional on his submitting to the investigation being conducted by accountants named by K.R.S. and paying all the costs involved, which were estimated at between £50 and £500. The plaintiff agreed that there should be an investigation by accountants and to pay the costs but insisted that the accountants should be unconnected with either party. Only the existing inchoate bookings of films from K.R.S. members to the K. theatre and the C. cinema were completed and subsequently both halls had to close down owing to lack of films, and the plaintiff was driven out of business. The plaintiffs claimed against K.R.S., its secretary and the head of its investigation department, damages for conspiracy and for trespass to the plaintiffs' premises; the plaintiffs also claimed a declaration against all defendants (viz., the three previously mentioned and C.E.A.) that the committee's recommendation was void as being obtained in proceedings contrary to natural justice, an injunction against acting on the recommendation and, as against K.R.S., damages for breach of contract that the proceedings should be conducted in accordance with natural justice.

Held: (i) there was no liability for conspiracy because the plaintiff had failed to show that the paramount object was to injure him or that unlawful means were employed, no trespass having been committed by the K.R.S. inspectors on the occasions when they visited the C. cinema or the K. theatre.

(ii) the remedies by injunction or declaration for violation of the rules of natural justice in the conduct of an inquiry by a domestic tribunal (such as the committee was) no less than the remedy of damages rested on contract, and did not lie in the absence of any contract between the plaintiffs and the defendants; but, assuming that there had been a contract in the present case that the proceedings before the committee would be conducted in accordance with the rules of natural justice, those rules had not been infringed.

Dictum of PILCHER, J., in *Davis v. Carew-Pole* ([1956] 2 All E.R. at p. 528) disapproved.

Abbott v. Sullivan ([1952] 1 All E.R. 226) considered and explained.

Dicta of LORD GODDARD, C.J., in *Russell v. Duke of Norfolk* ([1948] 1 All E.R. at p. 491) and of TUCKER, L.J., in the same case ([1949] 1 All E.R. at p. 113) applied.

Per CURIAM: (i) the requirements of natural justice in a case of this kind are (a) that the person accused should know the nature of the accusation made; (b) that he should be given an opportunity to state his case; and (c) that the tribunal should act in good faith (see p. 599, letter D, post).

(ii) if bodies like K.R.S., who exercise monopolistic powers and may ruin a man by their recommendations, set up an investigation committee which is a quasi-judicial body, they must be taken to hold out to those over whom they claim to exercise jurisdiction the assurance that the proceedings will be fair (see p. 598, letter G, post).

[As to the conclusiveness of decisions of domestic tribunals, see 15 HALSBURY'S LAWS (3rd Edn.) 213, para. 399; and for cases on the subject, see 21 DIGEST 238, 239, 676-683.]

A Cases referred to:

- (1) *Crofter Hand Woven Harris Tweed Co., Ltd. v. Veitch*, [1942] 1 All E.R. 142; [1942] A.C. 435; 111 L.J.P.C. 17; 166 L.T. 172; 2nd Digest Supp.
- (2) *Davis v. Carew-Pole*, [1956] 2 All E.R. 524; 3rd Digest Supp.
- (3) *Abbott v. Sullivan*, [1952] 1 All E.R. 226; [1952] 1 K.B. 189; 3rd Digest Supp.
- (4) *Russell v. Norfolk (Duke)*, [1948] 1 All E.R. 488; *affd.* C.A., [1949] 1 All E.R. 109; 12 Digest (Repl.) 693, 5321.
- (5) *Weinberger v. Inglis*, [1919] A.C. 606; 88 L.J.Ch. 287; 121 L.T. 65; 42 Digest 790, 12.
- (6) *Board of Education v. Rice*, [1911] A.C. 179; 80 L.J.K.B. 796; 104 L.T. 689; 75 J.P. 393; 19 Digest 602, 290.
- (7) *Cooper v. Wilson*, [1937] 2 All E.R. 726; [1937] 2 K.B. 309; 106 L.J.K.B. 728; 157 L.T. 290; 101 J.P. 349; Digest Supp.

Action.

This was an action by the plaintiffs, Miles Austen Byrne and Miles Byrne (Hereford), Ltd., against the first defendant, Kinematograph Renters Society, Ltd. (referred to hereinafter as "K.R.S."), the second defendant, Cinematograph Exhibitors Association of Great Britain and Ireland (referred to hereinafter as "C.E.A."), the third defendant, Frank Hill, and the fourth defendant, P.C. Belton. The third defendant was at all material times the secretary of K.R.S., and the fourth defendant was chief of the investigation department of K.R.S.

The individual plaintiff (referred to hereinafter as "the plaintiff") was the managing director of the plaintiff company and controlled two halls in Hereford. One of these was the Kemble Theatre which was owned by the plaintiff company and the other was the County Cinema of which the plaintiff was the lessee. On June 26, 1956, the joint investigation committee of K.R.S. and C.E.A. held a meeting, at which the plaintiff was present, to consider a report by the investigation department of K.R.S. in regard to certain irregularities in the box office returns made by the plaintiff. The irregularities, which caused some loss to the film renters concerned, were not contested by the plaintiff, but he explained that they were due to staff difficulties. As the result of a recommendation made by the joint investigation committee and approved by K.R.S. the members of that body did not enter into further film renting contracts for the theatre or the cinema and the plaintiff was, in effect, put out of business.

The plaintiffs claimed, among other relief, (a) a declaration that the proceedings of the tribunal on June 26, 1956, were not conducted in accordance with the tenets of natural justice; (b) a declaration that the findings of the committee as a result of the proceedings on June 26, 1956, which included the recommendation to the members of K.R.S., were null and void; (c) a declaration that the recommendation was illegal as in restraint of trade and contrary to public policy; (d) an injunction restraining the defendants from implementing or attempting to implement the recommendation, and/or from interfering with the plaintiffs' liberty to trade by hiring films from members of K.R.S. for exhibition to the public; (e) damages for breach of contract; (f) damages in conspiracy against K.R.S., and the third and fourth defendants, in that they unlawfully conspired to interfere with the plaintiffs' liberty to trade; and (g) punitive damages in trespass by reason of unlawful invasion of privacy as against K.R.S. and the third and fourth defendants. By amendment permitted at the trial (see p. 597, letter F, post) the plaintiffs alleged breach of contract by K.R.S., or that body jointly with C.E.A., that the reports of the inspectors of the investigation department of K.R.S. should be fair and accurate and that the inquiry by the committee should be conducted in accordance with natural justice.

A. R. Campbell for the plaintiffs.

Charles Russell, Q.C., and *C. F. Fletcher-Cooke, Q.C.*, for the first, third and

fourth defendants (Kinematograph Renters Society, Ltd., and two of its officials, Frank Hill and P.C. Belton). A

J. G. Strangman, Q.C., and T. A. C. Burgess for the second defendant, Cinematograph Exhibitors Association.

Cur. adv. vult.

May 15. **HARMAN, J.**, read the following judgment: At the time of the events with which this action is concerned, the plaintiff, Miles Austen Byrne, was interested in the entertainment industry in the town of Hereford, where he controlled two halls known as the Kemble Theatre and the County Cinema. The former was the property of the plaintiff company, Miles Byrne (Hereford), Ltd., in which the plaintiff was a shareholder and of which he was the managing director. He was, in addition, the lessee of the County Cinema. At the Kemble Theatre, what are called "live" theatrical shows were the main part of the fare, supplemented by film performances: the County Cinema was wholly given up to the latter. Contracts for films in both halls were negotiated and concluded by the plaintiff in the name of the plaintiff company in spite of the fact that the company had no interest in the County Cinema. As a result of a recommendation given by the first defendant, Kinematograph Renters Society, Ltd., to its members, the plaintiff has, in effect, been put out of business and has, no doubt, been very seriously injured in his trade. In this action, as originally framed, he sought to impugn this recommendation and have it pronounced null and void on the grounds that it was the result of proceedings conducted in defiance of the tenets of natural justice, or, alternatively, as being in restraint of trade and contrary to public policy. He also sought to have the defendants enjoined from implementing the recommendation and from interfering with his liberty to trade with members of the first defendant. He also claimed damages against the third and fourth defendants—and by amendment against the first defendant—for conspiracy to injure him in his trade. By a further amendment the plaintiff claimed damages for trespass against the first, third and fourth defendants, and, by yet another amendment made at the hearing, damages against the first defendant for breach of contract to treat him in accordance with natural justice. F

The first defendant (referred to hereinafter as "K.R.S.") is a company limited by guarantee whose object is to protect the interests of film renters (that is to say, distributors of films to exhibitors) in this country. It has now about twenty such members who, between them, apparently control more than nine-tenths of the films in commercial distribution. The third and fourth defendants are, or were, two employees of K.R.S. The second defendant, Cinematograph Exhibitors Association of Great Britain and Ireland, whom I shall call "C.E.A.", is a trade union, registered as such and concerned to protect the interests of exhibitors of films and their employees. C.E.A. claims to represent over nine-tenths of the cinema proprietors in this country, but neither of the plaintiffs is a member, and it was a part of the plaintiffs' case that C.E.A. is the creature of, or, at least, indirectly controlled by, the three largest distributing concerns which own chains of cinemas known as circuits. The circuits, it was further alleged, were, through associated companies, intimately connected with the large renters, so that, in effect, the circuits were favoured at the expense of the small or independent exhibitor outside the ring, and C.E.A. was the ally of the renters. I shall return to this point later. H

It appears that before the advent of sound to the cinema most film bookings were at a flat rate, but with the coming of the talking film, in about 1930, percentage bookings became the order of the day, that is to say, talking films were hired out on a sharing system. This, of course, complicated accounts between exhibitors and renters, and the latter set up what was called a "sound inspection system". This organisation was, at about the end of 1930, handed over to K.R.S., which set up an investigation department. Since the beginning of 1931 the renters have not attempted to make inspections on their several behalfs (although rights of inspection appear to be included in their ordinary I

- A contracts with exhibitors), but have left the whole matter to K.R.S. So far as I could see, K.R.S. acted in this matter, not as an agent for the renters, but as a principal, carrying out its object of protecting its members' interests. No evidence was produced of the appointment of K.R.S. as agent of any renter, although directors of certain of them were called to say that they regarded K.R.S. as their representative.
- B The K.R.S. investigation department was in its earlier days run by the third defendant, Mr. Hill, then secretary of the society, but he subsequently handed over control to the fourth defendant, Mr. Belton. The investigation department employs inspectors up and down the country to make routine visits to cinemas and to check the results of these visits with the returns made by exhibitors to renters. The method employed is to buy tickets at the cinema early in the day's
- C performance and again towards the end of the day, and, by a comparison of the two numbers with those shown on the returns, to test the accuracy of the latter. Some check is also made by what are called hand tallies, where the inspector, sitting in the cinema, or just outside it, makes a count of patrons. No notice of these activities is given to exhibitors, nor is there anything in the renters' contracts to show that such an organisation exists, or that the renters claim to
- D exercise their rights of inspection through K.R.S., and I believe the plaintiff when he said that, until the end of the investigation here, he had no knowledge that there were such people as K.R.S. inspectors. Apart from visits as above described, which are known as routine visits, extra visits, which are known as special visits, may be made when there is some cause to suspect irregularities. It appears to be the procedure, if and when evidence of irregularity comes into
- E the inspectors' hands, sooner or later to confront the exhibitor with the evidence and to try to extract from him a confession of guilt. The results are then reported to Mr. Belton, who makes a summary of the case which he lays before a body called the joint investigation committee. This body (which I shall call "the committee") came into existence in the latter part of 1930. It is a committee of K.R.S. presided over by one of the council of that body, but by
- F invitation there sit on it three members nominated by C.E.A. The object of the committee is, and always was, to deal with cases of dishonest returns, and C.E.A. considered it right to nominate representatives on the ground that it was in the exhibitors' interest, as well as in that of the renters, that returns should be honestly made. The C.E.A. members may take part in the discussion of a case, but it appears that the committee has never voted, and, if it did, the C.E.A.
- G members would be in a minority because the chairman is always a member of K.R.S. The committee does not hear evidence, nor does it in any way investigate the case before it. It assumes the correctness of Mr. Belton's summary. There was some difference of opinion among the defendants' witnesses whether the exhibitor against whom the complaint is made is always invited to attend a meeting of the committee, but in this case the plaintiff was so invited and was
- H asked what he had to say, although without being shown Mr. Belton's summary of the charges against him which was the only document before the committee. If Mr. Belton's summary shows a *prima facie* case, the committee apparently as a routine matter proceeds to ban or blacklist the exhibitor pending an investigation of his books. That is what happened here. The exhibitor is called on to agree to an examination of his books and returns for an unlimited
- I period by accountants nominated by K.R.S. and at his expense. If he agrees to this course, limited bookings are, it is said, allowed to him to keep his trade alive in the interim.

The accountants' report when received is considered by the committee at a further meeting at which the exhibitor is not present, and final sentence is then passed either confirming the ban or requiring the payment of the deficiency, if one be found. There is apparently some nebulous appellate authority, but recourse to it is not considered to be the right of the exhibitor. Its activities were never invoked here, nor were the plaintiffs informed of its existence. The process

described is about as far from what a lawyer would consider a judicial one as can be imagined. It is, however, alleged on the part of K.R.S. that it owes no duty to people in the position of the plaintiffs, and has, therefore, no obligation to treat them with justice. It is said that the members of K.R.S. are at liberty to do their business or to withhold it as they choose, and the fact that they all accept as of course the recommendations of K.R.S. in a case of banning, and thus deprive the person banned of his livelihood, is not a matter of which anyone can properly complain in the absence of bad faith. A B

It may be useful to say something here about the way in which the plaintiffs' businesses were run. They were of necessity separate businesses, although, as I have said, the plaintiff apparently hired films for both houses in the name of the plaintiff company. It is, apparently, the object of an exhibitor to book as far ahead as he can, and the plaintiff said that in May, 1956, he had bookings up to six months ahead, although there were gaps here and there caused, in part, by the fact that, while he had made offers for films, he had not received the assent of the renters so as to constitute a firm contract. The booking of films was the plaintiff's main function. He also personally supervised the front of the house, and paid the renters' bills as and when they came in. According to him, he had nothing to do with the box office at either hall and exercised no supervision over them, having delegated all this to his wife who was a small shareholder in the plaintiff company and had a modest salary for her work for the County Cinema. According to her, and she was the only witness on this subject, a competent cashier was employed at the Kemble Theatre. This is supported to some extent by the fact that no irregularity or discrepancy was discovered there by the K.R.S. inspectors. Mrs. Byrne, however, said that it had been impossible to find a suitable cashier for the County Cinema and that the box office was run partly by "usherettes", that is to say, girls employed in the front of the house, and partly by other persons employed on a part time basis. It was, of course, necessary, when showing films on sharing terms, that records of some sort should be sent to the renters. In fact, at the County Cinema no return book was kept at all. The only book-keeping consisted in the retention of copies of the returns sent to the renters week by week. It appears that the cashier starting the day's business would write up on a piece of paper the starting number of tickets for the day, and that whoever was in charge at the end of the day would write up the closing numbers. In addition, the latter person would add up the total cash takings for the day, write them on the back of the return sheet, and put them with the cash in the safe. Specimens of these returns were among the exhibits. It appears that, on the day following, someone, possibly a third person, would enter up the tax, that is to say, the excise duty or entertainment tax, and what is called "the levy", and so reach a net figure of takings on which the renters' proportion would be based. The returns sent to the renters week by week were copied from these daily sheets, usually by some employee in the box office. For the two weeks, however, which show the main discrepancies, help was apparently short, and Mrs. Byrne herself made the copies which went to the renters. She told the investigators and the court that she never made any check of cash takings against ticket numbers but simply accepted the daily returns made up by the cashier. This is, no doubt, a shockingly lax way of carrying on business, and one which would make it impossible to explain figures five or six months old, at any rate in the absence, as was the case here, of the person or persons employed at the relevant dates. E F G H I

The other facts of the case do not require statement in great detail. It appears that some time in 1955 a firm of renters known as Twentieth Century Fox Film Co., Ltd., who did a considerable business with the plaintiff, complained to K.R.S. that the plaintiff's returns were unsatisfactory. Mr. Belton thereupon decided on a special investigation, and instructed a Mr. Lewis to put a check on the County Cinema and report as soon as possible. Mr. Lewis was a young investigator in the service of K.R.S., and his superior was a Mr. Pinder. These

A two, with some assistance, carried out the special investigation. It began with a visit on Sept. 16, 1955, by Mr. Lewis and a Mr. O'Keefe who bought early and late tickets in two price ranges and took a hand tally. The results were reported to Mr. Belton, who applied to the renters for the return covering that day. This return was not forthcoming until late in November, so that the investigation was held up until then. No discrepancies were found, but Mr. Belton, on his own initiative and without consulting the renters, determined to try again. The next visit was made on Nov. 28, when a like process was gone through and the process was repeated on Saturday, Dec. 3. The result of this investigation was to show a serious discrepancy. Tickets taken at the beginning of the week tallied with the returns, but those taken on Saturday did not, and it now appears that the whole of Saturday's takings appear on the return for the following Sunday, with the result that the renter (by coincidence, the same firm) whose sharing ended on Saturday lost his share of that day. On the other hand, the plaintiffs, who engaged films on the Sunday at a flat rate, made a profit at the renter's expense. This at once convinced Mr. Belton that a fraud was being perpetrated. He is a man whose object in life is to unmask such frauds, and it apparently did not occur to him that there could be any other explanation or that it was fair to the exhibitor to ask for one. He decided instead to continue the investigation, and for the period from that time until Feb. 13, 1956, ten further visits were made. The films on show came from various renters. The figures showed no discrepancies of a substantial nature at all. This greatly discouraged the investigators.

Mr. Belton, however, was determined to run his quarry to earth, and in a letter of Feb. 8, 1956, he is found writing to Mr. Lewis as follows:

"I thank you for your memo. of [Feb. 6], and as I have this morning heard from Mr. O'Keefe to the effect that he is resuming work again today, I hope that you will be able to complete the check on the . . . booking with some late tickets this evening . . . A final secret check can then be made over the six days' run of the Fox booking commencing Monday, Feb. 20, and if the results of all these visits do not show up any further evidence of irregularities, I am of the opinion that the serious discrepancies of Dec. 3, 1955, should be taken up with the exhibitor with a view to getting an explanation. However, we will await the outcome of your latest checks before reaching a decision in this respect."

Two further checks were, therefore, made on Monday, Feb. 13, and Saturday, Feb. 18, when discrepancies similar to those found at the beginning of December, 1955, re-appeared in a slightly aggravated form, the whole of Saturday's and some of Friday's tickets being withheld from the return until Sunday. These the investigators, perhaps naturally, considered to be a great triumph for them, and on Feb. 28, 1956, Mr. Belton wrote to Mr. Lewis in these terms:

"You will no doubt be pleased to learn that our patience has at last been rewarded. Although the result of the visit of Feb. 11 disclosed no discrepancies the check over the six day run of Fox's 'Love is a Many Splendoured Thing' has revealed cuts similar to those disclosed on this company's previous booking 'The Seven Year Itch', which played over six days commencing Nov. 28 [1955]."

He then goes into details. We get a chorus of delight from the bloodhounds on the trail:

"Dear Mr. Belton, Thank you for your memo. of [Feb. 28] re the above hall. I am delighted that events have turned once again in our favour . . ."

Those are Mr. Lewis's sentiments on the matter. Mr. Pinder in his letter says: "I was delighted to learn that at last we had been fortunate in securing further evidence at the above."

Even now, however, Mr. Belton was not satisfied with the evidence which he had got, nor did he think fit to demand any explanation. Instead, he caused ten further visits to be made to the County Cinema and two to the Kemble Theatre. These showed no further substantial discrepancies; they extended until Apr. 30, 1956. On this latter date Mr. Lewis and Mr. Pinder were instructed to confront the plaintiff with the existence of the discrepancies and to demand an explanation of them. Accordingly, towards the end of the performance on that day, these two persons disclosed their identity as K.R.S. inspectors and asked to check the tickets in the box office. In order to lull any suspicion that the plaintiff might have, they did not scruple to tell him a direct lie, namely, that the inspection was a mere routine matter in accordance with their ordinary duties. Mr. Pinder produced some kind of authority from K.R.S., although there was a curious conflict of evidence as to its nature (which I need not resolve), and the two sleuths spent the evening in the box office counting rolls of unused tickets, though with what object or result I have been unable to understand. They then asked to see the return book, and, on being informed by the plaintiff that none was kept, they asked for copies of the renters' returns. The plaintiff truly answered that these were with his accountants and were not immediately available, and with this the inspectors had to be content. They arranged that the plaintiff should communicate with his accountants, obtain the returns and notify Mr. Pinder when the investigation could be resumed. On the next day the plaintiff communicated with his accountants and ascertained that he could get the return sheets back at once. Thereupon he telephoned to K.R.S., asking for Mr. Pinder. He was, however, answered by Mr. Belton who explained that he was in charge of the investigation, and, when the plaintiff asked what it was all about, said that it was no routine investigation, as his inspectors had said, but a special investigation directed by himself, having regard to discrepancies already in his possession. An appointment was made for the following Thursday, May 3, for the investigation to be continued.

On this occasion the inspectors arrived at 10 a.m. and continued to question the plaintiff and his wife all day long, leaving at 6.30 p.m. Mr. Lewis was in charge of this inquisition, and, according to the report which he sent to Mr. Belton about a week later, he conducted the matter himself. This the plaintiff and his wife declare to be untrue. They say that the great majority of the questions were put by Mr. Pinder, the superior officer of Mr. Lewis. However this may be, Mr. Lewis's report is a highly imaginative document, couched in a style which purports to retail Mr. Lewis's questions and Mr. and Mrs. Byrne's answers. Mr. Lewis kept no shorthand note, and obviously he is drawing on his recollection and not distinguishing his part of the questioning from that of Mr. Pinder. I do not, however, think that the report seriously misrepresents the substance of what happened. The plaintiff and his wife were confronted with the documents, that is to say, the formal reports made by the inspectors on their twenty-three visits (twenty-one for the County Cinema and two for the Kemble Theatre), and the attention of Mrs. Byrne, in particular, was directed to the large discrepancies over the two weeks ending Dec. 3, 1955, and Feb. 18, 1956. She and the plaintiff were pressed again and again to explain how it came about that tickets bought on the Saturday appear as bought on the Sunday following in each week. In effect, they offered no explanation at all, the plaintiff saying that he knew nothing about it, and Mrs. Byrne saying how the box office was run, and that, after so long an interval, she could offer no explanation, as the cashiers employed in December, 1955, and February, 1956, had both left, one of them having been discharged for dishonesty.

The object of Mr. Lewis was to obtain some kind of confession of dishonesty, but in this he absolutely failed. He was, however, convinced, and so remained, that this was a case where the returns had been manipulated in favour of the exhibitor and that either Mrs. Byrne or someone under her direction was responsible. In this he differed entirely from his superior, Mr. Pinder, who, at any

A rate by the end of the day, was convinced of the honesty of the plaintiff and his wife, and thought that some explanation must be forthcoming involving a muddle on the part of some employee. It is, indeed, unfortunate that this view of Mr. Pinder makes no appearance in Mr. Lewis's long report, although Mr. Pinder signed it. Mr. Lewis said that he supposed Mr. Pinder would send a covering letter expressing his disagreement, while Mr. Pinder said that he considered the report to be Mr. Lewis's responsibility and that he was not bound to state his view. The plaintiff and his wife said, and I see no reason to disbelieve them, that the attitude of the inspectors was outwardly friendly, and that Mr. Pinder pointed out to them that, according to the inspectors' return, hand tallies on two occasions seemed to show that more people had witnessed the performance than appeared on the renters' returns. This, of course, would have been a loss to renter and exhibitor alike. The plaintiff wished these latter occasions to be entered in the report which he knew the inspectors were about to make, and he says that he was assured that this would be done. They did not, in fact, appear in Mr. Lewis's report, but they were already well-known to Mr. Belton, who did not consider that any importance should be attached to them.

D On May 5, 1956, the plaintiff wrote to the third defendant, Mr. Hill, then secretary of the K.R.S., in the following terms:

E "Dear Mr. Hill, Referring to your inspectors' call on us last Monday and Thursday, it does appear that all this trouble could have been avoided if either your members had reported to me any queries they discovered right away instead of a lapse of six months in between, or we had been on circuit inspection. You will appreciate that, like many places these days, we suffer very badly from staff difficulties and so do not always know from one day to another exactly who will be on duty or not. Also having two theatres to manage in this city, does not make things any easier from my point of view . . ."

The answer was made by Mr. Belton, who wrote on May 7, as follows:

F "Your letter of [May 5] addressed to the secretary has been passed to me for attention, but having not yet received a full report from the [K.R.S.] inspector arising out of their investigations during last week, I would prefer not to offer any comment except in so far that the matters which are the subject of the investigation were disclosed as a result of the inspectors visiting the cinema in the normal course of their duties, and experience has shown that it is not always expedient or in some cases even possible to bring such matters to the notice of exhibitors immediately upon discovery. However, I will write to you again . . ."

H After receiving Mr. Lewis's report, Mr. Belton wrote to the plaintiff a long letter, dated May 11, in which he set out the details of the two discrepant weeks and reckoned that the net difference was something under £70, of which the renters' share might be rather less than half. The letter continued in these terms:

I "From the report which I have now received the substance of these matters was discussed in some detail. It appears that several persons may have had a hand in putting entries on the return sheets, and although Mrs. Byrne is understood to be responsible for all matters appertaining to the box office and returns and identified some of the returns as being in her own handwriting, the only explanation given for the discrepancies is the general one that reliance has been placed on figures supplied by various former cashiers who are no longer in the [plaintiff] company's employment. So far as one can gather little or no check has been made on the figures, but irrespective of the question of responsibility the facts contained in the inspector's reports clearly indicate that the renter whose percentage bookings played on the dates in question suffered serious loss in consequence of the

discrepancies. Moreover, the following Sunday programmes in each case are understood to have been booked on flat rentals. The position is certainly a very unsatisfactory one indeed, and in accordance with normal procedure a full record on the facts will be made to the joint investigation committee comprising representatives of [K.R.S.] and of [C.E.A.]. Notwithstanding the representations which have been made to the [K.R.S.] inspectors and contained in the second paragraph of your letter of May 5 as to your staff difficulties, the committee may well take a very serious view of the position and will almost certainly expect some further and more detailed investigation to be made which usually takes the form of an audit by a firm of independent accountants, at the exhibitors' expense. You will be notified of the committee's decision in due course, and in the meantime should you deem it necessary to put forward any additional explanations for the discrepancies, particularly those of which examples have been quoted in this letter, I shall be glad to hear from you. Will you please also let me know whether or not you are prepared to facilitate an independent audit on the lines to which I have referred so that the committee may be advised accordingly."

The plaintiff replied:

"Many thanks for your letter . . . but while you mention *two* cases where the mistakes appear to be against the interest of your members, you have not mentioned the ones where the mistakes are against us to the benefit of your members. Regarding your ideas of having an independent firm of accountants—this is all right—but quite honestly, with cinema business what it is these days, I cannot afford to pay for this service, as I already have a big enough bill, each year, from my own chartered accountants. I sincerely feel that these two cases would have been cleared up, without all this trouble, had your members concerned reported the matter to me at once on receipt of the returns. Instead, I am expected to remember back for six months after it happened. With two theatres to run and a constant change of staff these days, makes it impossible, as I am only human and cannot work miracles! Also, I am not happy about your joint investigation committee in so far as I note they are made up of C.E.A. representatives, and for this reason alone will be against me from the start because I have never become a member of the C.E.A., but only belong to the A.I.C. [the Association of Independent Cinemas, Ltd.]. Therefore it may be possible that the C.E.A. representatives will be prejudiced against me. So how will I get a fair hearing? . . ."

Mr. Belton replied on May 14, and said this among other things:

"My letter of [May 11] cites two such cases where the renter's share appears to have been seriously affected and in such circumstances some further investigation would seem to be required in order to determine where responsibility lies and the extent to which the renter or renters may have suffered. With regard to the fourth paragraph of your letter, the fact that you are not a member of [C.E.A.] does not prejudice your case in the slightest degree since all exhibitors whether members of a trade association or not receive a fair hearing and may, if they so desire, appear in person. I will notify you in due course of the date when the committee meeting is to take place."

There is an answer from the plaintiff saying that a thorough investigation had been made by the inspectors who appeared only to have two cases in their mind. The plaintiff was then advised that there was to be a meeting of the committee on Tuesday, June 26, "and if you wish to make personal representations to the committee please attend at the head office" at the time stated.

At the meeting held on June 26, the committee consisted of six members,

- A three from K.R.S. and three from C.E.A., the chairman being Sir David Griffiths, chairman of K.R.S. A document produced by Mr. Belton, and based on the inspectors' returns and Mr. Lewis's report, was placed before the members of the committee. The document, which is headed "Examples of Irregularities", is by no means an objective document. It states that the inspectors' checks indicate "a substantial cut" in favour of Sunday bookings. It mentions that
- B there are other minor irregularities. It does not state that there were twenty-three visits, at twenty-one of which no discrepancy emerged. It puts forward shortly Mrs. Byrne's plea that the cause of the cuts was staff trouble. It makes no statement of Mr. Belton's belief or of Mr. Lewis's belief that a dishonest practice was involved, nor of Mr. Pinder's contrary belief, but a reader would be likely to come to the conclusion, I think, that dishonesty was involved, and this,
- C in fact, was the impression made on at any rate the majority of the committee.

- The plaintiff was called in and asked to explain "this". "This" was Mr. Belton's summary report, which the plaintiff at once asked to see. This was refused him. The chairman was willing that he should see it, but Mr. Belton reminded him that this was not the practice, saying that the plaintiff knew the charges against him from Mr. Belton's letter of May 11, part of which I have
- D read. The plaintiff replied that he had given his explanation in letters written to Mr. Belton. These the committee had not seen, and the plaintiff was authorised to read them if he cared to. He did read the first few, which I also have read, but then, seeing that no impression was being made on the committee, he desisted. He was then questioned by Mr. Hill as to the box office procedure in his business. The plaintiff disclaimed knowledge of this and wished to put
- E his wife forward to give evidence. There was some conflict on this subject, but in my judgment she was not allowed to do so, although she interjected some words trying to prompt the plaintiff, who, in effect, said that it was a muddle of which he could, at this date, offer no explanation. At this point the plaintiff and his wife left, but the plaintiff shortly afterwards returned and handed in for the inspection of the committee a document which he had prepared showing his
- F Sunday takings since September, 1955. This, I should have thought, would have inclined the committee in his favour, but I was told that the contrary view was taken because, in addition to the two weeks being investigated when the Sunday takings were abnormal, there was one other week outside the period investigated when an abnormal figure appeared. After the plaintiff left, there was a short discussion in the committee, and its decision is to be found in a
- G minute in these terms, composed, I think, by Mr. Hill. It is headed "Minutes of the joint investigation committee meeting held . . . June 26, 1956, at 2.45 p.m." Then the persons present are mentioned. It then goes on:

- "County, Hereford. Miles Byrne (Hereford), Ltd. The committee noted the details of irregularities as described in the summary which indicated
- H cutting in favour of Sunday flat bookings, and also representations from [the plaintiff] and Mrs. Byrne who appeared before it. [The plaintiff] read the correspondence which had taken place between [K.R.S.] and himself following the official check and reiterated the explanations previously given to the [K.R.S.] inspectors and in the correspondence, principally, that staff difficulties necessitating frequent changes in the box office had given
- I rise to inefficiency and mistakes in the returns. When questioned [the plaintiff] admitted that he had not given sufficient attention to checking the box office figures and the cash, but could offer no explanation for the specific irregularities, disclosed by the inspectors' visits on Dec. 3, 1955, and Feb. 18, 1956, from which only his company could have benefited. Having considered the whole position in the light of the exhibitor's replies to questions, the committee decided that the matter should take its normal course and recommended that no further contracts should be entered into with

[the plaintiff] or his companies for the supply of films pending the result of an investigation by independent auditors." A

This recommendation was put before the council of K.R.S. on Aug. 9, 1956, and was then approved. That, however, was obviously a mere formality because it was acted on long before the council in fact approved it. The minute reads:

"Recommendations of joint investigation . . . committees June 26 . . . 1956. The following recommendations were approved: To bar Miles Byrne Circuit Miles Byrne (Hereford), Ltd., County and Kemble, Hereford, etc." B

This seems an extraordinary procedure to a lawyer. The ban is, in fact, imposed before the investigation and without any decision being reached by the committee whether the matter involves a mere trifle of £30 or some more serious figure, or any consideration whether the plaintiff has been guilty of fraud or mere failure to supervise his box office. It is, however, as appears from the minute, the normal procedure of this committee, and did not seem to shock any of its members. The fact is that the committee members were aware, so they said, that the bar would not be operative pending the proposed investigation. It was apparently the practice to allow an operator during this period, not only to fulfil the contracts which he already had, but to complete contracts still inchoate in the way which I have explained, and, moreover, to allow a limited number of bookings to keep the cinema alive. This, however, was merely a matter for Mr. Belton's discretion, and was not, so far as I can see, ever clearly communicated to the plaintiff as a firm offer or promise. Moreover the latter part of it was conditional on the acceptance by the exhibitor of the terms imposed by the committee, which terms were that he should submit to an investigation by accountants nominated by K.R.S. and pay all the costs involved. These were variously estimated at between £50 and £500. C D E

On June 27, 1956, long before the committee's recommendation had been sanctioned by the council, Mr. Belton wrote to the plaintiff as follows:

"Following on your attendance with Mrs. Byrne at the meeting of the above committee yesterday, the committee gave careful consideration to the representations which you have made both verbally and in correspondence principally that the difficulty of obtaining suitable staff has necessitated frequent changes of cashiers thereby giving rise to inefficiency and mistakes in the returns . . ." F

This, of course, is an echo of the minute which Mr. Belton was obviously preparing at the same time— G

" . . . but in view of the very serious nature and effect of the discrepancies of which specific complaint has been made, it could only regard the position as being a very unsatisfactory one from the point of view of renters. In accordance, therefore, with normal procedure the committee has recommended that it is not in the best trading interests of members of [K.R.S.] to enter into further contracts with you or your companies for the supply of films to the cinemas pending the result of a full investigation by a firm of independent accountants nominated by [K.R.S.]. The committee will review the position again in the light of the auditor's report. I shall be glad to know, therefore, that you are prepared to facilitate and meet the expense of the investigation as required so that the necessary arrangements may be put in hand without delay." H I

The decision, it will be observed, involved the Kemble Theatre as well as the County Cinema, although no irregularities had been suggested at the former.

On the same date, June 27, the letters crossing, the plaintiff wrote to Mr. Hill as follows:

"I was a little dismayed at the joint investigation committee yesterday, that the chairman should spring questions at me, before even reading the

- A charge to me. In fact, at no stage of the proceedings was I given any chance to know the exact findings of the investigation, which, you must admit, is not quite fair to the defendant. Further, it seems a little ruthless to put me on the 'barred list' before the case has been cleared. Do you or the committee realise that this will force me to close within a few weeks because I shall be unable to fill the odd dates at both of my cinemas. I am willing to submit to an outside firm of accountants, to be agreed with me, to investigate further, but in the meantime do kindly allow me to keep open. Please be just and fair—that is all I am asking. Perhaps, therefore, you will reconsider the matter of bookings until the case has been cleared."
- B

Mr. Hill merely replied that he was passing the letter on to Mr. Belton.

- C The position at this point, therefore, was that the plaintiff was willing to submit his records to investigation but not to pay all the costs in any event, nor was he willing to accept K.R.S.'s nominee. The plaintiff at this point consulted solicitors. On June 29, 1956, Mr. Belton wrote to him in the following terms:

- "Your letter dated [June 28] and a copy of Mr. Hill's acknowledgment of even date has been handed to me. You have since received the letter written on behalf of the joint secretary of the joint investigation committee dated June 27 notifying you of the result of the committee's deliberations, and I understand that Mr. Hill has this morning received a communication from a firm of solicitors which refers to some of the matters mentioned in your letter of June 28, to which he will be making reply. In these circumstances I do not propose to comment on your letter . . . other than to say subject to your undertaking to submit the case to independent accountants for further investigation being implemented, [K.R.S.] on receipt of full particulars of the present booking position in relation to your various cinemas, is prepared to consider an extension of booking facilities pending the result of the said investigation and consideration of the auditor's report by the joint committee . . ."
- D
- E

- F [HIS LORDSHIP then referred to correspondence between the solicitors and to a letter from Mr. Hill saying that the inchoate contracts might be fulfilled, and continued:] Thereafter the case developed into a long wrangle between the solicitors, in which the K.R.S. solicitors were adamant that their conditions must be accepted, while the plaintiff agreed to pay the costs but was unwilling to accept the K.R.S. nominee, although he offered to accept an independent accountant. In the result, no relaxation of the ban beyond the fulfilment of the inchoate contracts was ever allowed. The plaintiff played his last K.R.S. film at the Kemble Theatre at Christmas, 1956, and the last at the County Cinema in March, 1957, and he has been driven out of business.
- G

- H The proximate cause of a result so calamitous to the plaintiff was, therefore, his insistence that the investigating accountants should be independent in the sense of being unconnected with either party, while K.R.S. insisted that a firm who habitually conducted this type of investigation on its behalf should be employed. The plaintiff is, however, in the position in which he finds himself by reason of the recommendation of the committee imposing the ban. The use of the word "imposing" is, in my judgment, justified because, as I was told, K.R.S. accepts these recommendations as a matter of course, and the renter members of K.R.S. do the like.
- I

This case does not, in my judgment, ultimately depend on the credibility of the witnesses, but I ought to say a word about it. An attack was made on Mrs. Byrne, and counsel for K.R.S. devoted some time to suggestions, both in cross-examination and in argument, that the discrepancies could not have been accidental but must have been deliberately produced by dishonesty on her part, for which the plaintiffs were responsible even if not privy to them. I reject these suggestions. K.R.S., through its then secretary, Mr. Hill, disclaimed them on a

motion in the action. Apart from that, no charge of fraud appears on the pleadings, nor was any made at the so-called hearing by the committee, whose decision was taken without any discussion of this point. It was at one time rather faintly suggested by the plaintiffs that the inspectors' returns on their weekly visits might have been false, for instance, that tickets entered as having been bought on Saturday might really have been bought on the following Sunday, but there was no foundation for this, and counsel for the plaintiffs, in his reply, made no reference to it. I accept the inspectors' reports at their face value. A B

Unlawful conspiracy is alleged against all the defendants, although no claim for damages is, or can be, made against the C.E.A., having regard to s. 4* of the Trade Disputes Act, 1906. The conspiracy is first alleged to be that of K.R.S. and its employees, Mr. Hill and Mr. Belton, by setting in motion the process of investigation which I have described and by reporting to the committee, and thus bringing about, as a result, the recommendation which resulted in the ban. C.E.A. only comes into this part of the case at one point, namely, by reason of the presence of its members at the sitting of the committee on June 26, and their concurrence in the recommendation then made. It is said that these things were done without just cause, or maliciously, or with the intention of injuring the plaintiffs, first, because no renters had questioned the plaintiff on his returns or complained of his conduct of his business, and, secondly, because the plaintiffs were not members of C.E.A. but were members of another and rival institution, called the Association of Independent Cinemas, Ltd. (A.I.C.). Other minor matters which are said to show a want of good faith are set out by way of particulars under para. 10 of the statement of claim. In effect, the plaintiff, in order to succeed on this branch of the case must show, as he sets out to do, that the predominant purpose of the defendants was spite or an intention to injure him. It is a defence to this claim that the object, or the predominant object, of the defendants was to protect their several trade interests. The plaintiff, however, asserts that this defence will not avail here because the defendants in the execution of their objects, even conceding that these were the promotion of their own trade interests, made use of unlawful means which resulted in the injury done. The unlawful means are said to be trespass on the plaintiff's property or an unlawful invasion of his privacy. C D E F

For my part, I have been unable to find any evidence to support the plaintiff's claim that the defendants were not acting in good faith. In my judgment, the plaintiff wholly fails to prove that C.E.A. was, in fact, controlled by the big circuits. Its rules appear to have been drawn to prevent that very thing. No doubt, A.I.C. was to some extent, like any splinter organisation, a thorn in the side of C.E.A. and in competition with it, but no evidence was led which even suggested that K.R.S. was concerned in this matter, except the mere fact that Mr. Pinder was interested enough to ask the plaintiff whether he was not connected with A.I.C. and, finding that he was and was chairman of the Birmingham branch, felt that it was of sufficient interest to communicate the information to Mr. Belton. But of a determination to drive the plaintiff out of business because he was a member of one organisation rather than the other, I find no trace at all. G H

The plaintiff, when he came before the committee, claimed to have a representative of his union to sit on the committee on the grounds that he would not get a fair hearing otherwise. This seems to me to be nonsense. It was a request to have an advocate in his favour present on the committee rather than a request for an impartial hearing. I am satisfied that no member of the committee was influenced by the fact that the plaintiff was not a member of C.E.A. It may be true that, if he had been a member of C.E.A., that body would have supported him at a later stage of the dispute, and that, as he was not a member, C.E.A. was not concerned to do so, but this had nothing to do with the matters of which the plaintiff complained. After the recommendation was made by the committee, the I

* See 25 HALSBURY'S STATUTES (2nd Edn.) 1269.

A matter was wholly in the hands of K.R.S., and C.E.A. had no more to do with it.

The essential elements to constitute an actionable conspiracy are so clearly established by *Crofter Hand Woven Harris Tweed Co., Ltd. v. Veitch* (1) ([1942] 1 All E.R. 142), that I need not repeat them here. In my judgment, the predominant object of K.R.S. and its employees was to further the objects of that society, while the predominant object of C.E.A., so far as it participated, was to forward its objects on the footing that insistence on correct returns was as much in the interests of the exhibitors as of the renters. It remains, therefore, to consider whether, in pursuance of these objects, unlawful means were used, and this brings me to the question of trespass.

It is alleged by the plaintiff that the investigation conducted by K.R.S. through Mr. Belton and his emissaries was illegal because it involved acts of trespass on the plaintiff's property. It was argued that the twenty-three visits of Mr. Pinder or Mr. Lewis and their assistants to the County Cinema which I have described were all acts of trespass because they went into the cinema, not for the purpose for which alone the public was invited to enter, but for a different purpose, namely, to obtain evidence against the plaintiff. I cannot think that there is anything in this point. The cinema was open to the public who were invited to go in and take tickets, and this is what Mr. Pinder and Mr. Lewis and their assistants did. Their motives in taking the tickets are, I think, immaterial from this point of view. They did nothing that they were not invited to do, and, in my judgment, it cannot be said that, because they may not have wished to see the performance but were merely interested in the numbers on the tickets or in counting the number of patrons, they committed acts of trespass.

E The events of Apr. 30 and May 3 are rather different. On Apr. 30 Mr. Pinder and Mr. Lewis entered the hall in the usual way and bought tickets. They apparently sat through the performance, or nearly through it, and then emerged into the foyer and asked to see the proprietor. When the plaintiff arrived, one of them told him that they were cinema inspectors and asked to see the ticket stocks in the box office. Mr. Pinder told a lie at this point, saying that the inspection was only a routine matter. The inspectors thus obtained the plaintiff's consent to enter the box office and check the rolls of tickets. It is said that, if the plaintiff had been told that the inspectors were obtaining entry in order to level accusations of fraud at him and if they had not told him a lie, he would never have let them in, and that, therefore, his consent was obtained by deceit and was no consent.

G A great deal was said during the course of the hearing about whether the plaintiff was ever accused of fraud during the investigation, and it was said to be a matter of complaint that, although that accusation was being made against him, it was never made clear to him. In my judgment, this is a false point. It is quite true that Mr. Belton and Mr. Lewis thought that the plaintiff was guilty of, or responsible for, dishonesty in the conduct of his business, but this was not an essential part of the accusation against the plaintiff.

H On a motion in the action Mr. Hill swore that no allegation was made against the plaintiff's integrity, and it appeared, as the trial went on, that, if every member of the committee had been told that the discrepancies in question were consistent with honesty and must be considered as such, the matter would have taken the same course. At a later stage, no doubt, the question of dishonesty might have become of great importance, but that stage was never reached. Further, in my opinion the lie told by the inspector about the nature of the visit made no difference to the plaintiff, who, in fact, discovered the truth from Mr. Belton on the telephone on the very next day, as also did he then find out that discrepancies in his returns were the subject-matter of investigation. None the less, he was willing to go on with the investigation and invited the inspectors to return, as they did on May 3. On this latter occasion the inspectors were in the plaintiff's office by his invitation and so remained, and it seems to me that no trespass can have been committed on this occasion.

It was said, in addition, that the plaintiff's privacy was invaded by the inspectors, and that this was some act of unlawfulness apart from trespass. I can only say that I do not appreciate this argument. Thirdly, it was said that the conspiracy was fostered by the irregularity in the procedure employed at the inquiry by the committee. This seems to me to be only another way of alleging an absence of natural justice, and I do not propose to discuss that at this juncture. Lastly, it was said that the recommendation was unlawful as being in restraint of trade and against public policy, and reference was made to certain sections of the Restrictive Trade Practices Act, 1956, which did not in fact come into force until August, 1956*, after the recommendation was made. It is true that both K.R.S. and C.E.A. are "trade associations" within the definition of s. 6 (8)† of this Act, and that s. 6 (7)‡, therefore, applies. It seems to follow that the objects clauses of both associations are registrable under the Act, and may in due course come up for investigation by the Restrictive Practices Court under s. 20‡. It is not for me to predict what view that court may take, and I cannot hold the recommendation void on either of the grounds alleged. I, therefore, conclude that there was no wrongful conspiracy here either because the paramount object was to injure the plaintiff or because unlawful means were employed, and the claims to damages for conspiracy and trespass, in my judgment, fail.

As I have said, the plaintiff put in the forefront of his case the complaint that he had not been treated in accordance with natural justice, and he sought on this ground to have the decision of the committee set aside, although he made no claim for damages under this head until the amendment made at the trial. This omission the plaintiff considered he was constrained to make because he was not alleging any contractual relationship between himself and any of the defendants. He claimed, nevertheless, to be entitled to a declaration and an injunction in the absence of any contract. For my part, I cannot accept this view. I think that the existence of some contract is essential. The plaintiff's argument rested on certain dicta of PILCHER, J., in *Davis v. Carew-Pole* (2) ([1956] 2 All E.R. 524). In that case PILCHER, J., came to the conclusion that he would have been justified by the decision of the Court of Appeal in *Abbott v. Sullivan* (3) ([1952] 1 All E.R. 226) in holding that relief by way of declaration and injunction was available to the plaintiff, though not damages, in the absence of any contractual nexus between him and the defendants.

In *Davis v. Carew-Pole* (2) the plaintiff, a livery stable keeper, was required to attend before the stewards of the National Hunt Committee, on the hearing of an allegation that a horse trained by him, an unlicensed trainer, had been entered to run in a steeplechase contrary to the National Hunt Rules. The plaintiff attended the inquiry when, without any prior notification, his alleged activities in connexion with the training of two other horses were considered. The plaintiff was declared a disqualified person under the rules. In an action against the committee claiming a declaration that the stewards' decision was ultra vires and void, and an injunction restraining the defendants from treating the plaintiff as a disqualified person, PILCHER, J., held that, on the evidence and on the true construction of the rules, the stewards were not entitled to declare the plaintiff a disqualified person. A claim by the plaintiff for damages was subsequently dropped. It was also held that, even though there might not have been any contractual link between the plaintiff and the committee, when there could be no claim in damages, the court had jurisdiction to grant an injunction and declaration; and that, since under the rules the stewards were not, in the circumstances, entitled to declare the plaintiff a disqualified person, the plaintiff was entitled to the relief sought. The court intimated that once the plaintiff had

* Part 1 of the Restrictive Trade Practices Act, 1956, which includes s. 6, came into force on Aug. 2, 1956, the date of the royal assent.

† See 36 HALSBURY'S STATUTES (2nd Edn.) 938.

‡ See 36 HALSBURY'S STATUTES (2nd Edn.) 952.

A submitted to the jurisdiction of the National Hunt Committee he was in contractual relation with the stewards and might have been entitled to damages. In that case the National Hunt Committee had a code of rules which the learned judge found not to have been observed. That aspect of the case is irrelevant here. PILCHER, J., said ([1956] 2 All E.R. at p. 528):

B “Originally in this type of action it was necessary for the plaintiff to show, if he wished to succeed, either that some proprietary right had been infringed, or that the defendants had committed a tort such as a libel, or had been guilty of a conspiracy to injure the plaintiff, or had acted in breach of contract if the parties were linked by any contract express or implied.”

C The judge then went on to say that counsel for the defendants had argued that a contractual basis was necessary, and in its absence the defendants could act as wrongfully as they liked. The judge continued (*ibid.*):

D “This argument did not appeal to me. It is, no doubt, true to say that, where no tort is alleged and no contract express or implied is made out, no claim for damages can succeed in cases of this type. In this connexion I refer to the decision of the Court of Appeal in *Abbott v. Sullivan* (3) ([1952] 1 All E.R. 226).”

He then stated the facts in that case, and went on in these words ([1956] 2 All E.R. at p. 529):

E “The principal matter dealt with in the judgments of the court related to the question whether it could properly be said on the facts of that case that any contract could be implied between the plaintiff and any of the defendants which would enable the plaintiff to recover damages against such defendants or any of them. SIR RAYMOND EVERSHED, M.R., and MORRIS, L.J., took the view that no contract could be implied and, therefore, no damages were recoverable. DENNING, L.J., took a contrary view.”

F PILCHER, J., then stated the declaration made in the court below, and observed (*ibid.*):

“MORRIS, L.J., said that he could see no objection to this declaration, although the necessity for the declaration had by that time become academic because the plaintiff had in fact been reinstated. SIR RAYMOND EVERSHED, M.R., took a similar view . . .”

G Now this is the point:

H “. . . and it therefore appears that the majority of the court would, if necessary, have been prepared to hold in that case that, although there was no contractual link between the plaintiff and the corn porters’ committee, none the less, the committee having purported to remove his name from the list of corn porters, the court had jurisdiction to declare that he should be reinstated on the list. The case therefore is one which, although that particular decision may not have been necessary and had become academic, none the less shows that the majority of the Court of Appeal, in a case where there was no contractual link between the plaintiff and the committee, assented to the view that the court had jurisdiction to make the type of declaration there asked for, namely, that the corn porters’ committee, in purporting to do what they had done, had exceeded their jurisdiction.”

I The learned judge then dealt with a certain portion of the judgment of DENNING, L.J., and went on to say ([1956] 2 All E.R. at p. 530):

“A glance at the statement of claim in this case will show how the learned pleader has done his best to link the plaintiff and the defendants by contract. While admiring his ingenuity, I am not prepared to hold that any implied contract could properly be inferred, at any rate until the plaintiff received the summons to attend the inquiry and submitted himself to the

jurisdiction of the stewards. In *Abbott v. Sullivan* (3) it will be remembered that the plaintiff had refused to attend the tribunal, saying that they had no jurisdiction. In the present case the plaintiff has submitted to the jurisdiction of the Stewards of the National Hunt Committee, and, at least from the moment when he did so, impliedly agreed to abide by their finding, subject to any legal right which he might have to impugn it. From that moment it seems to me that he was in contractual relation with the Stewards of the National Hunt Committee. In those circumstances, if counsel for the plaintiff had not decided (and, I think, he decided wisely) to waive his claim for damages, he might have been entitled to recover damages. If it be necessary that the parties should be in contractual relationship (and I think that it follows from *Abbott v. Sullivan* (3) that, where no damages are claimed, it is not necessary), then it seems to me that there is a great deal to be said for the proposition that, once the plaintiff had submitted to the jurisdiction of the Stewards of the National Hunt Committee, they were impliedly linked by contract, and linked in such a fashion that it would certainly be inequitable, and, I think, wrong, that the defendants should be entitled to say that the plaintiff had no cause of action against them."

The judge then granted the injunction and the declaration. It will be observed that in the end he held that there was a contractual nexus in that case, so that his views were obiter dicta and are not binding on this court.

With the greatest respect to the judge, I think that his views are not justified by *Abbott v. Sullivan* (3), on which he relied. The main question before the Court of Appeal in that case was whether the plaintiff could recover damages against certain members of the committee which had purported to decide against him. It was held by the Court of Appeal that the committee's resolution was ultra vires and that no action lay against the trade union on any ground. It was further held by SIR RAYMOND EVERSHED, M.R., and MORRIS, L.J. (DENNING, L.J., dissenting) that, in acting outside their jurisdiction, the corn porters' committee had not acted in breach of contract, and that an order for damages could not be made against the first two defendants (two members of the committee) for the committee's ultra vires resolution, or against the fourth defendant* for inducing the committee to make the resolution. DENNING, L.J. said that the jurisdiction of a domestic tribunal such as the corn porters' committee must in the last resort be based on contract, express or implied, and he thought that the resolution was made in breach of contract for which the remedy of damages would lie.

In that case a declaration was made by the judge of first instance, and an injunction was granted. Both those matters had become academic by the time that the case reached the Court of Appeal, and the court was not really concerned with any matter except the issue of damages. The Court of Appeal held by a majority that no sufficient contract existed to support a claim for damages, largely because no such claim was made in the pleadings. Talking about the corn porters' committee, SIR RAYMOND EVERSHED, M.R., said ([1952] 1 All E.R. at p. 229):

"... it is, in my judgment, plain that its jurisdiction must be founded on a contract express or implied mutually entered into and binding on all those who enjoy the privileges of being accepted into the ranks of the corn porters."

He went on to say (*ibid.*):

"The matter was, however, clearly fought and tried out in the court below, and in the circumstances the learned judge arrived at the conclusion, as I think, rightly, that the necessary contractual foundation for what had been done had not been established."

* The fourth defendant was a divisional officer of the trade union to which the corn porters belonged.

- A MORRIS, L.J., came to a similar conclusion. The dissenting judgment of DENNING, L.J., did not arise out of that, but arose out of the fact that he thought that one could spell out a contractual relationship, and the whole essence of the case was that a contract was necessary. DENNING, L.J., expressly said ([1952] 1 All E.R. at p. 235) that the court there approved of the declaration made by CROOM-JOHNSON, J., on the footing that there was at least a sufficient contractual nexus to justify such a form of relief. In my judgment, the remedies by way of declaration or injunction must have a legal and a contractual basis no less than the remedy of damages.

Russell v. Duke of Norfolk (4) ([1949] 1 All E.R. 109) seems to me relevant in this connexion. In the court of first instance ([1948] 1 All E.R. 488), LORD GODDARD, C.J., came to the conclusion that no contract could be implied.

- C LORD GODDARD, C.J., said ([1948] 1 All E.R. at p. 491), in a passage which was cited by TUCKER, L.J. ([1949] 1 All E.R. at p. 113):

"I can find no contract here under which the stewards were under any duty to the plaintiff to hold an inquiry. It is said that they did hold an inquiry, and, therefore, that they must hold it honestly, fairly, and in accordance with natural justice. That seems to me to be a fallacy. If there was no contractual duty to hold an inquiry, how can there be a breach of contract in withdrawing the licence, however the inquiry was conducted? It is admitted that the licence might have been withdrawn without any inquiry."

- D Both the Lord Chief Justice and the Court of Appeal in that case assumed that it was essential to find a contractual basis for the obligation to treat a man with natural justice. In the absence of such a contract, there was no obligation, and, if there was no obligation, the fact that natural justice was not done was not a matter of which the plaintiff could complain.

- E In the course of the hearing of the present case, counsel for the plaintiffs, while not accepting this view, sought to amend his claim by alleging a breach of contract, and this amendment I allowed, though made after the close of the plaintiffs' case, because it seemed to me desirable that, if the plaintiffs had any rights, they should not be deprived of them by the absence of some plea. The plaintiffs, by this final amendment, allege that, by setting up their investigation system, K.R.S., or that body jointly with C.E.A., warranted or contracted, first, that reports by their inspectors and the summary of those reports by Mr. Belton should be fair and accurate, and, secondly, that the inquiry by the committee should be conducted in accordance with natural justice. It is, however, in my judgment, clear that there could have been no contract in this case so long as the plaintiff was ignorant of the existence of the investigation system, and that any contract, therefore, must have been subsequent to Apr. 30* after the happening of all the events of which complaint is made.

- F This question of contract is a very difficult one, and it was discussed by DENNING, L.J., in *Abbott v. Sullivan* (3) ([1952] 1 All E.R. at p. 235), where he said:

- H "There remains, however, the question whether this way of putting the claim [that is, the contractual one] is sufficiently pleaded. No contract is alleged between the committee and the plaintiff. I confess that I feel much difficulty on this score, which is increased by the fact that SIR RAYMOND EVERSHERD, M.R., and MORRIS, L.J., think the point is not sufficiently pleaded. If this had been an ordinary case of contract, I should be prepared to regard the omission as fatal. But this is not an ordinary contract case. It is a claim in an uncharted area on the borderland of contract and of tort. I can quite understand a pleader being perplexed as to the right way of putting the claim, and, in the special circumstances, I think it is one of the rare cases where he would be fully justified in stating the material

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* See p. 586, letters A to D, ante.

facts without venturing to commit himself to the precise legal category in which they fall . . . We all agree that the facts are sufficiently stated to enable us to make a declaration which is founded on contract, and I think we should entertain the claim for damages on that footing also, despite the lack of formulation in the statement of claim." A

He explains that the contract there was that the tribunal would not act outside the jurisdiction which their rules gave them, and, as they acted outside their jurisdiction, then damages lie against them. B

The case here is different because there are no rules and no procedure is laid down, and, therefore, one cannot, as in most cases, satisfy the inquiry by examining rules, to see whether they have been broken, or procedure to see whether it has been transgressed. I have already read the statement of PILCHER, J., at the end of *Davis v. Carew-Pole* (2) ([1956] 2 All E.R. at p. 530)*, and I need not repeat it. C

The contract here, if there be one, must, it seems to me, come into existence when the plaintiff is invited to attend the inquiry by the committee, and agrees to do so. The contract would then be that the inquiry should be fairly conducted, and, in my judgment, it would be right in a case of this sort to imply such a contract. Compare, for instance, the speech of LORD PARMOOR in *Weinberger v. Inglis* (5) ([1919] A.C. 606 at p. 636): D

"As at present advised and without hearing further argument, I am not prepared to hold that a body in the position of the Committee of the Stock Exchange have an absolutely autocratic power to act as they please, and without regard to fundamental principles of just inquiry, in exercising a duty which is judicial in this sense, that it necessarily implies consideration and a decision which affects not only the immediate pecuniary interests, but also the whole business status of the member whose re-election is refused. The committee are not, of course, bound to treat such a question as though it were a trial. They can obtain information in any way they think best. I am, however, not satisfied that they are not subject to the limitation expressed in this House by LORD LOREBURN (*Board of Education v. Rice* (6), [1911] A.C. 179 at p. 182) always giving a fair opportunity to those who are parties in the controversy for correcting or contradicting any relevant statement prejudicial to their view. 'In such cases the Board of Education will have to ascertain the law and also to ascertain the facts. I need not add that in doing either they must act in good faith and fairly listen to both sides, for that is the duty lying upon every one who decides anything'." E

It seems to me that bodies like K.R.S., who exercise monopolistic powers and may ruin a man by their recommendations, ought not to act in an arbitrary manner or, at the least, that, if they do, as this body did, set up an investigation committee which is a quasi-judicial body, they must be taken to hold out to those over whom they claim to exercise jurisdiction the assurance that the proceedings will be fair. Indeed, in the present case the plaintiff was expressly told that he would get a fair hearing. It has, however, often been pointed out that it is a great mistake to suppose that the principles of natural justice require a body of this sort to conduct themselves as though they were a court of law: see the judgment of TUCKER, L.J., in *Russell v. Duke of Norfolk* (4) ([1949] 1 All E.R. at p. 118). He was there considering the inquiry, and he said: F

"Throughout this inquiry [the plaintiff] was, at every stage, it seems to me, given an opportunity of presenting his case and of asking any questions which he desired to ask. It is true that he was not in terms asked: 'Have you got any witnesses? Do you want an adjournment?'. A layman at an inquiry of this kind is, of course, at a grave disadvantage compared with a trained advocate, but that is a necessary result of these domestic tribunals which proceed in a somewhat informal manner. Counsel for the plaintiff, G

* See p. 595, letter I, to p. 596, letter C, ante. I

- A in the course of his forceful argument on this point, again and again said: 'What would be said of local justices who acted in this way?'. With all due respect, the position is totally different. This matter is not to be judged by the standards applicable to local justices. Domestic tribunals of this kind are entitled to act in a way which would not be permissible on the part of local justices sitting as a court of law. The conclusion I have reached
- B on this aspect of the case is that there was no material on which a jury could have arrived at a conclusion that this inquiry was conducted in a way contrary to the principles of natural justice. If, as I think is the better view, it really was a matter of law for the decision of the judge, I should unhesitatingly hold that there was nothing here which was contrary to the principles of natural justice as laid down in the various authorities which have
- C been brought to our notice. There are, in my view, no words which are of universal application to every kind of inquiry and every kind of domestic tribunal. The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter that is being dealt with, and so forth. Accordingly, I do not derive much assistance from the definitions of natural justice which have been from time to time used . . ."

- What, then, are the requirements of natural justice in a case of this kind? First, I think that the person accused should know the nature of the accusation made; secondly, that he should be given an opportunity to state his case; and, thirdly, of course, that the tribunal should act in good faith. I do not think that there really is anything more. It is said, however, that none of these necessities
- E was complied with here. As regards good faith, I have already said that I see no evidence of bad faith. It was said, however, that the plaintiff was not told of the true charge against him, which was one of fraud. This I have already said is, in my judgment, a false point. The committee was not concerned with fraud at the stage then reached. Secondly, it was said that he was not shown the charge, that is to say, Mr. Belton's summary, which was the only document before the committee. This is much more serious, but on the whole I conclude that the
- F plaintiff was not injured in this respect. There is nothing in Mr. Belton's summary which is not in Mr. Belton's letter, dated May 11, 1956, to the plaintiff, and the plaintiff admitted that he knew what was the complaint made against him, namely, the discrepancies in the two weeks already discussed. Next, it was said, to vitiate the proceedings, that Mr. Belton, his accuser, was in attendance throughout, and reference was made to *Cooper v. Wilson* (7) ([1937] 2 All E.R. 726). That was a very different case. The plaintiff, in that case, had been dismissed from his office by the chief constable, and, when he appealed from that decision, he found the chief constable, a respondent to the appeal, sitting and acting as one of the tribunal. Here I see no reason why Mr. Belton should not be present. He was not a member of the committee, and there was no evidence that he took
- G any part in the decision. Next it is said that the charge did not contain all the relevant material. It is quite true that it omitted to state the total number of visits made and their result, or the deficiency in the hand tallies, but, in my judgment, the addition of these two matters would not have been relevant to the committee's decision. Further, it is said that the plaintiff was prevented from calling his wife to testify on his behalf. This, I think, is true, but not fatal, because it is clear to me, having heard Mrs. Byrne's evidence in the witness-box, that she would have been able to add nothing on the only point which was relevant, that is to say, an explanation of the discrepancies. The whole burden of her song was that there was, and could be, no explanation after the lapse of so long a time, having regard to the way in which the business was conducted. She did not pretend that the discrepancies did not exist, nor that they did not show that money which should have gone to the renter went into the pocket of the exhibitor. If, therefore, she had been allowed a right of audience, she could not have altered the result.
- H
- I

Finally it was said that the penalty was so disproportionate to the offence that the decision could not have been come to bona fide. I agree that in the result the decision has brought about a punishment altogether disproportionate, for I propose to treat the plaintiff as having been an honest man. He was never accused of fraud by the defendants, still less convicted of it, and he is entitled, therefore, to the benefit of any doubt that there may be. Nevertheless, I do not regard the proceedings of the committee as necessarily taken in bad faith because it did not foresee the result. This came about owing to the plaintiff's unwillingness to submit to the K.R.S. terms, and not directly from the recommendation of the committee on this occasion. The stipulation that the accountants should be nominees of K.R.S. and that the plaintiff should pay their costs in any event was, no doubt, harsh, but it can be justified when it is considered that he was under obligation to make true returns to the renters and had failed to do so, and that it was this default of his that made investigation necessary.

In the result, therefore, much as I deplore the methods of the defendants, greatly as I doubt whether it is in the interests of the trade which they purport to represent to behave in this kind of way, I cannot hold that the plaintiff has any legal ground for the accusations which he makes against them. His action must, therefore, fail, and must be dismissed with the usual consequences.

Judgment for the defendants.

Solicitors: *A. Bieber & Bieber* (for the plaintiffs); *Hugh V. Harraway & Son* (for all the defendants other than the second defendant); *Pothecary & Barratt* (for the second defendant).

[Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.]

PRACTICE NOTE.

Probate—Grant—Person incapable of managing his own affairs—Applicant not authorised by Court of Protection—Evidence of incapacity of person for whose benefit grant required.

Intestacy—Grant of administration—Person incapable of managing his own affairs—Applicant not authorised by Court of Protection—Evidence of incapacity of person for whose benefit grant required.

Evidence of mental incapacity in Probate matters

Where application is made for a grant of representation for the use and benefit of a person incapable of managing his own affairs, and the applicant is not a person authorised by the Court of Protection to apply, evidence of incapacity will be required.

When the incapable person is a patient (whether certified or not) who is resident in an institution, the probate registrar will normally accept a certificate from the medical superintendent or deputy medical superintendent in the following terms:—

I certify that:

[Name of patient]

[Name of institution]

1. The above-named patient, who is now resident in this institution, is in my opinion through mental infirmity arising from disease or age incapable of managing his affairs.

2. In my opinion the above-named patient is unlikely to be fit to manage his own affairs within a period of three months.

(Sgd.).....

Date.....

[Deputy] Medical Superintendent

If the medical superintendent is unable to give such a certificate, the matter should be referred to the registrar for directions.

Evidence of the incapacity of a person not a resident patient should be in the form of an affidavit by the patient's doctor.

B. LONG,

June 23, 1958.

Senior Registrar.

A TRUSTEES OF THE NATIONAL DEPOSIT FRIENDLY SOCIETY v. SKEGNESS URBAN DISTRICT COUNCIL.

[HOUSE OF LORDS (Lord Keith of Avonholm, Lord MacDermott, Lord Somervell of Harrow, Lord Denning and Lord Birkett), April 28, 29, 30, May 1, June 25, 1958.]

B *Rates—Limitation of rates chargeable—Friendly society—Whether society non-profit making organisation—Whether “main objects are charitable or are otherwise concerned with the advancement of . . . social welfare” —Rating and Valuation (Miscellaneous Provisions) Act, 1955 (4 & 5 Eliz. 2 c. 9), s. 8 (1) (a).*

C A registered friendly society had many members and great assets. The trustees of the society conducted mutual insurance among the members and occupied for the purposes of the society a convalescent home. In the course of their insurance activities, the society accumulated considerable reserves in the form of investments, securities and land. By the rules of the society, a person could become a member if he satisfied certain conditions, and, as a member, he was entitled to certain benefits dependent on the contributions that he paid, the benefits being determined in accordance with the society's rules and being benefits calculated on an actuarial basis. The benefits provided by the society were confined to the members. Accommodation in the convalescent home was one of the benefits provided under the society's rules. The respondents, the rating authority, demanded payment of rates in respect of the convalescent home. The trustees of the society claimed limitation of rates in respect of the home under the Rating and Valuation (Miscellaneous Provisions) Act, 1955, s. 8 (1) (a), (2)*, on the ground that the society was an organisation which was not established or conducted for profit but was one “whose main objects are charitable or are otherwise concerned with the advancement of religion, education or social welfare” within s. 8 (1) (a). It was common ground that the society's objects were neither charitable nor for the advancement of religion or education.

E **Held:** the society was not entitled to limitation of rates because, though it was an organisation not established or conducted for profit within s. 8 (1) (a) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, for the reasons stated at (i) below, yet its main objects were not for the “advancement” of social welfare for the reasons stated at (ii) below, viz.:—

G (i) (LORD MACDERMOTT not dissenting) the object of the society was to provide benefits for its members as protection against the chances of life, not to make profits, and, therefore, it was an organisation which was not established or conducted for profit despite its very large holdings of investments.

H *New York Life Insurance Co. v. Styles* ((1889), 14 App. Cas. 381) applied. (ii) the society provided benefits only for its members, and thus its main objects lacked the element of being for the good of the public which was requisite to bring them within the scope of s. 8 (1) (a).

Decision of the COURT OF APPEAL ([1957] 3 All E.R. 199) affirmed.

I [For the Rating and Valuation (Miscellaneous Provisions) Act, 1955, s. 8, see 35 HALSBURY'S STATUTES (2nd Edn.) 394.]

Cases referred to:

- (1) *New York Life Insurance Co. v. Styles*, (1889), 14 App. Cas. 381; 59 L.J.Q.B. 291; 61 L.T. 201; sub nom. *Styles v. New York Life Insurance Co.*, 2 Tax Cas. 460; 28 Digest 59, 300.
- (2) *Inland Revenue Comrs. v. Baddeley*, [1955] 1 All E.R. 525; [1955] A.C. 572; 35 Tax Cas. 661, 694; 3rd Digest Supp.

* The terms of s. 8 (1) (a), (2) are set out at pp. 602, 603, post.

- (3) *General Nursing Council for England and Wales v. St. Marylebone Corpn.*, [1957] 3 All E.R. 685; [1958] Ch. 421; 122 J.P. 67. A
- (4) *Re Cranston, Webb v. Oldfield*, [1898] 1 I.R. 431; 8 Digest (Repl.) 352, 131.
- (5) *Oppenheim v. Tobacco Securities Trust Co., Ltd.*, [1951] 1 All E.R. 31; [1951] A.C. 297; 2nd Digest Supp.
- (6) *Longdon-Griffiths v. Smith*, [1950] 2 All E.R. 662; [1951] 1 K.B. 295; 2nd Digest Supp. B
- (7) *Bonsor v. Musicians' Union*, [1955] 3 All E.R. 518; [1956] A.C. 104; 3rd Digest Supp.
- (8) *Faulconbridge v. National Employers' Mutual General Insurance Assocn., Ltd.*, (1952), 33 Tax Cas. 103; 3rd Digest Supp.
- (9) *R. v. Whitmarsh*, (1850), 15 Q.B. 600; 19 L.J.Q.B. 469; 16 L.T.O.S. 108; 117 E.R. 586; 9 Digest (Repl.) 71, 277. C
- (10) *Bear v. Bromley*, (1852), 18 Q.B. 271; 21 L.J.Q.B. 354; 19 L.T.O.S. 60; 16 J.P. 710; 118 E.R. 101; 9 Digest (Repl.) 71, 279.
- (11) *Royal College of Surgeons of England v. National Provincial Bank, Ltd.*, [1952] 1 All E.R. 984; [1952] A.C. 631; 3rd Digest Supp.
- (12) *Stag Line, Ltd. v. Foscolo, Mango & Co., Ltd.*, [1932] A.C. 328; 101 L.J.K.B. 165; 146 L.T. 305; Digest Supp. D

Appeal.

Appeal by the ratepayers, the trustees of the National Deposit Friendly Society, from an order of the Court of Appeal (HODSON, PARKER and ORMEROD, L.J.J.), dated July 30, 1957, and reported [1957] 3 All E.R. 199, affirming an order of the Queen's Bench Divisional Court (LORD GODDARD, C.J., CASSELS and LYNSEY, J.J.), dated Jan. 24, 1957, and reported [1957] 1 All E.R. 407, on an appeal by the ratepayers by way of Case Stated against a rate and a demand made by the respondent rating authority, Skegness Urban District Council, in respect of a convalescent home and premises at North Parade, Skegness, belonging to the appellants. The facts are stated by LORD KEITH OF AVONHOLM, beginning at p. 603, letter D, post.

John Pennycuik, Q.C., J. P. Widgery, Q.C., and D. Barker for the appellants. *F*
Sir Arthur Comyns Carr, Q.C., and C. E. Scholefield for the respondents.

The House took time for consideration.

June 25. The following opinions were read.

LORD KEITH OF AVONHOLM: My Lords, this appeal arises out of a demand made by the respondents on the appellants for a rate for the year beginning Apr. 1, 1956, amounting to £1,983 4s., in respect of their occupation of a convalescent home situate at Skegness. The appellants appealed to quarter sessions against that rate on the ground that they had not been allowed the relief to which they claimed they were entitled under s. 8 of the Rating and Valuation (Miscellaneous Provisions) Act, 1955. The rate charged in respect of the said premises for the year ending Mar. 31, 1956, was £786 10s., and the appellants claimed that no higher rate should be charged for the following year. G

It will be convenient to set out the material portions of s. 8 so far as they may affect the issue between the parties: H

"(1) This section applies to the following hereditaments, that is to say—

(a) any hereditament occupied for the purposes of an organisation (whether corporate or unincorporate) which is not established or conducted for profit and whose main objects are charitable or are otherwise concerned with the advancement of religion, education or social welfare; (b) any hereditament held upon trust for use as an almshouse; (c) any hereditament consisting of a playing field (that is to say, land used mainly or exclusively for the purposes of open-air games or of open-air athletic sports) occupied for the purposes of a club, society or other organisation which is not established or conducted for profit and does not (except on special I

A occasions) make any charge for the admission of spectators to the playing field: Provided that this section shall not apply to any hereditament to which s. 7 of this Act applies, or to any hereditament occupied by an authority having, within the meaning of the Local Loans Act, 1875, power to levy a rate.

B “ (2) For the purposes of the making and levying of rates in a rating area, for the year beginning with the date of the coming into force of the first new valuation list for that area (in this section referred to as ‘ the first year of the new list ’), and for any subsequent year, the amount of rates chargeable in respect of a hereditament to which this section applies shall, subject to the following provisions of this section, be limited as follows, that is to say—(a) for the first year of the new list, the amount so chargeable shall not exceed the total amount of rates (including any special rates) which were charged in respect of the hereditament for the last year before the new list came into force . . . ”

It is sufficient to say that the first year of the new list was the year beginning Apr. 1, 1956.

D The appellants’ claim is that their convalescent home is a hereditament qualified for relief under that section.

E No dispute arises on the facts. As stated by the appellants, they are the owners and occupiers of a convalescent home and premises situate at North Parade, Skegness, and the respondents are the rating authority for the area in which the said premises are situate. The appellants are the trustees of a friendly society known as the National Deposit Friendly Society founded in 1868 and first registered under the Friendly Societies Acts on Aug. 27, 1872. At the material time the society consisted of some 700,000 members, and its objects are to provide on a mutual basis for pecuniary benefits of relatively small amounts to be paid to its members on the ordinary chances and changes of human life, such as relief during sickness, provision of facilities in convalescent homes, old age pay and payments to a member’s family in the event of his death. The society also contains an insurance section providing on a mutual basis for whole life and endowment assurances for the benefit of members. The society has no proprietors or shareholders, and all subscriptions received from members or income from investments held by the society are applied to the provision of the benefits above referred to. The committee of management, divisional committees and district committees of the society are not entitled to receive any remuneration for their services, apart from travelling and subsistence allowances. The amount of each member’s subscription is calculated on an actuarial basis to ensure that the income of the society is sufficient to provide the benefits prescribed by the society’s rules. No dividend or share of income is paid to members, except that each member is entitled to interest at $2\frac{1}{2}$ per cent. per annum on the amount standing to his credit with the society in addition to the benefits so prescribed by the rules of the society. The last-named benefits are not available to anyone who is not a member of the society. The hereditament in question here is used by the society as a convalescent home for its members, the provision of accommodation in such a home being one of the benefits provided by the rules of the society.

I To this statement of the appellants, it should be added that there are certain qualifications for membership, among which are the following:—In the main benefit section, members are classified according to age at admission. Certain restrictions are imposed as regards health, occupation and age. Thus, a candidate shall be in good health, of sound constitution, with no hereditary family complaint and shall not be following an occupation considered by the committee of management to be risky or injurious to health. A candidate unable to fulfil these conditions may be admitted in a class lower than that to which his age entitles him. The admission of males from forty-five to fifty years of age, and females from

forty to forty-five years of age, shall be conditional on the payment by them of a premium to the sickness reserve fund. A

Members may be reclassified by the committee of management in certain circumstances, among which may be noted

“upon change of employment to an occupation considered by the committee of management to be risky or injurious to health”,

and, on the application of a member, on ceasing to follow such an occupation if the member is a male not over fifty years of age or, if a female, not over forty-five years of age at the time of the application. B

It is also provided*:

“1. A member shall forfeit his title to any benefit other than death benefit when: (a) He shall refuse to answer satisfactorily any question respecting his health or employment put to him by an officer of the society, or shall by any wilful act prevent or delay the recovery of his health. (b) His monthly contributions are four months in arrear. (c) He is suffering from any complaint, disease, sickness or injury which he concealed at the time of his admission into the society, or which he may have contracted by profligacy, drunkenness or by any act whatsoever contrary to law.” C D

Regulations of a corresponding character are made for admission to the alternative benefit section.

Separate provision is also made for admission to the insurance section with a limit of £500 payable on death of a member or under an endowment insurance and of £104 a year for a pension or annuity. It is accepted, I think, by both sides that the society, subject to the restrictions of the Friendly Societies Acts, is truly a mutual insurance society. The point was taken by counsel for the appellants that it provided a form of social security within the financial reach of weekly wage earners against sickness, disablement or death. The society possesses investments amounting to over £22,000,000 in book value and over £21,000,000 in market value, as well as other assets, which result in a surplus fund of £448,066 at Dec. 31, 1955, after debiting members' balances, various reserve funds and other liabilities. E F

In the Case Stated by quarter sessions it is found, *inter alia*:

“(D) The policy of the appellants in the investment of their accumulated funds is to choose investments which offer the highest return of income consistent with security of capital. No attempt is made to select investments with a view to capital accretion. G

“(E) The income of the appellants is devoted to the payment of interest on the deposit accounts of members, the maintenance of sufficient funds to provide on an actuarial basis for the benefits to which their members are entitled in accordance with the said rules and the payment of expenses of management. No member receives any dividend or share of income other than interest at $2\frac{1}{2}$ per cent. on moneys standing to the credit of his deposit account and such sickness or other benefits as are provided by the said rules. H

“(F) So far as the questions are questions of fact (i) the appellant society is not established or conducted for profit; and (ii) apart from the welfare of individuals who subscribe, there is absent any element of advancement of the good of the community because the society's benefits are not available to anyone who is not a member.” I

They were of opinion (a) that the appellants were an organisation which was not established or conducted for profit; but (b) that the appellants, being concerned only with the provision of benefits for their own members, the main objects of the appellants were not concerned with the advancement of social welfare within the meaning of s. 8.

* By r. 96 of the society's rules.

A On appeal by way of Case Stated to the Divisional Court, the court (LORD GODDARD, C.J., CASSELS, J., and LYNSEY, J.) agreed that quarter sessions had come to a right decision and dismissed the appeal. On further appeal to the Court of Appeal (HODSON, PARKER and ORMEROD, L.J.J.) this decision was upheld, PARKER, L.J., giving the judgment of the court. The case now comes, with leave of the Court of Appeal, to your Lordships' House.

B The contention of the appellants is that their society is not established or conducted for profit, and that it is an organisation whose main objects are concerned with the advancement of social welfare. It is common ground that it is not a charitable organisation.

C Differing views have been expressed by the judges who have considered this case. LORD GODDARD, C.J. ([1957] 1 All E.R. at p. 409), doubted whether the society was not conducted for profit, but found it unnecessary to go into that.

D His view was that the main object of the society was to carry on an insurance business and that that was not social welfare. LYNSEY, J. (*ibid.*, at p. 410), while agreeing with LORD GODDARD, thought that "social welfare" in its context with "charitable" connoted an eleemosynary idea, and that it could not be said of a body providing benefits on an actuarial basis to its members that its

E main purpose was of an eleemosynary effect for the purpose of the business carried on. The Court of Appeal ([1957] 3 All E.R. at p. 201) considered that the earning of profits was purely incidental to the society's business and that it was not established or conducted for profit. As the exemption from rates was at the expense of the general body of ratepayers, it would be right, they thought, in the case of any doubt, to give the words of the provision a restricted meaning.

F The court thought (*ibid.*, at p. 202) that, unless some restriction could be implied from the contract,

"... the provision of benefits which tends directly to improve the health or conditions of life of individuals comes *prima facie* within the expression 'social welfare'."

F They found such a restriction in the words "objects ... concerned with the advancement of ...", which they read as requiring the advancement of social welfare as an end in itself or for its own sake. The Court of Appeal (*ibid.*, at p. 203) also agreed with LORD GODDARD, C.J., that it was remarkable, if Parliament had intended friendly societies to have special treatment with regard to rates, that it should not have said so in plain terms, as in some of the taxing statutes.

G My Lords, these views were canvassed very fully in the course of the hearing of this appeal. Other submissions were also put forward from one side or the other on what, in their context, the words "social welfare", or "the advancement of social welfare", or "objects concerned with the advancement of social welfare" were apt to cover. These I shall refer to later, but first I turn to the question whether the appellants' society is an organisation established or conducted for

H profit.

The society may, I think, quite properly be described as a mutual insurance organisation set up to provide benefits for its members in the various mischances of illness, disability and old age that may befall them during membership, and to afford them an opportunity of taking out whole life assurances, endowment assurances and old age annuities for themselves, and certain other defined types

I of insurance. A man might, in a sense, provide similar benefits for himself without joining any society by setting aside and investing a lump sum, or annual amounts, to accumulate with interest and to provide a nest egg against some emergency, or contemplated event, although such a scheme would be inadequate against unexpected early illness or death. The interest earned would necessarily be subject to tax but it could not, in my opinion, be said that he was engaged in earning a profit, or in setting up a profit-earning scheme. The accumulated sum is capital belonging to the person concerned. There are obvious advantages in joining with some 700,000 others to provide against such contingencies on a mutual basis

and the mutual organisation does not take on the character of a profit-making A
organisation by the mere addition of numbers. This was, in my opinion, the ratio
of the decision of this House in *New York Life Insurance Co. v. Styles* (1) ((1889),
14 App. Cas. 381), which is, I think, conclusive on this point. The Court of Appeal
thought that profits, or something in the nature of profits, were earned by the B
society for its members, but that this was purely incidental to the purpose for
which the society was formed, and that it could not be said that it was established
or conducted for profit. It may well be that, on change of its investments, the
society on some occasions realised a capital appreciation just as on other occasions
it may have suffered a capital loss. But it was not trading in its investments,
and the position in the case of this mutual society does not seem to me to be
different in any way from what it would be in the case of a single individual.
The society holds very large investments which earn large sums of interest and C
rents. These are, no doubt, profits and gains for the purpose of the Income Tax
Acts but, in my opinion, the existence of these investments does not make the
society an organisation established or conducted for profit within s. 8 of the Act
of 1955. If it were otherwise, many charitable organisations holding investments
would be cut out of the benefit of the section.

The argument for the appellants on the second limb of the section is very D
simple. The protection afforded through the benefits provided by the society to
its members is, it is said, a species of social welfare, and the objects of the society
are concerned with the advancement of this type of social welfare. Reliance was
placed on certain words used by LORD TUCKER in *Inland Revenue Comrs. v.*
Baddeley (2) ([1955] 1 All E.R. 525 at p. 547), with reference to the phrase
"the promotion of social well-being". This phrase, said LORD TUCKER, E

"... would appear to cover many of the activities of the so-called
'welfare state', and to include material benefits and advantages which have
little or no relation to social ethics or good citizenship, concepts which are
themselves not easily definable."

Further, it was submitted that nothing turned on the introduction of the word F
"advancement". It meant no more than being concerned with religion, educa-
tion or social welfare. For instance, any organisation is concerned with the
advancement of education which is concerned with instruction or education.
So the advancement of social welfare includes making people socially well, at
least where it is sought to attain that end among people in the wage-earning class
as here. No distinction can be made between the advancement of social welfare
and the provision of the social welfare of a class. On the other side, it was said G
that advancement of social welfare involves the conception of an organisation for
the spread of social welfare, of devotion to good works, as suggested by
LORD EVERSHED, M.R., in *General Nursing Council for England and Wales v.*
St. Marylebone Corpn. (3) ([1957] 3 All E.R. 685 at p. 691), of some propagation
or encouragement of social welfare from the outside on altruistic grounds, or H
motivated by Good Samaritan principles.

It was pointed out and accepted by both sides that it had been the practice of
rating authorities prior to the passing of the Act of 1955 to make sympathetic
assessments on charitable organisations as a matter of grace and that the Local
Government Act, 1948, transferred the duty of making valuations to the valuation
officers of the Inland Revenue as from Apr. 1, 1956, and so deprived the local I
rating authorities of making sympathetic assessments in the case of charitable
organisations. These sympathetic assessments had been freely made not only
on charitable organisations in the strictly legal sense but on charitable organisa-
tions in the popular sense. The Valuation for Rating Act, 1953, had provided,
by s. 2, that houses, private garages and private storage premises should be
rated at 1939 values for the first valuation list after Mar. 31, 1956. This meant
that other premises, including those of associations not being carried on for profit,
would be very badly hit by the new and greatly increased valuations.

- A Accordingly, the relief under s. 8 of the Act of 1955 was introduced. Thus, it was suggested by counsel for the appellants, this section should be given a liberal interpretation in favour of non-profit making organisations. A subsequent statute, the Rating and Valuation Act, 1957, was passed to meet the situation by giving relief in the shape of a deduction of one-fifth of the net annual value of all non-industrial hereditaments but this, in my opinion, is irrelevant on the point of
- B the construction of the Act of 1955. The respondents, on the other hand, relied on the legislation of 1953 as supporting the view that s. 8 should be given a restricted construction, as otherwise shops and other premises that were not derated and did not come under the relief of s. 8 would be the more heavily burdened.

- My Lords, the scope of s. 8 of the Act of 1955 is, in my opinion, difficult of precise definition. It would, I think, be unsafe to venture on any definition or
- C delimitation for the purposes of the present case. The varieties of organisations to which the terms of the statute may be thought to apply are infinite and each case must, in my opinion, be considered on its own merits. Some of the suggested criteria or tests advanced by counsel for the parties may be helpful in certain cases, but I am not satisfied that they are exhaustive. If I may venture on a general observation, it is that the words "or are otherwise concerned with the
- D advancement of religion, education or social welfare" indicate that the section is concerned with objects which are also the concern of charitable organisations but which for some reason or other may fail to come under the definition of "charitable purposes" in the strictly legal sense. Some organisations, prior to 1955, seem to have been given sympathetic assessments by rating authorities which were charitable in the popular rather than in the legal sense. On the other
- E hand, the section shows that the objects of an organisation need not be wholly charitable. It is sufficient if its main objects are charitable, but that leaves it open, if its main objects are not charitable in the legal sense, to say that they are concerned with the advancement of religion, education or social welfare. I attach some importance to the words "concerned with the advancement of" as did also the Court of Appeal. These words import, I think, some limitation on the
- F words which follow. It would have been very simple otherwise to have said "are otherwise concerned with religion, education or social welfare". But, whatever width may be given to the words of s. 8 (1) of the statute, I find myself unable to hold that an organisation like that of the appellants, formed for the mutual assurance of members admitted on a selective basis, albeit described to us as members of the lower wage-earning class, can be described as an organisation
- G whose main objects are concerned with the advancement of social welfare. The benefits provided are benefits provided by the members for themselves. The desire for protection in time of need is the common bond that has brought them together. That is a most laudable object, but I find it impossible to distinguish their organisation in any essential respect from any mutual insurance society which provides similar, if more enlarged, benefits for a wider and more diverse
- H cross section of the community.

I would dismiss the appeal. The costs of the appeal must be borne by the appellants.

- LORD MACDERMOTT:** My Lords, the appellants are the owners and occupiers of a convalescent home in Skegness in respect of which they claim to
- I be entitled to the measure of rating relief provided by s. 8 of the Rating and Valuation (Miscellaneous Provisions) Act, 1955. To make good their claim, the appellants must bring the home within the description contained in sub-s. (1) (a) of that section which reads as follows:

"any hereditament occupied for the purposes of an organisation (whether corporate or unincorporate) which is not established or conducted for profit and whose main objects are charitable or are otherwise concerned with the advancement of religion, education or social welfare."

The appellants are the trustees of the National Deposit Friendly Society. A
This society has been registered under the Friendly Societies Acts since 1872.
It has some 700,000 members and its objects are, in the words of the appellants' written case,

" . . . to provide on a mutual basis for pecuniary benefits of relatively small amounts to be paid to its members upon the ordinary chances and changes of human life such as relief during sickness, provision of facilities in convalescent homes, old age pay and payments to a member's family in the event of his death." B

The society also has an assurance section providing on a mutual basis for whole life and endowment assurances for the benefit of members. The subscriptions received from members and the income of the society's substantial investments are applied to the provision of benefits, and the amount of each member's subscription is calculated on an actuarial basis to ensure that the society's income is enough to provide the benefits prescribed by its rules. These benefits are not available to anyone who is not a member of the society. Admission to ordinary, that is, to benefit membership, is at the discretion of the committee of management who must be satisfied regarding the age, health, character and occupation of applicants. Each member is entitled to interest at $2\frac{1}{2}$ per cent. per annum on the amount standing to his credit with the society, but, apart from that and the prescribed benefits, no dividend or share of income is payable to members. The home in question is provided by the society for its members, and the use of it is one of the benefits referred to in the rules. Nothing, however, turns on the actual nature of this user. The society has many properties in different parts of England and, if the appellants are right in their present contentions, the relief they now claim must extend far beyond the premises they hold for convalescent purposes. C D E

If the rated property is to come within s. 8 (1) (a) of the Act of 1955, three conditions have to be fulfilled—first, it must be a hereditament occupied for the purposes of the society; second, the society must be an organisation which is not established or conducted for profit; and third, the society's main objects must be charitable, or " otherwise concerned with the advancement of religion, education or social welfare ". Of these requirements, the first is clearly satisfied. The second has been a matter of controversy throughout the litigation, but quarter sessions found, and the Court of Appeal held, that the society was not established or conducted for profit. As at present advised, I am not disposed to differ from that view, but I do not need to express a final opinion on it and I shall, therefore, refrain from doing so and proceed on the assumption that this condition, too, is fulfilled. Coming to the third condition, the issue is further narrowed by certain concessions which the appellants have made, namely, that the main objects of the society are neither charitable nor otherwise concerned with the advancement of religion or education, and also that the words " advancement of " apply to " education " and " social welfare " no less than to " religion ". There can be no question as to the propriety of these concessions, and the point left for determination, accordingly, is whether, in law, the main objects of the society are " otherwise concerned with the advancement of . . . social welfare." F G H

My Lords, " social welfare " is, on any view, a wide and difficult expression. I
The Court of Appeal ([1957] 3 All E.R. at p. 201) regarded " welfare " as denoting a " state of being well, whether in the physical, mental or material sense " and, founding on what LORD TUCKER said in *Inland Revenue Comrs. v. Baddeley* (2) ([1955] 1 All E.R. 525 at p. 547), respecting the phrase " the promotion of social well-being ", thought ([1957] 3 All E.R. at p. 202) that, apart from any restriction to be implied from the context,

" the provision of benefits which tends directly to improve the health or

- A conditions of life of individuals comes prima facie within the expression 'social welfare'."

On consideration, I must confess to having some doubt whether that conclusion may not go too far. Though I am not sure that this expression has as yet gained a settled primary sense, I would hesitate to regard it as synonymous with "social well-being". That phrase may be employed to describe a state of comfort and

- B plenty, but "social welfare" seems to me to savour, at present anyway, more of those needs of the community which, as a matter of social ethics, ought to be met in the attainment of some acceptable standard. It is, however, unnecessary for me to reach a decision respecting the true import of "social welfare" in this case and, in the circumstances, it is, perhaps, better not to make the attempt.
- C Instead, I shall assume for the purposes of this opinion, and in favour of the appellants, that the expression is, in itself, apt as a comprehensive description of the society's main objects.

On this assumption, the next question is whether the context nevertheless excludes the appellants' premises from s. 8 (1) (a). I am satisfied that it does. I find it impossible to regard para. (a) as referring to two categories of main

- D objects—the one charitable, the other not—which have no feature or quality in common. The purpose of the paragraph—to provide a basis for the relief of certain ratepayers at the expense of others—makes some worthy attribute which will pervade both categories a likely requirement. From the language which Parliament has used, it seems to me that the paragraph provides for this and makes it necessary for every object that comes within it to have a common

- E and commendable quality. Though the objects which constitute the second category—"the advancement of religion, education or social welfare"—are not charitable, there can be no doubt that they are akin to what is charitable and have been intentionally described as such; there is nothing in their description incompatible with charity and, if they fall outside what is charitable, it is not because they are in conflict with the legal concept of charity, but because they lack some one or more of its characteristics. But perhaps the clearest indication
- F of a common factor is the use of the word "advancement" in the second category. It is a word which has long been associated with charitable purposes, particularly in relation to religion and education, and it stands for something of importance in what is legally charitable. Its insertion in the non-charitable category seems to me to indicate the existence of a close link between the categories and to be difficult to explain on any other basis.

- G The same purposeful word, in my opinion, also indicates the nature of this link. In *Re Cranston, Webb v. Oldfield* (4) ([1898] 1 I.R. 431 at p. 446), FITZGIBBON, L.J., said this:

"The essential attributes of a legal charity are, in my opinion, that it shall be *unselfish*—i.e. for the benefit of other persons than the donor—that it shall be *public*, i.e. that those to be benefited shall form a class worthy, in numbers or importance, of consideration as a public object of generosity, and that it shall be *philanthropic* or *benevolent*—i.e. dictated by a desire to do good."

- H My Lords, what FITZGIBBON, L.J., said by way of defining the public nature of a charity may be open to review in the light of the decision of this House in *Oppenheim v. Tobacco Securities Trust Co., Ltd.* (5) ([1951] 1 All E.R. 31), but there can be no doubt that unselfishness and benevolence are still of the essence of legal charity. That is not to say, and I do not think FITZGIBBON, L.J., meant to suggest, that the unselfish element must be absolute in the sense that what would otherwise be charitable will fail to be so if its founders or promoters incidentally take some degree of benefit. The principle, as I understand it, is that a valid charity must be substantially altruistic and benevolent in its purposes. That quality, which is, of course, but one facet of legal charity, appears to me to be reflected in the word "advancement" as used in the paragraph in question,
- I

for there it seems clearly to be used as it is commonly used in relation to what is charitable, and, so used, I think it must be construed as implying a desire to do good to others. A

If, then, as I would hold, that is the nature of the quality which links and runs through the categories mentioned in s. 8 (1) (a), it remains to inquire whether the objects of the society possess or lack this quality. In my opinion, they lack it. That they promote the well-being of the society's members may be taken for granted, but that is not the test. The society's benefits are provided for, and confined to, its subscribing members, and are enjoyed by them, not incidentally or by the side of some wider, dominating purpose, but because such benefits are the whole aim and object of the association for mutual benefit which the society is. It is the private interests of its own subscribing membership that the society promotes and, admirable as that may be, it cannot be considered as in any relevant sense an altruistic activity. For this reason, I am of opinion that, whatever "social welfare" may be, the objects of the society are not concerned with its "advancement" within the meaning of s. 8 (1) (a). B C

I would, therefore, affirm the decision of the courts below and dismiss the appeal. D

LORD SOMERVELL OF HARROW: My Lords, I agree with the opinion delivered by my noble and learned friend on the Woolsack. The words used are general and I agree it would be unsafe, and I think also it would be impossible, to find some definition in other words which would be of assistance in subsequent cases. This is not one of those rare cases, as my noble and learned friend implies, in which assistance can be got from other cases in which the courts have had to construe and apply different words from those under consideration. E

LORD DENNING: My Lords, in order to understand s. 8 of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, it is as well to know the background against which it was enacted. It is legitimate for this purpose to take notice of matters generally known to well-informed people. The background here—as both counsel agree—is that previously, in the days when the local authorities were entrusted with the task of assessing the value of properties, they used to make "sympathetic" assessments. If they thought that an organisation was deserving of some relief from the burden of rates, they used to make a very low, even a nominal, assessment of the value of its property; so that, when the rate was afterwards made by the rating authority, at so many shillings in the pound, the sum payable by the deserving organisation was very small. There was no statutory authority for this practice. It was just done and nobody objected, because it was in a good cause. By recent enactments, however, Parliament has taken away from the local authorities the task of assessing the value of properties and has entrusted it to the valuation officers of the Commissioners of Inland Revenue. These officers have to assess values on uniform standards—applicable over the whole country—without favour or sympathy for anyone. This has meant a great increase in the values placed on the properties of these deserving organisations; and, if they were called on to pay the full rate, at so many shillings in the pound, on these new assessments, they would have to pay far more than they used to do, and the effect of the sudden change on their finances might well prove disastrous. In order to help these deserving organisations over this difficulty, Parliament enacted s. 8 of the Act of 1955, which provides that for the first year they should not have to pay more than they did before, and that for the following three years at least they should only have to pay on a reduced basis. Full rates, however, will become payable if the local authority give three years' notice to that effect. Over and above this temporary assistance, Parliament, by the self-same section, has given the local authorities a permanent discretion to help these deserving organisations by reducing or F G H I

A remitting the rates payable by them. It is, therefore, a question of great importance to an organisation to know whether it comes within the deserving category or not. Hence the many cases now coming before the courts.

B Section 8 is framed very widely, no doubt because Parliament intended that local authorities should be able to do much as they had done in the past—to give relief from rates where they considered it to be deserved; but, at the same time, Parliament did intend to lay down some limits to the organisations which could be considered deserving as otherwise there might be undue variation between one rating area and another.

C In applying s. 8 (1) (a), the first thing to notice is that it covers “any hereditament occupied for the purposes” of the deserving organisation. Our present case happens to concern a convalescent home at Skegness, but the question for consideration would be just the same if we were considering the head office of the society in Buckingham Palace Road. If the convalescent home is entitled to statutory relief from rates, so are the commercial offices of the society.

D In order to qualify for the benefit of the section, the society must be an organisation “which is not established or conducted for profit”. I have no doubt that this society was not “established” for profit. Like other friendly societies it was, no doubt, established to encourage thrift among people of small means. Rule 2 (1) shows that its object was to enable its members, by the pooling of their contributions, to establish a common fund or funds, out of which they would receive relief during sickness, medical benefit, old age pay, and money to be paid on death. Rule 2 (2) shows that, if there was any surplus due to a member—after E providing for the benefits—the society was to accumulate it at interest for him. The society was, therefore, in its inception, very like a simple mutual insurance association in which a group of individuals pay premiums representing their share of the estimated “risk”; and, at the end of the year, any surplus is returned to them or applied in reduction of the next premiums. Such an association, so long as it is conducted on that basis, does not make profits: see *New York Life Insurance Co. v. Styles* (1) ((1889), 14 App. Cas. 381). The basis of that decision, as I F understand it, is that the surplus is returned to the contributors, or at any rate credited to them.

G But has the society, in the course of its history, changed its character? Is it now “conducted for profit”? It is not a small group of individuals. It has 700,000 members. Although it is not an incorporated body, it is a legal entity—or, at any rate, so like one that I doubt whether anyone can tell the difference: see *Longdon-Griffiths v. Smith* (6) ([1950] 2 All E.R. 662), *Bonsor v. Musicians' Union* (7) ([1955] 3 All E.R. 518). The largest section of its undertaking is the deposit section, which is conducted in this way: the members pay contributions to the society, out of which it pays the sickness and other benefits. Any surplus is credited to the members' deposit accounts. But many members, in addition to H their contributions, often make direct payments into their deposit accounts. These direct payments amount in all to very large sums. The deposit accounts carry interest at 2½ per cent. and can be withdrawn on notice. The society invests the contributions and deposits in authorised investments. In making these investments, the policy of the society

I “is to choose investments which offer the highest return of income consistent with security of capital . . . No member receives any dividend or share of income other than interest at 2½ per cent. on moneys standing to the credit of his deposit account and such sickness or other benefits as are provided by the said rules.”

And it is to be noticed that the society does not have to pay any income tax: see s. 440 (1) of the Income Tax Act, 1952.

This policy of the society has yielded impressive results. The members' balances (representing the money due to them by the society, including accrued

interest) stand at some £14 million. But the society's investments stand at some £22 million (which bring in an income of £880,000 a year). The society has, therefore, the very substantial reserve of some £8 million. This reserve is credited in the accounts, as to some £5½ million to the sickness reserve fund, and some £2½ million to the death benefit fund. It may well be asked: How has this vast reserve accumulated unless it be from profits made by the society on its investments? It does not require much imagination to suggest that it has received four per cent. or five per cent. on its investments (free of tax) and paid out only 2½ per cent. to its members. This is a far cry from a simple mutual insurance association which, in fact, returns any surplus to its members. It is far removed, too, from the complicated mutual insurance corporations of today which in theory—but not in reality—return surpluses to contributors: see *Faulconbridge v. National Employers' Mutual General Insurance Assn., Ltd.* (8) ((1952), 33 Tax Cas. 103 at pp. 125, 126), and the Report of the Royal Commission on Taxation of Profits, para. 589, para. 590. None of those mutual associations has anything corresponding to the deposit section of this society.

Looking at the way in which the society has conducted its affairs, I am of opinion that it has made profits. It has not distributed those profits like a commercial company. Nor has it returned them to members. It has used them to build up large and accumulating reserve funds. But the fact that the society has made profits does not mean that it is "conducted for profit", which I take to mean "conducted for the purpose of making profit". Many charitable bodies, such as colleges and religious foundations, have large funds which they invest at interest in stocks and shares, or purchase land which they let at a profit. Yet they are not established or conducted for profit. The reason is because their objects are to advance education or religion, as the case may be. The investing of funds is not one of their objects properly so called, but only a means of achieving those objects. So here, it seems to me, that, if the making of profit is not one of the main objects of an organisation, but is only a subsidiary object—that is to say, if it is only a means whereby its main objects can be furthered or achieved—then it is not established or conducted for profit: see *R. v. Whitmarsh* (9) ((1850), 15 Q.B. 600), *Bear v. Bromley* (10) ((1852), 18 Q.B. 271). Applied to this case, I think that the building up of a reserve fund—despite its size—is not one of the main objects of this society. It is only incidental—a consequence of the wise investment policy it has pursued. The main object of the society is to provide security for people of small means against the risks which life holds for them—and not to make a profit therefrom. It is, therefore, not conducted for profit.

The next thing that is necessary, in order to enable the society to qualify for the benefits of s. 8, is that its

"main objects are charitable or are otherwise concerned with the advancement of religion, education or social welfare."

It is quite plain that, by those words, Parliament intended to extend the benefit of the section beyond the field of legal "charities". In law, "charitable" is a term of art with a technical meaning which is narrower than its popular meaning. In this section, Parliament intended to expand the technical meaning so as to embrace a wider group of deserving organisations. Thus Parliament does not limit the organisations to those whose objects are "exclusively" or "only" of a particular character, as it has done in some statutes. It is sufficient if the "main objects" of the organisation—which I take to mean all of its main objects as distinct from its subsidiary objects—are of that character. For instance, a scientific institute would qualify for the benefit of the section if its main object was the advancement of education even though it had, as a subsidiary object, the purposes of its members. But, in order to ascertain the "main objects" of an organisation, you are entitled, I think, to look not only at its rules but also to consider the way in which it has conducted its affairs. If you should find, for

- A instance, that a scientific institute—which was formed primarily for the promotion of science—has been so conducted that the advancement of the interests of its members has become one of its main purposes—as distinct from being merely subsidiary to the advancement of education—then it would cease to qualify for the benefits of the section: see *Royal College of Surgeons of England v. National Provincial Bank, Ltd.* (11) ([1952] 1 All E.R. 984 at p. 999, per LORD REID).
- B Again, Parliament does not limit the benefit to those organisations whose main objects are “charitable”. It extends the benefit to those whose main objects are “otherwise concerned with the advancement of religion, education or social welfare”. This is a considerable extension on “charities”, but is it an unlimited extension?

- C The principal question in this case, it seems to me, is whether, in order to obtain the benefit of the section, the main objects of the organisation must be directed to the public benefit rather than to the private benefit of the individuals who make up the organisation. Counsel for the appellants argued that the words were so wide as to eliminate any necessity for public benefit. He laid stress on the words “or otherwise”. He pointed to the words “the advancement of religion, education” in the section, and said that trusts for those purposes are “charitable” if they are directed to the public benefit. If the words “or otherwise” are to be given any effect, he said, in regard to religion and education—over and above “charitable”—they must bring in organisations which are not directed to the public benefit. I cannot agree with this contention. I think the words “charitable or otherwise” give a colour, so to speak, to all the words that follow after them. The section cannot be read as if those words were left out—as if the only question were whether the main objects are “concerned with the advancement of religion, education or social welfare”. The main objects which are “otherwise” concerned must, I think, be objects that are akin to charitable objects—have some kindred quality with charitable objects. That is how LORD BUCKMASTER approached a similar problem in *Stag Line, Ltd. v. Foscolo, Mango & Co., Ltd.* (12) ([1932] A.C. 328 at p. 334), and I would approach this problem in the same way.
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- What, then, are the ways in which the main objects must be akin to charitable objects? The one thing that distinguishes charitable objects from all others is that they are for the good of the community, that is, for public rather than for private benefit; and, in order to qualify an organisation for the relief given by the section, there must be present, I think, the concept of public benefit—wider, no doubt, than the somewhat limited interpretation put on it in the charity cases—but, still, it must be present. For this purpose, the main objects must be altruistic—must be concerned with doing good for others rather than for yourself—for others, that is, who are outside your own circle of relatives and friends and to whom you are under no personal obligation. There is no need under this section to canvass the cases on what constitutes a section of the community for
- G
- H “charitable” purposes, such as *Oppenheim v. Tobacco Securities Trust Co., Ltd.* (5) ([1951] 1 All E.R. 31) and *Inland Revenue Comrs. v. Baddeley* (2) ([1955] 1 All E.R. 525), in which there was a divergence of opinion among the judges. Suffice it to reach a conclusion on a general survey of the circumstances.

- I I am confirmed in this view by the other words in the section. Take the word “advancement”, as used in the phrase “advancement of education”? The word “advancement” connotes, to my mind, the concept of public benefit. When a man teaches his own children their lessons, he is not concerned with the “advancement of education” but solely with the “education” of his children. But when a schoolmaster teaches the boys in a public school, he is concerned—with their education truly—but also with the “advancement of education” generally. I would not, myself, confine the “advancement of education” to the advancement of education as an end in itself or for its own sake—if that means the advancement of the theory of education as taught in a training college for teachers—or even if it means the advancement of mind training.

"Education" means, I think, simply the educating of people either in general subjects or in particular subjects. But the "advancement" of education connotes public, as distinct from private, benefit. Likewise the "advancement of religion" connotes the promotion of religion by spiritual teaching or by pastoral or missionary work among others outside one's own circle. When a man says his prayers in the privacy of his bedroom, he may truly be said to be concerned with religion but not with the "advancement of religion".

The words "social welfare" themselves also connote, to my mind, the concept of public benefit. These words comprehend many objects which are beneficial to the community but are not charitable according to the somewhat limited interpretation given in the charity cases. A person is commonly said to be engaged in "social welfare" when he is engaged in doing good for others who are in need—in the sense that he does it, not for personal or private reasons—not because they are relatives or friends of his—but because they are members of the community or of a portion of it who need help. The need may not be due to poverty. It may be due to the conditions of life of the persons concerned. They are usually people who are under a disadvantage compared to others more favourably placed—boys who need a youth club instead of running on the streets—people of small means who are given holidays in a home which they could not otherwise afford—working men who need a club where they can spend their leisure—and so forth. If a person is engaged in improving the conditions of life of others who are so placed as to be in need, he is engaged in "social welfare". But people who are engaged in improving their own conditions of life are not engaged in social welfare. If an organisation is formed by public-spirited folk with the object of providing a boys' club—or a room for a women's institute—it is, no doubt, concerned with the advancement of social welfare; but, if it is formed by a group of persons with the object of providing a social club for their own enjoyment or recreation, it is not. The difference between the two is that the main objects of the one are directed to the public benefit whereas the others are not.

The Court of Appeal seem to have derived some help by writing, as it were, into the section, after the words "social welfare", the phrase "as an end in itself or for its own sake". I find no special virtue in this phrase. It has for me no clear meaning. But, if and in so far as it brings in the concept of public benefit, it brings into play the very distinction which is, I think, implied throughout the section.

It is this distinction which gives the clue to the deciding of the present case. I agree with counsel for the appellants that the main objects of this society are directed to social security—in the sense that the purpose is to enable people of small means to secure themselves against the risks which life holds for them—nevertheless I cannot see in its objects any element of public benefit. The purpose is that each member should provide for his own security—by means of his contributions and deposits—just as other people do by insurance. No member is concerned with doing good for others. Each one is concerned with doing good for himself and his family. And the society exists so as to enable each member to do just that very thing. I entirely agree with all the judges in the courts below in holding that this is not charitable or otherwise concerned with the advancement of social welfare.

I would, therefore, dismiss this appeal.

LORD BIRKETT: My Lords, I agree with the opinion delivered by my noble and learned friend on the Woolsack. In my opinion, the special facts are decisive of the two main points raised in this appeal, and show that the appellants'

A organisation is not established or conducted for profit, and that its main objects do not fall within the proper construction of s. 8 (1) (a) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955.

Appeal dismissed.

B Solicitors: *Woolley, Tyler & Bury* (for the appellants); *Wrentmore & Son* (for the respondents).

[*Reported by G. A. KIDNER, Esq., Barrister-at-Law.*]

C

CADE v. BRITISH TRANSPORT COMMISSION.

[HOUSE OF LORDS (Viscount Kilmuir, L.C., Lord Morton of Henryton, Lord Cohen, Lord Evershed and Lord Birkett), May 8, 12, 13, June 25, 1958.]

D *Railway—Look-out—Statutory duty of railway to appoint look-out—Work “for the purpose of . . . repairing the permanent way”—Sub-ganger lengthman engaged on tightening loose fish-plates on goods line—Train going at slow speed—Whether “danger . . . likely to arise”—Prevention of Accidents Rules, 1902 (S.R. & O. 1902 No. 616), r. 9.*

E C., an experienced sub-ganger lengthman employed on the respondents' railway undertaking, was instructed to inspect a section of line used for goods trains only to see if there were anything wrong. His duties included examining the track for any defects, putting in keys and tightening bolts. There were two lines on this section of the railway. The section was a “permissive block”, that is to say a number of trains up to seven might enter the block at the same time. An average of two or three trains passed in each direction during each hour with a maximum of five or six. After fetching a long spanner from a lengthman's hut, C. returned to the line to tighten a nut. A few minutes afterwards, two trains passed each other where C. was working travelling in opposite directions at speeds of twenty and fifteen miles an hour. The engine of each of these trains was proceeding tender first. When standing between the two lines, C. was fatally injured by one of the two passing trains. When the accident happened, visibility was good, it being possible to see a train for a quarter of a mile in each direction. No look-out man was provided by the respondents. The appellant, C.'s widow, brought an action against the defendants under the Fatal Accidents Acts, 1846 to 1908, for breach of statutory duty under the Prevention of Accidents Rules, 1902, r. 9*, on the ground that C. was “working . . . for the purpose of . . . repairing the permanent way” within that rule, and that the respondents had failed to provide the look-out man whom the rule required them to provide in “cases where any danger is likely to arise”.

H **Held:** (i) at the time of the accident the deceased was working for the purpose of repairing the permanent way within the meaning of r. 9 of the Prevention of Accidents Rules, 1902.

I *Reilly v. British Transport Commission* ([1956] 3 All E.R. 857) approved.

(ii) the words “where any danger is likely to arise” in r. 9 imported an estimate of likelihood and the question whether the circumstances were such as to bring the case within these words, was, therefore, one of degree and of fact.

Dicta in *Hutchinson v. London & North Eastern Ry. Co.* ([1942] 1 All E.R. 330) considered and applied.

* The terms of r. 9 are set out at p. 617, letter F, post.

(iii) (LORD COHEN dissenting) the decision of the trial judge that the circumstances were not such that any danger was likely to arise should not be disturbed; and, therefore, the appellant's action failed.

Decision of the COURT OF APPEAL ([1957] 3 All E.R. 87) affirmed.

[As to the making of rules for the prevention of accidents on railways, see 27 HALSBURY'S LAWS (2nd Edn.) 281-283, paras. 606, 607, and SUPPLEMENT. For a summary of the Prevention of Accidents Rules, 1902, see 22 HALSBURY'S STATUTORY INSTRUMENTS 239.]

Cases referred to:

- (1) *Judson v. British Transport Commission*, [1954] 1 All E.R. 624; 3rd Digest Supp.
- (2) *London & North Eastern Ry. Co. v. Berriman*, [1946] 1 All E.R. 255; [1946] A.C. 278; 115 L.J.K.B. 124; 174 L.T. 151; 38 B.W.C.C. 109; 2nd Digest Supp.
- (3) *Reilly v. British Transport Commission*, *Woods v. British Transport Commission*, [1956] 3 All E.R. 857; 3rd Digest Supp.
- (4) *Hutchinson v. London & North Eastern Ry. Co.*, [1942] 1 All E.R. 330; [1942] 1 K.B. 481; 111 L.J.K.B. 369; 166 L.T. 228; 36 Digest (Repl.) 114, 564.

Appeal.

Appeal by Phyllis Maude Cade from an order of the Court of Appeal (HODSON, PARKER and ORMEROD, L.JJ.), dated July 15, 1957, and reported [1957] 3 All E.R. 87, affirming an order of BARRY, J., at Leeds Assizes dated Jan. 17, 1957, whereby he dismissed the appellant's claim under the Fatal Accidents Acts, 1846 to 1908, and the Law Reform (Miscellaneous Provisions) Act, 1934, for damages in respect of the death of her husband, Laurence Cade. The facts are set out in the opinion of VISCOUNT KILMUIR, L.C.

F. W. Beney, Q.C., and *Sir Christopher Cowan* for the appellant.

Marven Everett, Q.C., *G. S. Waller, Q.C.*, and *A. G. Sharp* for the respondents.

The House took time for consideration.

June 25. The following opinions were read.

VISCOUNT KILMUIR, L.C.: My Lords, this is an appeal from an order of the Court of Appeal in England (HODSON, PARKER and ORMEROD, L.JJ.), which affirmed a judgment of BARRY, J., in favour of the respondents. The appeal raises the question of the meaning of certain words of r. 9 of the Prevention of Accidents Rules, 1902 (S.R. & O. 1902 No. 616), made by the Board of Trade pursuant to s. 1 (1) of the Railway Employment (Prevention of Accidents) Act, 1900.

The appellant is the widow and administratrix of the estate of Laurence Cade. She claimed damages in respect of the death of her husband in the following circumstances. At the time of his death the deceased was a sub-ganger lengthman in the employ of the respondents, with some four years' experience of that gang. He was working under the orders of one Winfield, the foreman ganger on a section of the Alexandra Dock to Stairfoot Railway at Hull. The length for which Mr. Winfield was responsible included the section of line shown on the agreed plan and photographs. It consisted of two sets of running lines, described as a main line to distinguish them from sidings, but used by goods trains only. The length was what is called a permissive block, that is to say a number of trains up to seven might enter the block at the same time. The evidence was that an average of two or three trains passed in each direction during each hour with a maximum of five or six. On the gang starting work on the morning of Nov. 12, 1953, Mr. Cade, on the instructions of Mr. Winfield, went track walking which involved examining the track for any defects, putting in keys, tightening bolts and generally dealing with anything that went wrong.

A He went alone without a look-out man, carrying only a hammer. If he found a fish-plate bolt loose, it would be his duty to get a spanner to tighten it. If he found only one bolt loose, he would go on with his inspection until he came to a lengthman's cabin, but if he found both bolts in a fish-plate loose he would go at once to the nearest cabin for a spanner. The type of spanner was heavy with a handle three feet long. Later Mr. Winfield met Mr. Cade at a lengthman's hut. Mr. Cade was carrying a spanner and said "I am going back to tighten a nut at Settings Dyke Bridge". A few minutes afterwards, two trains passed each other near Settings Dyke Bridge travelling in opposite directions at speeds of twenty and fifteen miles per hour. The engine of each of these trains was proceeding tender first. One drew sixteen wagons and the other fifty. When the train on the up-line had passed about half the other train, the driver of the up-line train saw Mr. Cade swaying from side to side in the six-foot way between the tracks and about level with the middle of the tender in front of that driver's engine. Eventually Mr. Cade was found lying diagonally across the six-foot way, having been severely injured by being struck by one of the trains and on the same day he died from his injuries. These injuries were in the left part of his head, and were inflicted most probably by the tender of the engine being driven on the up-line. Near where he was found on the six-foot way side of the up-line there was a fish-plate both the bolts of which were loose. The accident occurred at about 8.15 a.m. when visibility was good. It was possible to see a train for a quarter of a mile in either direction from the point of the accident.

E The appellant by her statement of claim and at the trial alleged that the deceased was killed by reason of a breach by the respondents of r. 9 of the Prevention of Accidents Rules, 1902. The appellant made further allegations of negligence which are no longer material.

Rule 9 is as follows:

F "With the object of protecting men working singly or in gangs on or near lines of railway in use for traffic for the purpose of relaying or repairing the permanent way of such lines, the railway companies shall, after the coming into operation of these rules, in all cases where any danger is likely to arise, provide persons or apparatus for the purpose of maintaining a good look-out or for giving warning against any train or engine approaching such men so working, and the persons employed for such purpose shall be expressly instructed to act for such purpose, and shall be provided with all appliances necessary to give effect to such look-out."

G The two questions raised were:—(i) Whether the work which the deceased was doing was a case where any danger was likely to arise? (ii) Whether a lengthman about to tighten, or engaged in tightening, a loose bolt in a fish-plate is a man working for the purpose of repairing the permanent way? Although the second point, having been decided by BARRY, J., and the Court of Appeal in favour of the appellant, was in this House raised later in the argument, I deal with it first.

H It was submitted that, if tightening a nut is "repair", the deceased was not working for the purpose of repair, since the evidence did not prove more than that he was bending over in order to commence the tightening. It is unnecessary to say more about this argument save that I do not accept it; nor is it necessary to deal in detail with *Judson v. British Transport Commission* (1) ([1954] 1 All E.R. 624), as the facts were very different, but I should wish to hear full argument on the scope and extent of the words "for the purpose of relaying or repairing" before being taken to agree with all the observations in the Court of Appeal on this point.

I Secondly, reliance was placed on the reasoning in *London & North Eastern Ry. Co. v. Berriman* (2) ([1946] 1 All E.R. 255), in which the construction of this rule came before your Lordships' House. The deceased in that case was engaged in oiling the connecting rods and other apparatus by which the points were

worked from the signal box. We were reminded that the majority of the House differed from the view of the Court of Appeal that repair means or includes maintenance. It is worth noting that before us it was conceded that the two were not mutually exclusive. The majority in *Berriman's* case (2) did not, however, stop there. They went on to say that the word "repair" must be given its ordinary meaning which was unaffected by the context of r. 9, or the fact that the work in question was on a railway line. That being the approach I observe that LORD MACMILLAN said (*ibid.*, at p. 260):

"Relaying is the major operation of renewing what is so defective as to be past repair; repairing is the minor operation of making good remediable defects."

LORD PORTER used the words (*ibid.*, at p. 267):

"The exact meaning of repair is perhaps not easy to define, but it contains, I think, some suggestion of putting right that which has gone wrong."

While my noble and learned friend, LORD SIMONDS, put it thus (*ibid.*, at p. 271):

"I do not doubt that apart from obsolete usage its meaning in the transitive sense is that which I find in the first dictionary that comes to my hand, 'to restore to good condition by renewal or replacement of decayed or damaged parts or by refixing what has given way; to mend'."

Applying this conception that "repair" involves putting right that which has gone wrong, I believe that tightening a nut which has come loose is within it. It is, indeed, viewed as a virtually conceded point in the speech of LORD JOWITT, L.C., who, with LORD WRIGHT, constituted the minority in that case. Moreover, I agree with the decision and the reasoning of DONOVAN, J., in *Reilly v. British Transport Commission* (3) ([1956] 3 All E.R. 857). This view is buttressed in the present case by the rule, which the deceased was obeying, that, when he found that two nuts had worked loose, he had immediately to get a spanner and tighten them. I am, therefore, of opinion that the respondents fail on the second point.

I now turn to the construction of the words "in all cases where any danger is likely to arise". It was agreed before your Lordships that the "danger" to which the rule is directed is danger from trains or engines approaching men, or (as in the present case) a single man, working on or near the railway lines.

If that is the nature of the "danger" of the risk of injury to the men or man, what, then, is the extent of the respondents' obligation? That is the vital question and counsel for the appellant rightly emphasized the use of the phrases "in all cases" and "any danger". Giving due emphasis to these phrases, the question which must be asked in every case when men or a man are or is so working, or rather (for the question must be asked and answered in time) going to work, on or near the railway lines is "Will any risk of injury to them or him be likely to arise from approaching trains or engines?" Whenever that question is answered properly in the affirmative, then, and only then, must a look-out man be provided.

If that is a correct expression of the nature of the respondents' obligation, two consequences seem to me to flow necessarily from it. The first is that the duty of the British Transport Commission is not an unqualified or absolute duty like the duty which might arise, for example, under the Factory Acts legislation. As observed by LORD GREENE, M.R., in *Hutchinson v. London & North Eastern Ry. Co.* (4) ([1942] 1 All E.R. 330 at p. 332) the vital words "any danger is likely to arise" mean what they say, and must be given their ordinary meaning. They import, inevitably, an estimate of likelihood; not of what might possibly be foreseen, but of what should be expected to occur. The estimate must be made according to ordinary principles of common sense and experience. Therefore, the estimate must be made in the light of all relevant circumstances known at the material time, including the amount and

- A speed of traffic on the line, the visibility allowed by gradients and bends and weather conditions, the nature of the work to be done, and also the skill and experience of the men or man about to do it. Counsel for the appellant argued that such skill or experience was not a relevant factor or, alternatively, that the learned judge and the Court of Appeal had given it an inadmissible weight. I do not accept either of these submissions. Though, no doubt, some allowance
- B has to be made for temporary inadvertence and distraction, a fair judgment must make some assumption as to the behaviour of the men or man engaged; and the assumption will, plainly, vary widely with the experience and skill of the individual concerned; this is the second consequence I had in mind. If it were otherwise, and if the estimates must be made on the assumption of maximum foreseeable inadvertence, then the obligation to provide a look-out will
- C arise in every case except those of traffic conditions of an extremely limited character. If that had been the intention of the rule-making authority, I cannot think that the rule would have been drawn in its existing form. It would have been a simple matter to impose an obligation always to provide a look-out for men working on or near the lines except only in cases in which, having regard to the small amount or other conditions of traffic, no such look-out should be
- D regarded as reasonably necessary.

- It has been of the essence of counsel for the appellant's case that, in the present case (as in every other like case where an experienced man, himself a sub-ganger, was deputed to do a job of inspection of the line which would occupy half a day), the only proper answer to the essential question, which must have been asked at the beginning of the day, was that a look-out should be provided. In other
- E words, that, because of the possibility of tightening operations in regard to the bolts and the possibility of distraction during the performance of that task, some danger was likely to arise. In my judgment, that is not the fair meaning of the words of the rule. It confuses what is possible with what is likely. It must be remembered that, in *Hutchinson's* case (4), it was not disputed that there was danger in the work that the men were carrying out. All that was said was
- F that the danger was not an exceptional danger (see per LORD GREENE, M.R., [1942] 1 All E.R. at p. 333). It will be noted that GODDARD, L.J., says (*ibid.*, at p. 336):

- "... I can see no ground whatever for saying that that rule is to be construed as meaning any unlikely danger. With regard to the words 'where any danger is likely to arise', an abnormal or unusual danger is
- G one not likely to arise and is one of those dangers which it is difficult to foresee ... I can see no reason whatever for giving any other meaning than the plain, natural meaning to those words ..."

As, in my view, there is in this case no breach of the rule, it is unnecessary for me to consider the observations in that case on what is necessary to constitute contributory negligence.

- H I see nothing in the ratio decidendi of *Hutchinson's* case (4) contrary to my own conclusion that the answer in every case must be a matter of degree and, therefore, of fact. In the present case, the view taken by Mr. Winfield, the responsible officer of the respondents, was, as I read his evidence, that, in the circumstances, no danger was likely to arise. BARRY, J., who felt sympathy for the appellant, but who heard the witnesses, came to a like conclusion of
- I fact, and I do not think that he was guilty of misdirection. The three judges of the Court of Appeal confirmed the conclusion of BARRY, J. I think that this House should be very slow to disturb such unanimity of opinion on a question of degree and fact. Moreover, I share their opinion, and would dismiss the appeal.

LORD MORTON OF HENRYTON: My Lords, r. 9 of the Prevention of Accidents Rules, 1902 (S.R. & O. 1902 No. 616), has already been read, and the relevant facts have already been stated, by the Lord Chancellor.

The first question arising on this appeal is whether the deceased man, Mr. Cade, was "working for the purpose of repairing the permanent way" at the relevant time. It was submitted by counsel for the respondents that the tightening of a nut or a bolt is in no case a work of repair, but is a work of maintenance which is performed in order to prevent the need for repair. They further contended that, if the work in question was a work of repair, the deceased man was not doing that work at the time of the accident.

My Lords, as to the former argument, this House, in *London & North Eastern Ry. Co. v. Berriman* (2) ([1946] 1 All E.R. 255), decided that men engaged in oiling, and possibly also cleaning, the mechanism connecting the signal cabin and the points or signals on the running lines of a railway were not engaged in work of repair. In my view, however, it is clear from the speeches in that case, that, if the work in question had been the tightening of bolts which were loose, the decision would have been the other way. For instance, LORD PORTER said (*ibid.*, at p. 267):

"I cannot think that the ordinary man, if asked whether the deceased man was engaged in repairing the permanent way when he was brushing down and oiling the signal wires and point rods, would say that he was. The exact meaning of repair is perhaps not easy to define, but it contains, I think, some suggestion of putting right that which has gone wrong. It does not include the mere keeping in order by oiling, brushing or cleaning something, which is otherwise in perfect repair and only requires attention to prevent the possibility of its going wrong in the future."

The precise point arising in the present case was dealt with by DONOVAN, J., in *Reilly v. British Transport Commission* (3) ([1956] 3 All E.R. 857), and that learned judge said (*ibid.*, at p. 860):

"The function of crossing bolts and nose bolts is to hold tightly together the component parts of the points at that spot. If by working loose they do not do this, then the bolts cease to perform their full duty even though they have worked loose only a little; for their function is not to work loose at all. Accordingly, when the bolts are tightened up again the result is that something which has not been doing its full duty before is now restored to full duty: and I see no difficulty in describing an operation which has that effect as a repair. Looked at in another way, a crossing bolt or nose bolt which is loose is a defective unit—even though it is only a little loose, for it should be tight, and if the defect is not made good it may get more pronounced, and serious results, for example, a derailment of a train, might ensue. To put right such a defect is, I think, reasonably and properly called a repair."

I entirely agree with these observations.

The latter of the two arguments already mentioned must also be rejected. The learned trial judge, BARRY, J., took the view on the evidence that at the time when Mr. Cade was struck, he was bending over to tighten one or other of the nuts by hand and, in my opinion, he was fully justified in so finding. It is, therefore, unnecessary to consider whether or not Mr. Cade was "working on the line for the purpose of repairing the permanent way" from the time when he set out along the line to do the work allotted to him by the ganger Mr. Winfield. I incline to think that he was. I quote the following three questions and answers from Mr. Winfield's evidence:

"Q.—What happened then after you had got to that hut and, so to speak, signed on? A.—Well, we all, the gang, set off to work after I told Cade that he would go track walking.

"Q.—What does that involve? A.—It involves examining the track.

"Q.—For what purpose? A.—For any defects, or putting in keys, tightening up bolts or anything that has gone wrong."

- A The present case is, I think, distinguishable from *Judson v. British Transport Commission* (1) ([1954] 1 All E.R. 624), since the plaintiff in *Judson's* case (1) was not walking along the line for the purpose of putting right anything that was wrong, but merely for the purpose of deciding what lengths of line would be required for the repairing and relaying of the line on a later day. I think, however, that some of the observations of the Court of Appeal as to the scope and extent of the words "for the purpose of relaying or repairing" may require consideration on some future occasion.

The next question arising in the present case is whether any danger was "likely to arise", within the meaning of r. 9, either when Mr. Cade set out on his morning's work or when he set out to tighten the loose nuts, after meeting the ganger Mr. Winfield at the lengthman's hut. These seem to me to be the only times at which the duty of providing a look-out man could possibly arise. I think that the latter time, as well as the former, is material to be considered; it would, no doubt, have been possible for the ganger to say to Mr. Cade: "Wait here until I get a look-out man to accompany you", to return to where the other three men were working and to detail one of them to accompany Mr. Cade as a look-out.

- D In my opinion, however, no danger was "likely to arise", within the meaning of the rule, at either of those times. It was certainly possible that danger might arise, but that is not the test to apply in considering whether or not the respondents were in breach of r. 9. The rule is made

- E "With the object of protecting men working . . . on or near lines of railway in use for traffic for the purpose of relaying or repairing the permanent way of such lines . . . in all cases where any danger is likely to arise."

Plainly, it is always possible that danger may arise to men so working, but the obligation under the rule is limited to cases where danger is likely to arise; so it is clearly contemplated that there may be cases in which danger is unlikely to arise, even when men are working on or near lines of railway in use for traffic for the purpose mentioned in the rule. In considering whether danger was or was not "likely to arise" in the present case, it is, in my view, proper to take into consideration such factors as—

- G (a) The site of the accident.—The accident occurred on a curve of a line on a radius of twenty chains, and Mr. Winfield gave evidence that the lines were in view for a quarter of a mile in both directions from the point where the accident occurred.

- H (b) The amount and speed of traffic on the lines.—The lines, although technically known as a main line, were used for goods traffic only. Mr. Winfield and the Assistant District Operating Superintendent employed by the respondents both said that the trains travelled at irregular intervals and not in accordance with any time-table, but at an average of about two to three per hour in each direction. Mr. Winfield stated that the speed of one of the two trains involved in the accident was twenty miles per hour, and it was stated by witnesses called by the respondents (whose evidence was not challenged in this respect) that the speed of the other train was about fifteen miles per hour.

- I (c) The nature of the work.—Mr. Winfield and another witness, Mr. Miller, stated that the work was simple and did not require much attention. Mr. Winfield stated that it was possible to place the spanner on the nut and then to turn it while glancing along the track and while keeping a look-out for traffic.

(d) The experience of the deceased.—It was proved, and accepted by the appellant, that the deceased was a qualified look-out man and that he was familiar with the rules contained in the British Railways' Rule Book; and Mr. Winfield stated that the deceased had been a member of his gang for about four years, that he was familiar with this length of line and that he had been appointed a sub-ganger in October, 1953.

(e) Mr. Winfield stated that visibility was good on the morning in question. A
These being the relevant circumstances, I agree with the learned judge and the
Court of Appeal that, in the present case, danger was unlikely to arise, and that
there was no breach of r. 9. I should add that counsel for the appellant con-
tended that it was not right to take into account the fact that the deceased man
was an experienced man who was likely to keep a good look-out, and they B
relied on certain observations of LORD GREENE, M.R., and GODDARD, L.J.,
in *Hutchinson v. London & North Eastern Ry. Co.* (4) ([1942] 1 All E.R. 330).
On this aspect of the matter I cannot usefully add anything to the view expressed
by the Lord Chancellor, with which I respectfully agree.

I agree that this appeal should be dismissed.

LORD COHEN: My Lords, I have had an opportunity of reading in print C
the speech which has been delivered by the noble and learned Lord Chancellor.
I am in complete agreement with his statement of the law applicable to the case.
I accept that the duty of the respondents is not an unqualified or absolute duty,
and that the words "any danger is likely to arise" import an estimate of likeli-
hood; not of what might possibly be foreseen, but of what should be expected D
to occur. I agree also with his statement that the estimate must be made in
the light of all relevant circumstances known at the time. I have, however,
the misfortune to differ from him as to the proper conclusion to be drawn from
those circumstances in the present case. Since the rest of your Lordships, as
well as the learned judges in the courts below, agree with the estimate drawn by
the noble and learned Lord Chancellor, I can have no great confidence in my
conclusion, and I shall not detain your Lordships long in giving my reasons E
for my view of the facts.

In my opinion, on the facts as found by the learned trial judge and sum-
marised by the noble and learned Lord Chancellor, it was likely that two trains
would from time to time be passing one another at the point where this accident
happened, that on some occasion when this occurred a ganger might be engaged
in tightening loose bolts of a fish-plate and that, if he were so engaged, his F
attention might be distracted to such an extent that he would fail to observe an
approaching train. That being so, it seems to me to be irrelevant that the
concurrence of those factors might not often occur, and I should have held
that this was a case where danger was likely to arise. For those reasons, I
would have allowed the appeal.

LORD EVERSHED: My Lords, I agree with the opinion of my noble G
and learned friend on the Woolsack, and have nothing to add to it.

LORD BIRKETT: My Lords, I agree with the opinion of my noble and
learned friend on the Woolsack. It covers so completely anything I might
wish to have said that I do not desire to deliver an opinion of my own.

Appeal dismissed. H

Solicitors: *Smith & Hudson*, agents for *Williamson, Stephenson & Hepton*,
Hull (for the appellant); *M. H. B. Gilmour* (for the respondents).

[Reported by G. A. KIDNER, Esq., Barrister-at-Law.]

A

CHICK AND ANOTHER v. COMMISSIONER OF STAMP DUTIES.

[PRIVY COUNCIL (Viscount Simonds, Lord Tucker, Lord Keith of Avonholm, Lord Somervell of Harrow and Lord Denning), May 13, 14, 15, June 17, 1958.]

B

Privy Council—Australia—New South Wales—Death duty—Gift inter vivos—Exclusion of donor—Gift of property by deceased to son without reservation, qualification or condition—Partnership agreement between deceased and his sons—Deceased manager of partnership business—Property used for depasturing of partnership stock—Whether bona fide possession and enjoyment retained by son to the entire exclusion of deceased—New South Wales Stamp Duties Act, 1920-1956, s. 102 (2) (d).

C

In 1934 C. transferred by way of gift to his son a pastoral property, together with the improvements thereon. The gift was made without reservation or qualification or condition. The son was then living in a homestead erected on the property and continued to do so until C.'s death.

D

In 1935 C., his son and another son entered into an agreement to carry on in partnership the business of graziers and stock dealers. Under the agreement, C. was to be manager of the business and his decision was to be final and conclusive in connexion with all the matters relating to its conduct. The business was to be conducted on the respective holdings of the partners which were to be used for the purposes of the partnership only. Any and

E

all lands held by any of the partners at the date of the agreement or acquired afterwards were to be and remain the sole property of such partner and were not, on any consideration, to be taken into account as or deemed to be an asset of the partnership, and any partner holding any such land was to have and retain the sole and free right to deal with it as he might think fit. Each of the partners owned a property and these were

F

thenceforth used for the depasturing of the partnership stock. The deceased died in April, 1952, and, in assessing the death duty payable in respect of his estate, the respondent included the value of the property given to C.'s son by way of gift, by virtue of the New South Wales Stamp Duties Act, 1920-1956, s. 102 (2) (d)*. It was not in dispute that the son assumed bona fide possession and enjoyment of the property immediately on the gift to the entire exclusion of C. or of any benefit to him under s. 102 (2) (d).

G

Held: the value of the property was rightly included in the dutiable estate, since from 1935 onwards the partners and each of them were in possession and enjoyment of the property so long as the partnership subsisted, and, therefore, the son had not retained the bona fide possession and enjoyment of the property to the entire exclusion of C. or of any benefit to him within s. 102 (2) (d).

H

Comr. of Stamp Duties (New South Wales) v. Owens ((1953), 88 C.L.R. 67) approved.

Appeal dismissed.

[**Editorial Note.** The provision of the United Kingdom legislation comparable to s. 102 (2) (d) of the New South Wales Stamp Duties Act, 1920-1956, for present purposes is s. 11 (1) of the Customs and Inland Revenue Act, 1889, amending s. 38 (2) (a) of the Customs and Inland Revenue Act, 1881: see 9 HALSBURY'S STATUTES (2nd Edn.) 344, 332.]

I

Cases referred to:

(1) *New South Wales Stamp Duties Comrs. v. Thomson*, (1928), 40 C.L.R. 394; [1928] Argus L.R. 30; Digest Supp.

* The terms of s. 102 (2) (d) are set out at p. 624, letter H, post.

- (2) *Comr. of Stamp Duties (New South Wales) v. Owens*, (1953), 88 C.L.R. 67; A.L.R. 569; 27 A.L.J. 280; 70 W.N.N.S.W. 155; 53 S.R.N.S.W. 403; Aus. Digest Supp.
- (3) *Munro v. Stamp Duties Comr.*, [1934] A.C. 61; 103 L.J.P.C. 18; 150 L.T. 145; Digest Supp.
- (4) *St. Aubyn v. A.-G.*, [1951] 2 All E.R. 473; [1952] A.C. 15; 3rd Digest Supp.
- (5) *Comr. of Stamp Duties of the State of New South Wales v. Permanent Trustee Co. of New South Wales, Ltd.*, [1956] 2 All E.R. 512; [1956] A.C. 512; 3rd Digest Supp.
- (6) *Lang v. Webb*, (1912), 13 C.L.R. 503; 21 Digest 123c.
- (7) *Rudd v. Comr. of Stamp Duties*, (1937), 37 S.R.N.S.W. 366; 54 W.N. N.S.W. 117; Aus. Digest Supp.
- (8) *Oakes v. New South Wales Stamp Duties Comr.*, [1953] 2 All E.R. 1563; [1954] A.C. 57; 3rd Digest Supp.

Appeal.

Appeal by Clifford John Chick and Jack Wesley Chick from a judgment of the Supreme Court of New South Wales (STREET, C.J., ROPER, C.J., in Eq., and WALSH, J.), dated June 28, 1957, on a Case Stated by the respondent, the Commissioner of Stamp Duties of New South Wales, under the New South Wales Stamp Duties Act, 1920-1956, s. 124. The facts are set out in the judgment of the Board.

Sir Garfield Barwick, Q.C., and *R. J. Ellicott* (both of the Australian Bar) for the appellants.

G. Wallace, Q.C. (of the Australian Bar), and *Anthony Cripps, Q.C.*, for the respondent.

VISCOUNT SIMONDS: This appeal, which is brought from a judgment of the Supreme Court of New South Wales, arises on a Case Stated by the respondent, the Commissioner of Stamp Duties of New South Wales, under s. 124 of the New South Wales Stamp Duties Act, 1920-1956. The question which it raises is whether certain pastoral property near Gurley, known as "Mia Mia", which on Apr. 21, 1952, the date of the death of John Chick (who will be called "the deceased"), belonged to his son, Clifford John Chick, should be included in the dutiable estate of the deceased. The respondent claimed that it should be included and the Supreme Court upheld his claim. Against that decision the appellants, the executors of the deceased, appeal.

The respondent rests his claim on s. 102 (2) (d) of the Act which, at the relevant date, was in the following terms:

"For the purposes of the assessment and payment of death duty but subject as hereinafter provided, the estate of a deceased person shall be deemed to include and consist of the following classes of property:— . . . (2) . . . (d) Any property comprised in any gift made by the deceased at any time, whether before or after the passing of the Act, of which bona fide possession and enjoyment has not been assumed by the donee immediately upon the gift and thenceforth retained to the entire exclusion of the deceased, or of any benefit to him of whatsoever kind or in any way whatsoever whether enforceable at law or in equity or not and whenever the deceased died."

The material facts can be briefly stated. On Feb. 19, 1934, the deceased transferred by way of gift to his son, the appellant Clifford John Chick, the property "Mia Mia", together with the improvements thereon. This gift was made without reservation or qualification or condition. The donee was then living in a homestead erected on the property and continued to do so until the death of the deceased. It is not in dispute that he assumed bona fide possession and enjoyment of the property immediately on the gift to the entire exclusion

- A of the deceased or of any such benefit to him as is mentioned in para. (d). The question is whether he also thenceforth retained it, and this depends on the impact of para. (d) on the facts next to be stated.

On July 25, 1935, some seventeen months after the gift, the deceased and the appellant Clifford John Chick, and another son, the appellant Jack Wesley Chick, entered into an agreement to carry on in partnership the business of B graziers and stock dealers under the name or style of John Chick & Sons. The agreement provided (by cl. 1) that the partnership should commence, or be deemed to have commenced, on July 1, 1935, and, subject to the conditions thereof, should continue until dissolved in manner thereafter appearing, (by cl. 2) that the deceased should be the manager of the said business and that his decision should be final and conclusive in connexion with all matters relating C to its conduct, (by cl. 4) that the capital of the business should consist of the livestock and plant then owned by the respective partners or thenceforth to be acquired in connexion with the business, (by cl. 5) that the said business should be conducted on the respective holdings of the partners at or near Gurley and such holdings should be used for the purposes of the partnership only, (by cl. 12) that the partnership might be terminated as therein mentioned, and (by cl. 13) D that any and all lands held by any of the partners at the date of the agreement or acquired afterwards should be and remain the sole property of such partner and should not on any consideration be taken into account as or deemed to be an asset of the partnership and any such partner holding any such land should have and retain the sole and free right to deal with the same as he might think fit.

In pursuance of this agreement, each of the partners brought into the partnership E livestock and plant previously owned by him. Each of them also at the date of the agreement owned a property near Gurley (the property of the appellant Clifford John Chick being "Mia Mia"), and their three properties were thenceforth used for the depasturing of the partnership stock. This continued up to the death of the deceased. In computing the final balance of his estate for the purposes of the Act, the respondent included the value of F "Mia Mia", thus bringing up the total amount of duty chargeable from £13,590 to £27,100 11s. 6d. He contended that the facts which have been stated precluded the appellants from claiming that the bona fide possession and enjoyment of the property, though it might have been assumed by the donee immediately on the gift, was thenceforth, that is at all times until the death of the deceased, retained by him to the entire exclusion of the deceased or any such G benefit to him as is mentioned in para. (d). The Supreme Court upheld this contention, and their Lordships have no doubt that they were right in doing so.

The respondent took his stand on the plain words of the section. How, he asked, could it be said that the deceased was entirely excluded from the property, the subject of the gift, or from the possession and enjoyment thereof, when, for some seventeen years before his death, he had been a member of a partnership, H whose right it was to agist their stock on it, and himself moreover was the manager of the partnership business with the power to make final and conclusive decisions on all matters relating to it. The "objective and outward facts" (to use an expression of ISAACS, J., in *New South Wales Stamp Duties Comrs. v. Thomson* (1) (1928), 40 C.L.R. 394) were, he urged, wholly inconsistent with such exclusion. To this simple presentation of the case no adequate answer, as it I appeared to their Lordships, was given by the appellants. Whatever force and effect might be given to cl. 13 of the partnership agreement, on which the appellants appeared to place some reliance, other parts of the agreement and, in particular, cl. 5, put it beyond doubt that the partners and each of them were in possession and enjoyment of the property so long as the partnership subsisted.

It is, however, right to refer to some of the contentions which were advanced on behalf of the appellants. In the first place, it is not disputed that the property was given outright by the deceased to the appellant Clifford John Chick.

As was said by DIXON, C.J., in *Comr. of Stamp Duties (New South Wales) v. Owens* (2) ([1953], 88 C.L.R. 67 at p. 88), A

"If ever there was a gift of an estate in fee simple, carrying the fullest right known to the law of exclusive possession and enjoyment, surely this was such a gift."

It follows that the decision of this Board in *Munro v. Stamp Duties Comr.* (3) B ([1934] A.C. 61), on which the appellants relied, has no application to the present case. It must often be a matter of fine distinction what is the subject-matter of a gift. If, as in *Munro's* case (3), the gift is of a property shorn of certain of the rights which appertain to complete ownership, the donor cannot, merely because he remains in possession and enjoyment of those rights, be said within the meaning of the section not to be excluded from possession and enjoyment of that C which he has given. This view of the section, which was re-affirmed in *St. Aubyn v. A.-G.* (4) ([1951] 2 All E.R. 473 at p. 478) on a consideration of a similar section in a British statute, need not be further elaborated. But the question may arise and, having arisen, may lead to a difference of opinion what is the subject-matter of the gift. It was, as it appears to their Lordships, for this reason that, in *Owens' case* (2) WILLIAMS, J., and TAYLOR, J., dissented D from the majority of the court. In the present case, there is no room for any such difference.

Then it was contended that para. (d) had no operation because the partnership agreement was an independent commercial transaction for full consideration later than, and in no way related to, the gift, and was a mode of enjoyment by the donee of his property and an exercise by him of the possession of it. (These E are the words of the appellants' second formal reason.) In this reason there are several elements. The partnership agreement was "later" than the gift. This point was not pressed by learned counsel for the appellants. If possession and enjoyment are "thenceforth" to be retained by the donee, it is clearly irrelevant that there is an interval between the dates when the donor is excluded and ceases to be excluded. Nor is there wanting ample authority which shows F that this is an irrelevant consideration. A recent example is *Comr. of Stamp Duties of the State of New South Wales v. Permanent Trustee Co. of New South Wales, Ltd.* (5) ([1956] 2 All E.R. 512). Next, it was an "independent commercial transaction for full consideration". It is to be assumed that it was an "independent" transaction; there was no evidence to the contrary. But G para. (d) says nothing about independent transactions. The sole question is one of fact—was the donor excluded? If he was not excluded, it is not relevant to ask why he was not excluded. Equally with regard to the transaction being "commercial" and "for full consideration". Their Lordships see no reason why a gloss should be put on the plain words of para. (d) by excluding from its operation such transactions. As long ago as 1912 in *Lang v. Webb* (6) ([1912], H 13 C.L.R. 503) (a case where a testatrix gave certain blocks of land to her sons and on the same day took leases from them of the same land), ISAACS, J. (*ibid.*, at p. 517), said:

"The lease, however, gave to the donor possession and enjoyment of the land itself, which is a simple negation of exclusion, and brings the case within the statutory liability. It was argued that as the rent was full value, the lessee's possession and occupation were not a benefit. The argument is unimportant because the lease, at whatsoever rent, prevents the entire exclusion of the donor." I

This view of the sub-section has never been departed from, and their Lordships respectfully adopt the words of ISAACS, J., in the present case. It is irrelevant that the donor gave (if he did give) full consideration for his right as a member of the partnership to possession and enjoyment of the land that he had given to his son.

- A Then it is said that the transaction was "in no way related to the gift and was a mode of enjoyment by the donee of his property". The words "related to the gift" are, no doubt, an echo of the words "referable to the gift", which are to be found in *Munro's* case (3) and *St. Aubyn's* case (4), and are lucidly explained by DIXON, C.J., and KITTO, J., in *Owens' case* (2) (88 C.L.R. at p. 85), and at an earlier date by OWEN, A.J., in *Rudd v. Comr. of Stamp Duties* (7) ((1937), 37 S.R.N.S.W. 366 at p. 392). They might become of importance if it was the second limb of para. (d) which was under consideration and the question, therefore, was whether the donor had been entirely excluded from any benefit of whatsoever kind. But it is difficult to see what bearing they have when the simple question is whether the donor has been excluded from the subject-matter of the gift, a pastoral property known as "Mia Mia", and the clear answer is that he has not. Finally, the words "was a mode of enjoyment by the donee of his property" may be linked with the appellants' contention that para. (d) was not applicable because (again to cite the formal reason)
- C "neither the partnership agreement nor the use of the property pursuant thereto impaired or detracted from bona fide possession and enjoyment by the donee of the property given."

- D This contention, in their Lordships' opinion, involves a misconception, for which para. (d) provides no justification. It may be that the donee can make no better use of the property given to him than, for instance, by leasing it back to the donor. The question still is whether, as a fact, the donor has been excluded. This appears to be the contention raised in another form that a commercial transaction is not within para. (d). The answer is that the possession and enjoyment by the donee of the property given to him in the manner most advantageous to himself are by no means incompatible with the donor not being excluded from it. It was, however, natural that the appellants should refer to, and rely on, *Oakes v. New South Wales Stamp Duties Comr.* (8) ([1953] 2 All E.R. 1563). In that case, the testator, who owned a grazing property in New South Wales, executed a deed-poll under which, as from July 1, 1924, he held the property on trust for himself and his four children as tenants in common in equal shares. The deed gave him wide powers of management and, in particular, provided that, in addition to reimbursing himself all expenses of administration, he was to be entitled to remuneration for all work done by him in managing the trust property on which he resided with his family in his capacity as trustee and manager in the same manner and as fully in all respect as if he were not a trustee thereof. He continued to manage the trust property until his death, receiving certain varying sums annually as remuneration and, after deducting these and other outgoings and expenses, he divided the profits from the property into five equal shares, crediting one share to himself and one to each of his children. The children's shares he applied during their minority for their maintenance and education, and paid them to the children when they came of age. The remuneration taken by the testator for managing the property was assumed to be appropriate and reasonable for any other manager.
- H On these facts, the commissioner claimed that the whole of the trust property should be included in the testator's estate for the purpose of duty. This claim was upheld by the High Court (85 C.L.R. 386). The decision of the High Court was affirmed by this Board in a judgment delivered by LORD REID, in the course of which certain observations were made which, taken out of their context, appear to be favourable to the appellants. It had been argued on behalf of the commissioner that the testator derived a benefit within the meaning of para. (d) from the fact that he had applied the trust income in the maintenance of his children and, if it had not been available, would have had to spend more of his own. This contention was rejected, LORD REID saying ([1953] 2 All E.R. at p. 1568):

"... their Lordships will assume that there was some advantage to the

deceased. That advantage, however, was not at the expense of the children and did not impair or diminish the value of the gift to them or their enjoyment of it. It is possible for a donee, in the full and unrestrained enjoyment of his gift, to use or spend it in a way that happens to produce some advantage to the donor without there being any loss or disadvantage to the donee. But, in their Lordships' judgment, any such advantage is not a benefit within the meaning of the section. The point is not strictly covered by authority, but the contrary view would be difficult to reconcile with what was said in the House of Lords in *St. Aubyn's case* (4)."

A passage to the same effect appears later in the judgment. Having disposed of this contention, the Board then dealt with the benefit derived by the testator from his management of the property, and held that it was such a benefit as to bring para. (d) into operation.

But it was the cited passage on which the appellants relied. Applying it to the facts of this case, they said that the partnership agreement and all that was done under it by the deceased may have been beneficial to him, but the benefit or advantage derived by him did not impair or diminish the value of the gift of the property to the donee. On the contrary, it was the method most advantageous to the donee of dealing with the property. It was, therefore, not a benefit to the donor which brought the sub-section into operation. Their Lordships cannot accept this view. It is in flat contradiction to the law cogently stated by ISAACS, J., in *Lang v. Webb* (6) at an earlier stage in this opinion which has been consistently followed. Where the question is whether the donor has been entirely excluded from the subject-matter of the gift, that is the single fact to be determined. If he has not been so excluded, the eye need look no further to see whether his non-exclusion has been advantageous or otherwise to the donee. It must be observed that, in *Oakes' case* (8), the Board appears to have been dealing with the second limb of para. (d), the question being whether the donor was entirely excluded from any benefit to him of whatsoever kind or in any way whatsoever. It is possible that, in the consideration of this very difficult part of s. 102 (2) (d), it may be pertinent in some cases to inquire whether the benefit derived by the donor is one that impairs or detracts from the donee's enjoyment of the gift. Their Lordships, with great respect, think that this is a matter which may require further examination, but, as they have already said, they are clearly of opinion that it is not a relevant consideration where the question arises under the first limb of para. (d), and is whether the donor has been entirely excluded from the subject-matter of the gift, and they repeat that, in the present case, that question can only be answered in the negative.

Learned counsel for the appellants in the course of his argument conceded that he could only succeed if it was held that *Owens' case* (2), to which reference has been already made, was wrongly decided. Their Lordships, therefore, think it right to say that they agree with the reasoning and conclusion of the majority of the High Court in that case.

For these reasons, their Lordships will humbly advise Her Majesty that this appeal should be dismissed. The appellants must pay the respondent's costs of this appeal.

Appeal dismissed.

Solicitors: *Waltons & Co.* (for the appellants); *Light & Fulton* (for the respondent).

[Reported by G. A. KIDNER, Esq., Barrister-at-Law.]

A

R. v. ADAIR.

[COURT OF CRIMINAL APPEAL (Lord Goddard, C.J., Barry and Ashworth, JJ.),
June 16, 23, 1958.]

B

Criminal Law—Trial—Direction to jury—Question asked by jury after they had retired indicating that they were inferring facts for which there was no supporting evidence—Necessity for further direction by trial judge.

Criminal Law—Appeal—Substitution of verdict—Verdict of guilty on a second count of receiving substituted for verdict of guilty on first count of larceny where conviction on first count not upheld—Jury discharged at trial from giving verdict on second count—Criminal Appeal Act, 1907 (7 Edw. 7 c. 23), s. 5 (2).

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The appellant and a woman, F., with whom he was living, were charged at quarter sessions in two counts of an indictment with (count 1) burglary and larceny of, inter alia, eighty thousand cigarettes from a dwelling-house, and with (count 2) receiving sixty-eight thousand cigarettes knowing them to have been stolen. The facts were that on the night of Dec. 8, 1957, a public house was entered by means of a key and over eighty thousand cigarettes were stolen. The next day cartons containing sixty-eight thousand cigarettes, some of which were identifiable as having come from the public house, were found by the police in a flat which was occupied by the appellant. The police also found in the flat equipment for making keys including Plasticine bearing the impression of a key. The prosecution's case on the first count was that the appellant should be convicted of burglary and larceny on the basis that he had been present at the time; the prosecution did not suggest that he was an accessory. The jury, having retired for two hours to consider their verdict, returned to ask the deputy chairman of quarter sessions whether, if the appellant had in fact remained at his flat but had organised the burglary, had put pressure on someone to carry it out and had supplied the key, he could be found guilty of burglary. The deputy chairman replied: "The answer is, he is an accessory before the fact, and the short answer is: 'Yes'". No evidence had been given at the trial which showed that the appellant had put pressure on anyone to carry out the burglary. The jury found the appellant guilty of burglary and larceny on count one and were discharged from returning a verdict on the second count, that of receiving cigarettes; F. was found guilty of receiving five hundred cigarettes which were found among her personal belongings in the appellant's flat. The appellant now appealed against his conviction on count one on the ground that the deputy chairman inadequately directed the jury on the question that they had put to him.

Held: (i) if the form of a question put to the judge by a jury, who have retired to consider their verdict, shows that the jury appear to be assuming facts or drawing inferences for which there is no supporting evidence, further direction from the judge is requisite (see p. 631, letter F, post); in the present case the question put by the jury showed that they were drawing such inferences, viz., inferences concerning the appellant's having put pressure on someone to carry out the burglary, a fuller direction from the deputy chairman than his short answer had been needed and the conviction could not be upheld.

(ii) in the circumstances of the case the jury must have been satisfied of facts which proved the appellant guilty of receiving, and under s. 5 (2) of the Criminal Appeal Act, 1907, the court would substitute for the verdict of guilty on the first count a verdict that the appellant was guilty on the second count, viz., guilty of receiving cigarettes knowing them to have been stolen.

Verdict substituted in lieu of allowing the appeal.

[As to the retirement of a jury, see 10 HALSBURY'S LAWS (3rd Edn.) 431, para. 795. A

As to the court's power to alter a verdict, see 10 HALSBURY'S LAWS (3rd Edn.) 539, para. 990.

For the Criminal Appeal Act, 1907, s. 5, see 5 HALSBURY'S STATUTES (2nd Edn.) 930.]

Cases referred to: B

(1) *R. v. Melvin*, [1953] 1 All E.R. 294; [1953] 1 Q.B. 481; 117 J.P. 95; 37 Cr. App. Rep. 1; 14 Digest (Repl.) 678, 6926.

(2) *R. v. Smith*, (1923), 17 Cr. App. Rep. 133; 14 Digest (Repl.) 678, 6925.

Appeal.

This was an appeal by George Johnston Adair, the appellant, against his conviction at the County of London Quarter Sessions on Mar. 14, 1958, on the first count of an indictment which charged him, together with a woman named Farin, with breaking and entering a dwelling-house with intent to steal and stealing therein 81,540 cigarettes, nine bottles of whisky and five bottles of brandy. The indictment contained two further counts which jointly charged the appellant and Farin with receiving 68,400 cigarettes knowing them to be stolen and receiving a wireless set knowing it to be stolen. The ground of appeal was misdirection of the jury by the deputy chairman of quarter sessions. The facts are set out in the judgment of the court. D

F. H. Lawton, Q.C., and *C. G. L. Du Cann* for the appellant.

H. F. Cassel for the Crown.

Cur. adv. vult. E

June 23. ASHWORTH, J., read the following judgment of the court: This appellant was charged together with a woman named Farin at the adjourned quarter sessions for the County of London in an indictment containing three counts. In the first count they were jointly charged with breaking and entering a dwelling-house and stealing over eighty thousand cigarettes, nine bottles of whisky and five bottles of brandy; in the second count they were jointly charged with receiving sixty-eight thousand cigarettes knowing them to have been stolen. In the third count they were jointly charged with receiving a wireless set knowing it to have been stolen. The appellant was found guilty on the first and third counts, while the woman Farin was found not guilty on those counts but guilty of receiving five hundred cigarettes which were found amongst her personal belongings. The appellant did not challenge the verdict or sentence on the third count, but contended that as a matter of law he was wrongly convicted on the first count. F

The incident out of which the charge in the first count arose occurred in the night of Dec. 8/9, 1957, when premises known as the Royal Oak public house were entered by means of a key which fitted one of the doors of the bar, and the cigarettes and liquor were stolen. On the following day police officers visited a flat occupied by the appellant and the woman Farin and there they found stacked round a gas stove cartons containing sixty-eight thousand cigarettes some of which could be identified as having come from the Royal Oak. They also found equipment suitable for making keys, including some Plasticine bearing the impression of a key. The appellant's explanation to the police, which he repeated in his evidence at the trial, was that the cigarettes must have been deposited in the flat by a lodger named Bill, and that he, the appellant, had nothing whatever to do with the entry into the Royal Oak or the stealing therein. The key-making equipment was said by him to have been in his possession for amusement purposes only. G

Counsel for the Crown invited the jury to convict the appellant and Farin on the first count on the basis that they had themselves broken and entered the Royal Oak. No suggestion was made that the appellant should be convicted on the basis that while not taking part in the actual burglary he had organised or H

A assisted in the crime and was accordingly liable to be convicted as an accessory before the fact.

In his summing-up the deputy chairman dealt fully and accurately with the law and the facts on the footing that the appellant was alleged to have broken and entered the premises himself. In the absence of any suggestion that the appellant might be convicted as an accessory it is not surprising that the summing-up contained no reference to that point.

The jury retired to consider their verdict and two hours later they returned, desiring further direction on a point of law which they expressed in the following terms: "If Adair [the appellant] in fact remained at 15, St. Luke's Road (his flat) but organised the breaking-in of the Royal Oak public house, put pressure on someone to carry out the breaking and supplied a key or other equipment, could Adair be found guilty of burglariously breaking and entering the premises?" The deputy chairman's reply was as follows: "The answer is, he is an accessory before the fact, and the short answer is: 'Yes'". After a very short further retirement the jury returned a verdict of guilty against the appellant on the first count.

D Counsel for the appellant contended that in the circumstances and having regard to the way in which the case for the Crown had been presented, the short further direction given by the deputy chairman was inadequate. He did not contend that if the three elements mentioned in the jury's question had been proved by evidence, namely, organisation, pressure and the supply of a key, the deputy chairman's answer would have been wrong in law. His contention was that there was no evidence whatever to support two of the elements, namely, organisation and pressure, and that the deputy chairman should have directed the jury that their approach to the problem involved assumptions which the Crown had not suggested and which were not supported by the evidence.

F In our view it would not be right to say that in every case where by the form of their question a jury indicate a different approach to the problem from that which was put forward on behalf of the Crown, it is necessary by way of further direction to review all the evidence relevant to the points involved in the jury's question. If, however, the form of the question shows that the jury appear to be assuming facts or drawing inferences for which there was no supporting evidence, further direction is called for and they should be reminded how far the relevant evidence went. In the present case there was certainly no evidence that the appellant put pressure on someone to carry out the breaking-in and it is not possible to say that if the jury had been reminded of the absence of any such evidence, they would have convicted the appellant on the first count. While we have no wish to criticise the deputy chairman, who was confronted by a difficult question, we are of opinion that a fuller direction was called for than that contained in his short answer, and on this ground the conviction on the first count cannot be upheld.

H Having regard to their verdict on the first count the deputy chairman rightly discharged them from returning a verdict in respect of the appellant on the second count. The question now arises whether this court should substitute for the verdict of guilty on the first count a verdict of guilty on the second count, in pursuance of s. 5 (2) of the Criminal Justice Act, 1907. That sub-section is in the following terms:

I "Where an appellant has been convicted of an offence and the jury could on the indictment have found him guilty of some other offence, and on the finding of the jury it appears to the Court of Criminal Appeal that the jury must have been satisfied of facts which proved him guilty of that other offence, the court may, instead of allowing or dismissing the appeal, substitute for the verdict found by the jury a verdict of guilty of that other offence and pass such sentence in substitution for the sentence passed at the

trial as may be warranted in law for that other offence, not being a sentence of greater severity.”

In the first place it is clear that as the jury were discharged from returning a verdict in respect of the appellant on the second count, there is no such obstacle to the application of s. 5 (2) as existed in *R. v. Melvin* (1) ([1953] 1 All E.R. 294). In that case the jury had acquitted the prisoners on a count of larceny and this court held that it had no power in the circumstances to substitute a verdict of guilty of larceny, although the facts would certainly have warranted such a course. When s. 5 (2) is invoked, the question arises whether it is clear to this court that the jury must have been satisfied of facts which proved the prisoner guilty of the other offence: see *R. v. Smith* (2) ((1923), 17 Cr. App. Rep. 133 at p. 135).

In our view it is plain from the terms of the jury's question and their subsequent verdict on the first count that they must have rejected the explanation offered by the appellant for his possession of the cigarettes and the key-making equipment. It is equally plain that they must have been satisfied that the appellant was directly implicated in the theft and that when the cigarettes came into his possession he must have known that they were stolen. Confirmation of this view is to be found in the fact that the jury convicted the woman Farin of receiving five hundred cigarettes, which had been given to her by the appellant.

In these circumstances we think that the present case falls well within the ambit of s. 5 (2) and accordingly we substitute for the verdict of guilty on the first count a verdict of guilty on the second count. The sentence of eighteen months' imprisonment which was passed in respect of the first count will stand as the sentence on the substituted verdict.

Verdict of guilty of receiving on second count substituted for verdict of guilty on first count.

Solicitors: *Sampson & Co.* (for the appellant); *Solicitor, Metropolitan Police* (for the Crown).

[Reported by WENDY SHOCKETT, Barrister-at-Law.]

A

DEACOCK v. DEACOCK.

[COURT OF APPEAL (Hodson and Morris, L.JJ., and Vaisey, J.), June 17, 18, 1958.]

Divorce—Maintenance of wife—Jurisdiction to order on decree of presumption of death and dissolution of marriage—“Dissolution”—“Divorce”—Matrimonial Causes Act, 1950 (14 Geo. 6 c. 25), s. 16, s. 19.

B

The court has jurisdiction under s. 19 (2), (3) of the Matrimonial Causes Act, 1950, to award maintenance on a decree of presumption of death and dissolution of marriage under s. 16 (1), if the party presumed dead is subsequently found to be alive.

Dictum in *Wall v. Wall* ([1949] 2 All E.R. 927) disapproved.

C

Per HODSON, L.J.: the word “dissolution” relates to the marriage bond itself, whereas the word “divorce” relates to the parties to the marriage bond (see p. 635, letter D, post).

[As to the jurisdiction to make a decree of presumption of death and dissolution of marriage, see 12 HALSBURY'S LAWS (3rd Edn.) 287, para. 564; and as to the jurisdiction to order maintenance for a wife, see *ibid.*, 430, para. 966.

D

For the Matrimonial Causes Act, 1950, s. 16, s. 19, see 29 HALSBURY'S STATUTES (2nd Edn.) 403, 407.]

Cases referred to:

(1) *Scott v. Scott*, [1921] P. 107; 90 L.J.P. 171; 124 L.T. 619; 27 Digest (Repl.) 631, 5917.

(2) *Fisher v. Fisher*, [1942] 1 All E.R. 438; [1942] P. 101; 111 L.J.P. 28; 166 L.T. 225; 27 Digest (Repl.) 631, 5918.

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(3) *Simmonds v. Simmonds*, [1955] 2 All E.R. 481; 3rd Digest Supp.

(4) *Wall v. Wall*, [1949] 2 All E.R. 927; [1950] P. 112; 2nd Digest Supp.

Interlocutory Appeal.

This was an appeal by a wife respondent against an order of BARNARD, J., dated May 9, 1957, refusing her leave to file a notice of application for maintenance. The husband, who had been granted a decree absolute of presumption of her death and dissolution of their marriage in 1943, contended (i) that the wife's application to the court for maintenance was not made “on” the decree within the meaning of s. 19 (2) and (3)* of the Matrimonial Causes Act, 1950, and (ii) that in any case the jurisdiction to award maintenance conferred by s. 19 (2) and (3) did not apply on a decree of presumption of death and dissolution of marriage. The case is reported only on this latter point.

G

John Latey, Q.C., E. R. Moulton-Barrett and J. B. Gardner for the wife.

S. K. D. de Ferrars and J. M. Rankin for the husband.

HODSON, L.J.: This is an appeal pursuant to leave given by this court on Dec. 16, 1957, from an order of BARNARD, J., dated May 9, 1957. The actual order of the learned judge was an order on an appeal from Mr. Registrar TOWNLEY MILLERS dated Apr. 2, 1957, the registrar having refused leave to a wife to file a notice of what is called “ancillary relief”—in plain English, maintenance—out of time. Leave to appeal having been refused, this court gave leave.

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The reason why an application had to be made to the court to file a notice requiring the husband to pay maintenance appears from the rule. Rule 44 (1) of the Matrimonial Causes Rules, 1957, provides that

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“... (a) no such application shall be made later than two months after final decree except by leave.”

The provisions with regard to maintenance are statutory, and the relevant Act at the present time is the Matrimonial Causes Act, 1950. Section 19 (3) provides:

“On any decree for divorce or nullity of marriage, the court may, if it thinks fit, by order direct the husband to pay to the wife, during their

* The relevant part of s. 19 (3) is printed *supra* and at p. 634, post.

joint lives, such monthly or weekly sum for the maintenance and support of the wife as the court may think reasonable . . .”

The previous sub-section (also beginning with the words “On any decree for divorce or nullity of marriage”) makes provision for orders for security.

This is a very unusual case, because what happened here was that on Nov. 5, 1941, the husband presented a petition for divorce under the provisions of the Act then in force (being the Act of 1937), s. 8 (1) of which provided that:

“Any married person who alleges that reasonable grounds exist for supposing that the other party to the marriage is dead may present a petition to the court to have it presumed that the other party is dead and to have the marriage dissolved, and the court, if satisfied that such reasonable grounds exist, may make a decree of presumption of death and of dissolution of the marriage.”*

The parties were married in 1918. The wife was a Greek. The husband was in the Consular service; and they lived together in Greece and lastly in Athens. In 1930, according to the husband's case which he put before the court, his wife disappeared. He made certain accusations against his wife in his petition and in his affidavit in support of the petition (which affidavit was used as his evidence at the trial) which now appear, from the evidence which the wife has produced, to be entirely unfounded, because the wife has shown that in June, 1930, the position was that the Greek court at any rate, after hearing both parties, had made an order in her favour for maintenance for a provisional period, on the footing that she was indigent and that the husband was in all respects responsible for her maintenance. The facts which have now emerged are that the husband had at that time made the acquaintance of another woman in Athens, with whom he subsequently departed in the later months of 1930; that he left his wife, never went back to her, and disappeared from the scene altogether so far as the wife was concerned. However, the petition which the husband presented for presumption of death and for dissolution of the marriage was successful on the evidence that he produced, although, for some obscure reason which I cannot fathom, the only service which was directed on this Greek lady, who lived in Greece and never lived anywhere else, was by advertisement in the “News Chronicle” in this country. She heard nothing of the divorce until the year 1950; and she made no application to this court for maintenance until the year 1956.

In those circumstances, it is contended, and has so far been successfully contended, by the husband, that no application can be made now because it cannot be (within the language of the section to which I have referred) “On the decree”.

[HIS LORDSHIP considered authorities concerning the meaning of the word “on” in this context, including *Scott v. Scott* (1) ([1921] P. 107), *Fisher v. Fisher* (2) ([1942] 1 All E.R. 438) and *Simmonds v. Simmonds* (3) ([1955] 2 All E.R. 481), and the circumstances of the case, and continued:]

In my judgment, therefore, this application for maintenance is to be treated as having been made on the decree.

There is a further point, which was not taken before the learned judge but which has been taken in this court, and which is a curious one. It is this, that s. 19 (2) and (3) of the Act of 1950 (to which I have referred), following on the language of earlier Acts, speaks of a “decree for divorce”, and all the other sections to which we have been referred speak of decrees “for divorce”, with the exception of s. 16 (1), which takes the place of s. 8 (1) of the Act of 1937, to which I have previously referred, and which, having prescribed the remedy for a

* Section 16 (1) of the Matrimonial Causes Act, 1950, is in the same terms as s. 8 (1) of the Act of 1937, save that s. 16 (1) contains additional words concerning domicile.

A married person who alleges that reasonable grounds exist for supposing that the other party to the marriage is dead, declares that a petition may be presented

“to have it presumed that the other party is dead and to have the marriage dissolved, and the court, if satisfied that such reasonable grounds exist, may make a decree of presumption of death and of dissolution of the marriage.”

B It is said (and I confess that this argument does not produce very much impact on my mind) that there is a distinction between the words “dissolution of marriage” and “divorce”, and that, as s. 19 contains the word “divorce” and s. 16 does not, there is no statutory power to apply for maintenance at all in the case of presumption of death, the assumption contended for by counsel
C being that, since the person concerned is presumed to be dead, therefore (I suppose) they are dead and no application for maintenance is ever likely to be received from them. Of course, it does not in the least follow that because the courts presume a person to be dead that is a true fact—as this case demonstrates. In my view the word “dissolution” relates to the marriage bond itself, whereas the word “divorce” relates to the parties to the marriage bond; and it is apt
D to refer to “divorce” when speaking of parties and “dissolution” when speaking of the bond.

As the decree in this case shows, what has been done, or what has been purported to be done, by the court was to dissolve the marriage; and the word “dissolved” is used in this and in all other decrees, as it has been used for years:
E the word “divorce” is not used. The intention of the statute in providing this remedy of presumption of death appears to have been quite clear. It would not have been of any avail to declare that a man or woman was dead because that would not enable the other party to re-marry unless they really were dead. So that it was added to the presumption to which the court could give effect that the court should dissolve the marriage; and that is what has happened in this case.

F I confess that I cannot see any force in the argument, as so far stated, that there is no remedy by way of application for maintenance after a decree of this kind has been pronounced. The argument is supported by the language of sub-s. (3) of the section now in force [s. 16 of the Act of 1950], which reads:

G “Sections 10 to 13 of this Act shall apply to a petition and a decree under this section as they apply to a petition for divorce and a decree of divorce respectively”,

thereby lending some verbal support to the argument that there is a distinction between a petition for dissolution and a petition for divorce. I accept that there is that verbal support for the argument; but the explanation of the reference
H to the preceding “sections 10 to 13 of this Act” seems to be that the legislature thought it well to draw attention to the fact that these sections would apply to these cases under s. 16 although the opposite party to the marriage might be taken to be dead. It had not, I suppose, occurred to the legislature that the opposite party to the marriage might often turn out to be alive, which might provide the necessity for a litigant to rely on the succeeding sections of the
I statute, of which s. 19, the section dealing with maintenance, is one.

I have not overlooked the fact that this argument has some support from a decision of PEARCE, J., in *Wall v. Wall* (4) ([1949] 2 All E.R. 927), where the learned judge was considering the power to decree dissolution of marriage in connexion with the presumption of death. The point taken there was that the domicile of the applicant was not in this country, and the learned judge came to the conclusion that since the other party (who was in that case the husband) was, from the nature of the proceedings, supposed to be dead, it would be rather

absurd to attach to his domicile any particular virtue as founding jurisdiction, and the residence of the wife herself was held to be sufficient. However, in considering this question he did refer (*ibid*, at p. 930) in support of his conclusion to the sub-section which provided that (as I have quoted from the Act of 1950) the earlier sections should apply to a decree under this section as they applied to a petition for divorce and a decree of divorce respectively. For the reasons which I have given, I cannot myself agree with this part of the reasoning of the learned judge, although I am not in any way dissenting from the conclusion which he reached in that case. A

This second point is a point which also fails, in my judgment; and the appeal should be allowed. B

MORRIS, L.J.: I entirely agree. [HIS LORDSHIP considered the question whether the application was "on" the decree within the meaning of s. 19 (2), (3) of the Matrimonial Causes Act, 1950, and continued:] I have come to the same conclusion as that reached by Hodson, L.J., that this application was made "on" a petition for divorce, as the meaning of that phrase has been judicially determined. I therefore think that this appeal succeeds. C

On the other point which has been debated in this court though not formally taken before the learned judge, I am in full agreement with what my Lord has said, and I do not desire to add anything. D

VAISEY, J.: I also fully agree with the conclusions at which my Lords have arrived. Nor do I think that I have any real ground of difference with any of the reasons which they have expressed. How far the decision of what is a "reasonable time", having regard to the interpretation of the word "on" which the courts have given, involves the exercise of judicial discretion, is probably a question of words rather than of substance: but if and so far as that question has any substance I would myself desire to regard it as an open one. E

Appeal allowed.

Solicitors: *J. A. H. Powell* (for the wife); *Stoneham & Sons* (for the husband). F
[Reported by *HENRY SUMMERFIELD, Esq., Barrister-at-Law.*]

LONDON TRANSPORT EXECUTIVE *v.* BETTS (VALUATION OFFICER). G

[HOUSE OF LORDS (Lord Morton of Henryton, Lord Reid, Lord Keith of Avonholm, Lord Somervell of Harrow and Lord Denning), April 16, 17, 24, June 25, 1958.]

Rates—De-rating—Industrial hereditament—Purposes of user—Purposes other than those of a factory—Maintenance of occupier's road vehicles—Distinction from reconditioning—Rating and Valuation (Apportionment) Act, 1928 (18 & 19 Geo. 5 c. 44), s. 3 (1), (2). H

The appellants occupied a depot for work on their omnibuses, each omnibus being completely overhauled every three and a half years. The body of the omnibus was detached from the chassis, which was sent elsewhere for overhaul. The body was then inspected and all damaged parts were replaced, the seat upholstery was renovated and the body was repainted. The body was then mounted again on a chassis which was not necessarily its original chassis. On the question whether the depot was an industrial hereditament for rating purposes within s. 3 of the Rating and Valuation (Apportionment) Act, 1928, or was excepted from that definition by s. 3 (2) (b) as being a "place used . . . for the . . . maintenance of" the appellants' vehicles "notwithstanding that it is situate within the . . . precincts forming I

A a factory . . . and used in connexion therewith", and thus would "be deemed not to form part of the factory" by s. 3 (2) (b),

Held (LORD DENNING dissenting): the depot was not an industrial hereditament within the meaning of s. 3 of the Act for the following reasons—

B (i) the word "maintenance" in s. 3 (2) (b) covered repairs and included the overhauling and reconditioning of the vehicles carried out in the present case.

Potteries Electric Traction Co., Ltd. v. Bailey (Stoke-on-Trent Revenue Officer) ([1931] A.C. 151) followed; *Scottish Motor Traction Co. v. Edinburgh Assessor* (1931 S.C. 416) approved, and

C (ii) the exception in s. 3 (2) (b) of "any place used . . . for the . . . maintenance of" road vehicles from being part of a factory for the purposes of s. 3 applied where, as in the present case, the place so used was the whole, as well as where it was merely a part, of the hereditament.

Decision of the COURT OF APPEAL ([1957] 3 All E.R. 126) affirmed.

[As to what constitutes an industrial hereditament and use for the maintenance of the occupier's road vehicles, see 27 HALSBURY'S LAWS (2nd Edn.) 444-448, paras. 879, 880; and for cases on the subject, see DIGEST SUPP.]

D For the Rating and Valuation (Apportionment) Act, 1928, s. 3, see 20 HALSBURY'S STATUTES (2nd Edn.) 176.]

Cases referred to:

E (1) *Potteries Electric Traction Co., Ltd. v. Bailey* (Stoke-on-Trent Revenue Officer), [1931] A.C. 151; 100 L.J.K.B. 153; 144 L.T. 410; 95 J.P. 64; Digest Supp.

(2) *Scottish Motor Traction Co. v. Edinburgh Assessor*, *Wylies, Ltd. v. Glasgow Assessor*, 1931 S.C. 416; Digest Supp.

(3) *Hall & Co., Ltd. v. South-East Area of Surrey Assessment Committee*, (1933), 18 R. & I.T. 77; 4 D.R.A. 29.

F (4) *Re The Charlton Works*, (1942), 13 D.R.A. 64.

(5) *Escoigne Properties, Ltd. v. Inland Revenue Comrs.*, [1958] 1 All E.R. 406.

(6) *Street v. British Electricity Authority*, [1952] 1 All E.R. 679; [1952] 2 Q.B. 399; 3rd Digest Supp.

G (7) *London Co-operative Society, Ltd. v. Southern Essex Assessment Committee*, [1941] 3 All E.R. 252; [1942] 1 K.B. 53; 111 L.J.K.B. 113; 165 L.T. 409; 105 J.P. 399; 2nd Digest Supp.

(8) *Thomas v. British Thomson-Houston Co., Ltd.*, [1953] 1 All E.R. 29; 3rd Digest Supp.

H (9) *Thorogood v. Van Den Berghs & Jurgens, Ltd.*, [1951] 1 All E.R. 682; 115 J.P. 237; sub nom. *Thurogood v. Van Den Berghs & Jurgens, Ltd.*, [1951] 2 K.B. 537; 2nd Digest Supp.

(10) *Gilbert v. S. Hickinbottom & Sons, Ltd.*, [1956] 2 All E.R. 101; [1956] 2 Q.B. 40; 120 J.P. 288; 3rd Digest Supp.

(11) *Dalziel Co-operative Society v. Motherwell & Wishaw Assessor*, *Carlisle Co-operative Society v. Lanarkshire Assessor*, 1932 S.C. 413; Digest Supp.

I (12) *Wood v. London County Council*, [1941] 2 All E.R. 230; [1941] 2 K.B. 232; 110 L.J.K.B. 641; 165 L.T. 131; 105 J.P. 299; 2nd Digest Supp.

(13) *Magor & St. Mellons Rural District Council v. Newport Corpn.*, [1951] 2 All E.R. 839; [1952] A.C. 189; 115 J.P. 613; 3rd Digest Supp.

(14) *Goodrich v. Paisner*, [1956] 2 All E.R. 176; [1957] A.C. 65; 3rd Digest Supp.

Appeal.

Appeal by the London Transport Executive from an order of the Court of

Appeal (LORD EVERSHED, M.R., MORRIS and PEARCE, L.JJ.), dated July 11, 1957, and reported [1957] 3 All E.R. 126, dismissing an appeal by the executive by way of Case Stated from a decision of the Lands Tribunal, given on Feb. 18, 1957 ((1957), 1 R.R.C. 141), dismissing an appeal by the executive against a decision of a local valuation court of Central Middlesex Local Valuation Panel, given on Mar. 11, 1955. The local valuation court had directed that the hereditament known as Aldenham depot, Elstree, owned and occupied by the appellants, should be entered in Part 1 of the valuation list for Harrow Urban District, with a rateable value of £20,300. The appellants appealed on the ground that at all material times since Aug. 10, 1953, the depot had been occupied and used for industrial purposes, the major overhaul and rebuilding of road omnibuses, and ought to be treated as an industrial hereditament in accordance with the Rating and Valuation (Apportionment) Act, 1928. The facts are set out in the opinion of LORD MORTON OF HENRYTON, p. 639, letter G, et seq., post.

Sir Andrew Clark, Q.C., Michael Rowe, Q.C., and D. G. Widdicombe for the appellants.

Maurice Lyell, Q.C., and P. R. E. Browne for the respondent.

The House took time for consideration.

June 25. The following opinions were read.

LORD MORTON OF HENRYTON: My Lords, the question arising on this appeal is whether a hereditament occupied by the appellants and known as "the Aldenham Depot" is an "industrial hereditament" as defined by the Rating and Valuation (Apportionment) Act, 1928, which I shall call "the Act of 1928", and is, accordingly, entitled to the benefit of the "de-rating" provided by s. 68 of the Local Government Act, 1929. The Central Middlesex Local Valuation Court, the Lands Tribunal (Mr. ERSKINE SIMES, Q.C.), and the Court of Appeal have all answered this question in the negative.

The definition of an industrial hereditament is to be found in s. 3 of the Act of 1928, the relevant provisions whereof are as follows:

"(1) In this Act the expression 'industrial hereditament' means a hereditament (not being a freight-transport hereditament) occupied and used . . . subject as hereinafter provided, as a factory or workshop: Provided that the expression industrial hereditament does not include a hereditament occupied and used as a factory or workshop if it is primarily occupied and used for the following purposes or for any combination of such purposes, that is to say—(a) the purposes of a dwelling-house; (b) the purposes of a retail shop; (c) the purposes of distributive wholesale business; (d) purposes of storage; (e) the purposes of a public supply undertaking; (f) any other purposes, whether or not similar to any of the foregoing, which are not those of a factory or workshop.

"(2) For the purposes of this Act— . . . (b) any place used by the occupier for the housing or maintenance of his road vehicles or as stables shall, notwithstanding that it is situate within the close, curtilage or precincts forming a factory or workshop and used in connexion therewith, be deemed not to form part of the factory or workshop, but save as aforesaid, the expressions 'factory' and 'workshop' have respectively the same meanings as in the Factory and Workshop Acts, 1901 to 1920."

By s. 149 (1) of the Factory and Workshop Act, 1901, the expression "factory" has the following meaning assigned to it, so far as material to this appeal:

"Subject to the provisions of this section, the following expressions have in this Act the meanings hereby assigned to them; that is to say:— . . . The expression 'non-textile factory' means— . . . (c) any premises wherein

- A or within the close or curtilage or precincts of which any manual labour is exercised by way of trade or for purposes of gain in or incidental to any of the following purposes, namely—(i) the making of any article or of part of any article; or (ii) the altering, repairing, ornamenting or finishing of any article; or (iii) the adapting for sale of any article, and wherein or within the close or curtilage or precincts of which steam, water or other mechanical power is used in aid of the manufacturing process carried on there.

B “The expression ‘factory’ means textile factory and non-textile factory or either of those descriptions of factories . . .”

The Lands Tribunal Act, 1949, provides, by s. 3 (4):

- C “A decision of the Lands Tribunal shall be final; Provided that any person aggrieved by the decision as being erroneous in point of law may . . . require the tribunal to state and sign a case for the decision of the court . . .”

My Lords, it is not in dispute that the Aldenham depot is a “factory” within the definition contained in s. 149 (1) of the Factory and Workshop Act, 1901, but the tribunal in the present case found that the activities carried on by the appellants at the depot were the maintenance of their road vehicles within the meaning of s. 3 (2) (b) of the Act of 1928 and that, therefore, the depot was not an “industrial hereditament” within the definition in s. 3 (1) of the same Act.

- D The question stated by the tribunal for the decision of the court was “whether on the findings of fact he came to a correct decision in law”, and that question can conveniently be divided into two parts—(i) Did the tribunal fall into any error of law in holding that the activities carried on by the appellants at the depot were the maintenance of their road vehicles? (ii) If the tribunal fell into no such error in so holding, were the tribunal and the Court of Appeal right in holding that, on the true construction of s. 3 of the Act of 1928, the depot is not “an industrial hereditament”?

- E Before considering the first question, it is necessary to set out the facts on which the decision of the tribunal was given. I find it impossible adequately to summarise the very clear findings of fact, and I think it is necessary to quote them at length, in order to give an accurate picture of the appellants’ activities.

“The depot is registered as a factory under the Factory and Workshops Acts.

- G “It was used at the material time for the periodical overhaul of the omnibuses used by the appellants and for the repair of major accidents suffered by such vehicles.

- H “The work of overhaul is divided between the depot and the Chiswick works of the appellants. At the date of the proposal, Mar. 29, 1954, the overhaul work at the depot consisted of the overhaul of the body only, the chassis being merely prepared for dispatch to the Chiswick works for overhaul there, although heavy repairs to the chassis frame were carried out at the depot.

- I “The overhaul of the appellants’ vehicles is done to a programme, each vehicle being completely overhauled every three and a half years, maintenance and repair work (other than in cases of major accidents) in the intervening period being carried out at the local garages of the appellants.

“On arrival at the depot a vehicle is inspected and all parts requiring attention are marked with chalk and entered on a schedule. It is then taken to the body dismount shop where the body is removed from the chassis by an overhead crane. The chassis was then taken to the chassis preparation shop where it was cleaned and made ready for despatch to the Chiswick works for overhaul there. After overhaul it was returned to the depot,

but it was improbable that, on its return, its former body would be replaced on it, since the chassis went into stock and would in due course be drawn out and fixed to the body next in turn for despatch. The body is taken to a piece of machinery called an inverter, which enables it to be turned on its side for washing and for the carrying out of certain underfloor and roof repairs.

"From the inverter the body is taken by crane to the body repair shops. Here it is mounted on stilts which form a jig and hold the body at a convenient height for working between fixed gantries which afford convenient access at different levels. All defective parts are removed and subsequently go to appropriate shops elsewhere for reconditioning (if possible). The parts so removed are replaced by new or reconditioned parts taken by the men engaged on the job from stocks stored in what are known as cafeteria racks running along the side of the shop. The extent of the replacements carried out are, on the average, 1,940 pieces out of a total of 7,500 which constitute the total body; of these 1,940 pieces some 1,740 are reconditioned and subsequently re-used. These numbers exclude nuts, bolts and screws.

"The body having been reintegrated, is then taken by overhead crane to another inverter, where a coating of protective paint is applied to the underside.

"From there it is carried to the mount shop where it is again mounted on a chassis, which has been overhauled at Chiswick and returned to the depot.

"It is then towed to the rectification shop, where it is inspected. It then goes out on a road test and returns to the rectification shop for the correction of any faults shown on the road test.

"From there it is towed to the preparation shop where it is prepared for painting and where certain minor painting, such as the cream line, is put in by hand. Here, in addition to rubbing done, masks or protective coverings are applied to those parts not to be painted the familiar red or green.

"In certain cases where the paint work is very bad, such as cases where small dents have been beaten out in situ, the vehicle may have previously been taken through the special preparation shop where the existing paint is chemically removed.

"After preparation the vehicle goes to the paint shop where it is painted with one coat of colour by electrical sprays hand operated. It is there air dried and the transfers are put on during this drying period. It then receives two coats of varnish and is oven dried after each coat.

"The vehicle then goes to the finishing shop where the reconditioned cushions and upholstery are fitted and any small touchings up and finishings are carried out.

"Finally the vehicle goes to the licensing garage where it is inspected by the transport executive rolling stock engineer and the licensing authorities before it goes back to its own garage. For the purposes of the taxation officers, the bonnet number, the maker's chassis number and the registration number have to agree, and in view of the separation of body and chassis in the early stages of the overhaul and the substitution of a different re-conditioned chassis at a later stage, body and chassis are re-numbered so as to correspond with the licence.

"The whole process of overhaul of a vehicle from the time it enters to the time it leaves the depot occupies about three weeks.

"So far as major accident repairs are concerned, of which during the year ended March, 1954, there were an average of between ten and twenty vehicles a week, the vehicle is first inspected and the necessary body repair

- A work carried out in the accident repair shops and any necessary repainting consequent upon such repairs done in the accident painting shop. Damage to the chassis would also be repaired in the depot in the development shops.
- B “Even if a vehicle incurred a major accident within a short period before it was due for overhaul, it would go first to the accident repair shop for the accident damage to be repaired before it underwent overhaul though in such cases the repainting would be omitted in view of the complete repainting which each overhauled vehicle receives.
- C “All defective parts whether removed from a body in the body repair shops or the accident repair shop are first examined to see if they are capable of reconditioning. If they are so fit they are collected in the pre-repair stores where they are made up into batches and sent to the appropriate shops in the depot where they are reconditioned. After reconditioning metal parts are stove-enamelled and timber parts hand-painted. They are again inspected and then go to the progress body repair stores which together with the main stores, which are used primarily for new material, form the reservoir from which the cafeteria racks are kept stocked.
- D “There are two of the reconditioning shops of which special mention may be made, the trimmers’ shop and the board and blinds shop. In the former the cushions and upholstery are cleaned, repaired and rebuilt, and the leathercloth used for lining the omnibus and linoleum and cork tiles are cut to the necessary size from new material. In certain cases it proves necessary for new moquette to be used as the outer cover for the cushions and squabs (or backs of the seats), and this also is cut out and fitted in this shop. The extent of the reconditioning of the cushions and squabs varies from cleaning and a repaint of the back of the squab to a complete stripping to pieces and reassembling as in the original manufacture.
- E “In the boards and blinds shop, destination blinds are repaired or reconditioned. During 1954 five hundred new blinds were made and three hundred and seventy reconditioned on an average each week.
- F “There was also at the depot a plant shop used for the maintenance and servicing of the plant used on the premises and the manufacture of certain plant and equipment for such use.
- G “In 1955 there had been removed to the depot the reconditioning of chassis which had formerly been carried out at Chiswick. The defective parts were sent to Chiswick for reconditioning and after reconditioning returned to the depot.
- I “Chassis reconditioned at the depot have defective parts replaced from the store to which the reconditioned parts are returned.”
- H It will be observed, my Lords, that, in the boards and blinds shop and in the plant shop, a certain amount of manufacture is carried on, but it was common ground between the parties that this manufacture was on such a small scale, compared with the other work carried on at the depot, that it should be disregarded by the application of the rule *de minimis non curat lex*. Thus, your Lordships can approach the first of the two questions already staged on the footing that either the whole of the depot is used for the maintenance of the appellants’ road vehicles, or no part thereof is so used.

Counsel for the appellants submitted that the word “maintenance” should be given a narrow meaning in s. 3 (2) (b) of the Act of 1928, and referred your Lordships to s. 151 (1) (vi) of the Factories Act, 1937. He did not, of course, submit that this section could be used for the purpose of construing the Act of 1928, but he did submit that the operations of “cleaning, washing, running repairs or minor adjustments” set out in para. (vi) of that sub-section, with the

addition of "oiling and greasing", were the operations covered by the word "maintenance" in s. 3 (2) (b) of the Act of 1928. A

My Lords, I cannot find any context which supports this argument, either in the Act of 1928 as a whole or in s. 3 thereof. Moreover, I can find no support for the argument in any of the cases to which reference was made at the hearing. The word "maintenance" is an English word in ordinary use, having no technical meaning, and its meaning in s. 3 (2) (b) of the Act of 1928 was considered by this House in *Potteries Electric Traction Co., Ltd. v. Bailey (Stoke-on-Trent Revenue Officer)* (1) ([1931] A.C. 151), and by the Lands Valuation Appeal Court in *Scottish Motor Traction Co. v. Edinburgh Assessor* (2) (1931 S.C. 416). In the former case, this House decided that work done on the hereditament then in question (except as to one part thereof used as a paint shop) went beyond user for the maintenance of the vehicles of the Potteries company. It is, however, clear from the speeches of LORD BUCKMASTER and other noble and learned lords that the decision was based on the fact that spare parts were manufactured on a large scale on the premises. LORD BUCKMASTER said (*ibid.*, at p. 163): B

"It is said that these hereditaments are used for maintenance of the road vehicles, and accordingly that they are disentitled to the benefit of the statute. I find myself unable to accept this view having regard to the findings in the Special Case. The fact that spare parts are necessary for repairing omnibuses does not, in my opinion, make the manufacture of the spare parts a maintenance of the omnibus within the meaning of the statute. The processes carried out are distinctly held in the Special Case to be processes that are additional to ordinary maintenance. I think the word maintenance is a word sufficiently well known in this connexion to entitle us to rely upon the special finding of the fact in the Case. The finding that the work done in the manufacture of all the various articles specified, every one of which, as found in the Case, would have to be purchased by the appellants, if not made upon their own premises, shows that in substance the work carried on is the work of the manufacture of a large number of articles incident to the construction and the maintenance of a fleet of omnibuses. But the construction of an article needed to maintain differs in my opinion from what is meant by the word maintenance . . . There is, however, one part of the building that is specially used for a purpose that obviously may be that of maintenance. It is that part which is devoted to the painting of omnibuses. It was urged by the appellants that there was nothing to show how much of this painting was done by way of repair and how much is original work, but in the workshops of an omnibus company owning a fleet of 198 omnibuses there must be constant repainting required, and I think it is safe to assume that this part of the hereditament is devoted to that object and not entitled to the benefit of relief." D E F

The last passage makes it clear that LORD BUCKMASTER regarded the word "maintenance", as used in s. 3 (2) (b) of the Act of 1928, as including work of repair. G

In the *Scottish Motor Traction* case (2), the Lands Valuation Appeal Court (LORDS HUNTER, SANDS and FLEMING) upheld the decision of the Valuation Committee that the use of certain premises for "repairing, overhauling, and reconditioning the chassis and bodies of the appellants' buses" (to quote LORD HUNTER, 1931 S.C. at p. 421 *fin*) was a use for the maintenance of the appellants' road vehicles within the meaning of s. 3 (2) (b). The Appeal Court delayed giving judgment until the *Potteries* case (1) had been decided and reported, and LORD SANDS observed (*ibid.*, at p. 425): H I

- A "The premises are used for three purposes: (i) somewhat extensive offices; (ii) the repair of cars sent for that purpose by outside customers; (iii) 'repairing, overhauling, and reconditioning' the appellants' vehicles. The first is plainly a non-industrial purpose. The second is covered by the provision excluding retail shops from the benefit of the Act. The third is struck at by s. 3 (2) of the Act of 1928 as being 'maintenance' of the company's road vehicles, unless, and so far as, the repairing, overhauling, and reconditioning involve such an amount of renewal as not to be fairly described as maintenance of a vehicle."
- B

And the same learned judge observed (*ibid.*, at p. 426), in regard to other premises:

- C "There is nothing to show that the overhauling and reconditioning goes beyond maintenance . . ."

The relevant facts in the *Scottish Motor Traction* case (2), which has stood for twenty-seven years, strongly resemble the facts in the present case. I note that counsel for the respondent argued successfully (*ibid.*, at p. 420):

- D "It was immaterial that the work was carried out on a very large scale. The important point was that it was repair work, and not manufacture."

I entirely agree with that observation. In my view, the word "maintenance", in s. 3 (2) (b) of the Act of 1928, covers repairing, overhauling and reconditioning of vehicles, so long as the work does not amount to reconstruction, and so long as no manufacture of new parts is carried out on a scale to which the *de minimis* rule cannot be applied. If this view is correct, it may often be difficult to draw the line between "maintenance" and "reconstruction". That is a matter of fact and degree, on which different minds may arrive at different conclusions: see per LORD FLEMING in the *Scottish Motor Traction* case (2) (*ibid.*, at p. 430).

- E In the course of argument reference was made to the decisions in *Hall & Co., Ltd. v. South-East Area of Surrey Assessment Committee* (3) ((1933), 18 R. & I.T. 77), and *Re The Charlton Works* (4) ((1942), 13 D.R.A. 64). I see no reason to doubt the correctness of each of these decisions on the particular facts of the respective cases, but I cannot accept the passage in the judgment of CHARLES, J., in the former case (18 R. & I.T. at p. 79), where he contrasts "maintenance" with "overhaul". In my view, the words "maintenance" and "overhaul" are not mutually exclusive.
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In the present case, the view of the tribunal was expressed as follows (1 R.R.C. at p. 147):

- H "As in all questions of degree it is not easy to say on which side of the line a certain process may be said to fall but after a careful consideration of the evidence in the light of the view which I had of the depot on Sept. 19, I have arrived at the decision that the processes carried out at the depot can properly be described as the maintenance of vehicles. It is, I think, material that at the material dates, no manufacture of new parts other than destination blinds was taking place at the depot. The work done at the depot was work necessary to maintain the vehicles as a fleet in running condition, and the fact that, in order to carry out the work more expeditiously and efficiently, reconditioned parts were substituted in place of reconditioning and replacing the defective parts actually removed cannot in my view change what is in fact a repair into a reconstruction. Nor I think can the fact that, instead of dealing with each dented plate or mud-guard as the damage occurs, such repairs are carried out to a programme, alter the essential character of the work. Looking at each of the individual processes they seem to me to fall clearly within what, if one was dealing with
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a single vehicle, might properly be called maintenance, and I do not think that because they are done collectively to a fleet of vehicles they can be said to lose this character.” A

I cannot find any error of law in the decision of the tribunal on this point and, reading the decision as a whole, I cannot find that the tribunal misconstrued the word “ maintenance ” as it is used in s. 3 (2) (b) of the Act of 1928. I agree with the conclusion of the Court of Appeal, as expressed by the Master of the Rolls (LORD EVERSHERD) ([1957] 3 All E.R. at p. 133): B

“ Taking the matter as a whole, viewing it broadly and in the light of the whole evidence, it seems to me impossible to say that the conclusion which the tribunal reached was not a reasonable conclusion justified by the language of the section.” C

For these reasons, my Lords, I would uphold the decision of the tribunal that the work carried out by the appellants at the depot was maintenance of their road vehicles. What, then, is the effect of s. 3 (2) (b) of the Act of 1928 on the position of the appellants ? As I have already said, it is common ground that no distinction can be drawn between the work carried out on different parts of this hereditament, and that the whole of the hereditament is a “ factory ” within the definition in s. 149 (1) of the Factory and Workshop Act, 1901. It is clear that, if only part of the hereditament had been used for the maintenance of the appellants’ road vehicles, that part would “ be deemed not to form part of the factory or workshop ”, and would thus be excluded from the benefit of de-rating, even if the part so used were as much as nine-tenths of the whole. It is, however, contended by counsel for the appellants that s. 3 (2) (b) has no application to the present case, as not a part but the whole of the “ factory or workshop ” is used for the maintenance of the appellants’ road vehicles; thus the whole of the hereditament is entitled to be de-rated. Such a result may fairly be described as absurd, and I think that the words of s. 3 (2) (b) can properly be applied to a case in which the “ place ” used for either of the purposes mentioned in the sub-section is the whole of the hereditament. I agree with the view expressed as follows by the Master of the Rolls, with the concurrence of MORRIS and PEARCE, L.JJ. ([1957] 3 All E.R. at p. 130): D

“ . . . according to the plain sense of the language, the paragraph is, I think, saying: ‘ any place used for the maintenance of road vehicles notwithstanding that it is—[I paraphrase that as “ even though it be ”]—within the close, the confines, of a factory, still is not to be deemed part of the factory; and if it so happens that the place is the whole, then none of it forms part of the factory and the whole is excluded.’ I do not say the language is wholly happy, but I cannot find such a construction to be subversive of the meaning of the words used. I think that such a reading of the paragraph gives common sense and coherence to the two sub-sections read together.” E

The result is, in my opinion, that the depot is not an industrial hereditament within the definition in s. 3 (1) of the Act of 1928, and this appeal should be dismissed with costs. F

LORD REID: My Lords, the appellants can only succeed if their Aldenham depot is an industrial hereditament within the meaning of s. 3 of the Rating and Valuation (Apportionment) Act, 1928. There is no question of apportionment in this case; either the whole hereditament is industrial or none of it is. To be an industrial hereditament, it must be occupied and used as a factory. Undoubtedly it is a factory within the meaning of the Factory and Workshop Act, 1901, but s. 3 of the Act of 1928 adopts the definition of factory in the Act of 1901 subject to limitations. I do not think that we are concerned with the limitations contained in the provisos to s. 3 (1); proviso (f) is not very easy to I

A interpret, but it does not appear to me to have any application to this case. But the limitation contained in s. 3 (2) (b) is of crucial importance. The paragraph is in these terms:

B “For the purposes of this Act— . . . (b) any place used by the occupier for the housing or maintenance of his road vehicles or as stables shall, notwithstanding that it is situate within the close, curtilage or precincts forming a factory or workshop and used in connexion therewith, be deemed not to form part of the factory or workshop, but save as aforesaid, the expressions ‘factory’ and ‘workshop’ have respectively the same meanings as in the Factory and Workshop Acts, 1901 to 1920.”

C The question in this case is whether the provisions of this paragraph prevent the appellants’ premises from being an industrial hereditament and, therefore, exclude de-rating. The first argument is that the paragraph cannot apply because the work carried on in these premises is not “maintenance” of the appellants’ vehicles. It is said that maintenance in this context does not include repairs but only includes such minor operations as oiling, greasing, inflating tyres, and, perhaps, making adjustments and cleaning. The structure and wording of s. 3 are such that, at first sight at least, this argument is attractive.

The definition of “factory” in the Act of 1901 is such that, if what I may call factory work is done in only part of a hereditament, or of a “close or curtilage or precincts”, it brings within the factory not only those areas where factory work is done but also other areas within the precincts where no factory work is done. Looking to the purposes of the Factories Acts, this is intelligible, but looking to the purpose of the de-rating legislation, it is equally intelligible that areas where no factory work is done should not be de-rated merely because they are within the same precincts as the actual factory. What I have called factory work includes “(ii) the altering, repairing, ornamenting or finishing of any article”, and these terms cannot be read in any narrow sense. If “maintenance” could be read as limited to minor operations which do not amount to altering, repairing or ornamenting vehicles, then s. 3 (2) (b) would be dealing only with places where no factory work is done, and would simply provide that such places, though technically within a factory by reason of the Act of 1901 definition, are not to be part of a factory for the purposes of the Act of 1928. But I cannot accept that argument because, in my judgment, it is not consistent with the decision of this House in *Potteries Electric Traction Co. v. Bailey (Stoke-on-Trent Revenue Officer)* (1) ([1931] A.C. 151). It has long been established practice that any decision of this House in a previous case on a question of law, such as the interpretation of a statute, shall be regarded as binding, and shall be followed, whether or not the question was adequately argued or considered, and however much your Lordships may disagree with the decision. I would not, myself, be against a modification of this strict practice, but, so long as it exists, I do not think that I am entitled to depart from it.

I have had the advantage of reading the speech about to be delivered by my noble and learned friend, LORD KEITH OF AVONHOLM. I agree with his analysis of that case and shall not add to it. But I think that that case leaves open the question whether maintenance in this context is wide enough to cover all kinds of repair, however extensive, or whether it should be limited to some particular kinds of repair. This question appears to me to depend on the proper construction of the word “maintenance” in the context of this paragraph, and that must be a pure question of law. Once it is decided that maintenance includes at least some kinds of repair, I can see no good reason for holding that any particular kind of repair is excluded. It is not suggested that maintenance in this context has any technical meaning. “Maintenance” is an ordinary word of the English language, and, if it includes doing a few repairs at one time and

then a few more at another time, I do not see how the operation could cease to be maintenance if it is found convenient to do a large number of repairs at the same time. Nor do I see any proper distinction between different kinds of repairs, or between repairs which are done with simple equipment and repairs which are more conveniently done in a fully equipped workshop. But reconstruction which goes beyond producing a repaired vehicle and, in effect, produces a different vehicle may be another matter. I do not think, however, that it would be reasonable to hold that the operations in the present case go beyond repair and amount to reconstruction. It is true that, as the bodies of the vehicles dealt with are interchangeable, it is generally found convenient not to replace the same body on the same chassis. That is the only feature in the case which could, to my mind, be said to point to reconstruction, but it would not appear to me to be reasonable to attach crucial importance to this point. I am, therefore, of opinion that the facts found in this case have rightly been held to come within the scope of maintenance.

But that does not end the case. Two arguments were submitted to the effect that, even if these premises were wholly used for maintenance, they should, nevertheless, be de-rated. First it is said that the language used in para. (b) is such that it can only apply where the premises used for "housing or maintenance of his road vehicles . . ." are part of a larger hereditament, the other part being used for other purposes coming within the definition of factory purposes. In the present case, the whole of the hereditament is used for repair, i.e., maintenance of the appellants' vehicles, and it is argued that it is impossible to make the language of the paragraph apply to it. If that were so it would lead to an absurd result; if a part—even ninety-five per cent.—were used for repairing vehicles, the paragraph would apply and that part would not be derated, but if the whole were so used the paragraph would not apply and it would be derated. It is, therefore, necessary to examine the language closely to see whether it is capable of being read in a way which would avoid this absurdity.

On any view, the paragraph is awkwardly drafted. The last part adopts the definition of "factory" in the Act of 1901 "save as aforesaid", and indicates that the earlier part of the paragraph is to be read into the 1901 definition so as to narrow its scope. But the earlier part of the paragraph is drafted in a form hardly appropriate for this purpose. The use of the word "notwithstanding" in the earlier part of the paragraph is important. It must, I think, have been used on the assumption that if the premises used for maintenance, etc., stood by themselves as a separate hereditament, those premises would, undoubtedly, not be entitled to de-rating. To say that certain premises shall not be de-rated (which is the effect of this paragraph read with s. 4) notwithstanding that they are within the precincts of a factory, clearly assumes that they would not be de-rated if they stood by themselves, and, although this may be going to the extreme limit of what is permissible as a matter of construction, I am prepared to hold that this paragraph covers the present case by clear implication. In a situation so confused, I attach little importance to the verbal criticism that the words used are "form part of the factory" instead of "form part of a factory".

The second argument is quite different. Take a case where para. (b) clearly applies, the premises used for maintenance being within the precincts of a factory. Then it is argued that the paragraph does not say that those premises are not to be de-rated; it merely says that they are to be excised from the factory. The premises must, then, be re-examined as a separate entity; if they are not by themselves a factory, they are not de-rated, but, if they are in themselves a factory, then they are entitled to be de-rated. And, if that is so where the premises used for maintenance are within the precincts of a factory, it must equally be so

A if para. (b) is held to apply to the present case. I trust that that is a fair statement of the argument. In my opinion, that argument fails because it fails to take account of s. 4. I shall not elaborate the point because it seems to me to be clear that the effect of s. 4 is not to make a separate hereditament of a part of a factory which, by reason of s. 3 (2) (b), is deemed not to form part of the factory. All that s. 4 does is to provide for the valuation of the whole original hereditament in two parts. The part affected by s. 3 (2) (b) does not get the benefit of de-rating but the rest does, and then the valuation of the two parts are added together to make the valuation of the whole original hereditament. So there is no room for a re-examination of the part affected by s. 3 (2) (b) to see whether or not it would be a factory if it stood by itself.

C For these reasons, I agree that this appeal should be dismissed.

LORD KEITH OF AVONHOLM: My Lords, the operations conducted by the appellants at their Aldenham depot have been described in full by my noble and learned friend on the Woolsack. They may be described broadly as amounting to repair and overhaul of omnibus bodies, including the renovation of seat upholstery and the repainting of the bodies. The work might, indeed, be called major repair and overhaul though that, I think, does not affect the issue. Nor does it, I think, matter that the work covers both repair due to ordinary wear and tear and repair due to major accidents. What is material is that no manufacturing operations are carried on at the depot, apart from the making of a negligible quantity of destination blinds, although reconditioning of defective parts removed from the omnibuses takes place.

E The first point taken for the appellants was that these repair and overhaul operations did not amount to maintenance of road vehicles within the meaning of s. 3 (2) (b) of the Rating and Valuation (Apportionment) Act, 1928. Maintenance, it was said, must be confined to such operations as washing, cleaning, oiling, greasing and day-to-day minor repairs and adjustments. This was referred to as ordinary maintenance, as contrasted with maintenance that might extend to major repairs, overhaul and renovation. Much of this argument was based on language used in *Potteries Electric Traction Co., Ltd. v. Bailey (Stoke-on-Trent Revenue Officer)* (1) ([1931] A.C. 151), in this House. My Lords, there is nothing said in that case which, in my opinion, supports this contention, and there is much in the case which is against it. Apart from work done in a paint shop to which I shall refer in a moment, it is clear that the operations carried out on the premises in that case were, in the main, manufacturing operations of a very extensive kind. It is only necessary to read the statement of facts as given in the report of the case in the Court of Appeal ([1931] 1 K.B. 390) to realise how predominant were the manufacturing operations carried on, and how inextricably mixed with any repairs done on the premises. LORD BUCKMASTER, after explaining that, in substance, the work carried on was the work of the manufacture of a large number of articles incident to the construction and the maintenance of a fleet of omnibuses, says ([1931] A.C. at p. 163):

I “But the construction of an article needed to maintain differs in my opinion from what is meant by the word maintenance and, as already decided, it is the purpose to which the premises are put and not the purpose to which their products are devoted that is the question to be regarded.”

VISCOUNT DUNEDIN said (*ibid.*, at p. 169):

“Maintenance is taken along with housing, and points, I think, to something done to the vehicle on the premises . . . The ultimate fate of the part made is to maintain the vehicle. That does not show that maintenance is done on the hereditament.”

LORD WARRINGTON OF CLYFFE ([1931] A.C., at p. 175) says:

“ With one small exception there is in my opinion nothing in the detailed description of the work which is inconsistent with the general conclusion of the learned recorder ”

which was that the premises were an industrial hereditament. LORD TOMLIN, after referring to the words in s. 3 (2) “ any place used by the occupier for the housing or maintenance of his road vehicles or as stables ”, said (*ibid.*, at p. 180):

“ The manufacture of spare parts for use elsewhere is not in my view within the contemplation of the sub-section. The findings of fact of the learned recorder make it plain in my opinion that the premises (other than the paint shop) are not used for maintenance in the sense which I have indicated.”

LORD THANKERTON concurred in the opinion of LORD BUCKMASTER. All their Lordships agreed, however, that the paint shop was used for the maintenance of vehicles as being devoted to the repair of vehicles, and should be excluded from the industrial column of the valuation list. LORD DUNEDIN said (*ibid.*, at p. 169), “ it seems pretty clear that the painting shop is used for the purpose of real maintenance.” LORD WARRINGTON said (*ibid.*, at p. 175):

“ In his [the recorder's] description of the paint shop he says it is used amongst other things for painting omnibuses, lorries and cars. This is, I think, a matter of ordinary maintenance and the paint shop should therefore have been excluded from the factory.”

This would not have been so, of course, if the paint shop had been devoted wholly to the painting of omnibus bodies made on the premises. The painting would then have been incidental to, and part and parcel of, a manufacturing operation. The finding, however, in the Case was (*ibid.*, at p. 155):

“ The paint shop was used for painting omnibuses, lorries and cars and all new woodwork produced in the body-building and wood-working shop.”

From the opinions of LORD BUCKMASTER and LORD WARRINGTON, the House appears to have proceeded on the view that the paint shop was primarily used for the repainting of the fleet of omnibuses and other vehicles.

My Lords, I have devoted some time to the view taken of the facts of that case, but it is important to notice the issue which was before the House. It was whether it was relevant to consider the purpose for which the various parts were being made. It was the case for the revenue officer that the articles were being made for the repair of the omnibuses, and that this was, therefore, maintenance. The judgment of the House was that it was what was actually done on the premises that was relevant, and that the ultimate purpose or destination of the articles made on the premises was immaterial. This is seen in the passages I have already quoted, and is summed up in one sentence from the speech of LORD BUCKMASTER (*ibid.*, at p. 163):

“ But the construction of an article needed to maintain differs in my opinion from what is meant by the word maintenance and, as already decided, it is the purpose to which the premises are put and not the purpose to which their products are devoted that is the question to be regarded.”

My Lords, if repairs, whether major or minor, were not maintenance, it was idle to raise or to decide this issue. Making articles for repair purposes could never be maintenance if making repairs was not itself maintenance. In my opinion, there underlies all the speeches of their Lordships in that case an acceptance of

- A the view that repairing of vehicles was maintenance. And that view, I think, became a matter of decision in their treatment of the paint shop in that case. The repainting of car and omnibus bodies cannot be treated as a matter of day-to-day maintenance. And, if not, I see no ground for excluding any other type of repair which does not result in reconstruction, or the production of a new article. This was the view also of the Lands Valuation Appeal Court in Scotland in
- B *Scottish Motor Traction Co. v. Edinburgh Assessor* (2) (1931 S.C. 416), given after consideration of the decision of the House of Lords in the *Potteries Electric Traction Co.'s* case (1). Two of the premises in that case were used partly for the repair, overhaul and reconditioning of the bodies of buses belonging to the occupiers of the premises and partly for similar work on motor vehicles of outsiders. So far as work was done for customers, that was held to be work in the
- C nature of the business of a retail shop under s. 3 (1) of the Act, and, in so far as it was work on the occupier's own vehicles, to be maintenance of his vehicles under s. 3 (2). In my opinion, that case was rightly decided.

- It was submitted that what was maintenance in the sense of the Act was a question of law and not a question of fact. That may be so, but, once it is decided
- D that maintenance includes repair in the wide sense I have indicated, the question of law has been largely, if not entirely, settled, and the only question left is whether what was done is repair or amounts to something more, namely the remaking of a new article. That may, in certain cases where the facts are equivocal as between repair and reconstruction, raise questions of fact and degree which are essentially within the province of the fact finding tribunal to determine, as
- E has been observed by the learned Master of the Rolls (LORD EVERSHED) in this case and also by LORD FLEMING in the *Scottish Motor Traction Co.* case (2) (1931 S.C. at p. 430). This would seem to have been the position in *Hall & Co., Ltd. v. South-East Area of Surrey Assessment Committee* (3) ((1933), 18 R. & I.T. 77), to which we were referred. Certain operations described there as overhaul of road vehicles were held by the assessment committee not to be maintenance. On the
- F other hand, the committee held that repair of vehicles which consisted in remedying all kinds of specific defects was maintenance. It was only the question of the overhauling operations on which appeal was taken to the Divisional Court and, the court treating the matter as one of fact and degree, refused to disturb the determination of the committee. There is no magic in the word "overhaul".
- G The question is what is nature of the operations. I agree with the learned Master of the Rolls* that there is no ground on which it can be said that the Lands Tribunal here was not entitled to find that the overhauling done here was maintenance.

I turn now to the other point in the case. In s. 3 (1) of the Act "industrial hereditament" is defined as

- H "a hereditament (not being a freight-transport hereditament) occupied and used . . . subject as hereinafter provided, as a factory or workshop . . ."

There is nothing, in my opinion, in the proviso to that sub-section which excludes the appellants' depot from being an industrial hereditament. But, passing to sub-s. (2) (b) of s. 3, we find that any place used by the occupier for, inter alia, the

- I maintenance of his road vehicles, shall,

"notwithstanding that it is situate within the close, curtilage or precincts forming a factory . . . and used in connexion therewith, be deemed not to form part of the factory . . . but save as aforesaid, the expressions 'factory' . . . have . . . the same meanings as in the Factory and Workshop Acts, 1901 to 1920."

* See [1957] 3 All E.R. at p. 133.

It is said that if a hundred per cent. of a place used by the occupier as a factory is used for the maintenance of his road vehicles, this paragraph does not apply. We must find that the place used for the maintenance of road vehicles is part of a larger unit. My Lords, if ninety per cent. of a factory is to be deemed not to be part of a factory because it is used for the maintenance of the road vehicles of the occupier, I have difficulty in seeing that a place used to the extent of a hundred per cent. for the maintenance of the occupier's vehicles is a factory within the meaning of the paragraph. The matter may be put in another way. If I ask what part of this factory is used for the maintenance of the road vehicles of the occupier, and the answer is a hundred per cent., then that part is to be deemed not to form part of the factory. To answer that a hundred per cent. is not part of a whole reduces the situation, as the learned Master of the Rolls has indicated, to an absurdity. Whatever part is used for the maintenance of the occupier's vehicles is to be deemed not to form part of his factory. That fixes the meaning or extent of the factory in any particular case and, if the whole is so used, then none of it is to be deemed to be a factory. The point is a new one, and did not arise in the *Scottish Motor Traction Co.* case (2), because there, part of the premises was used for the repair of the vehicles of outsiders. So part was disqualified for de-rating as being business of the nature of a retail shop and part as used for maintenance of the occupier's own vehicles. It should be noted, however, that, in the *Potteries Electric Traction Co.'s* case (1), the whole of the premises would have been excluded from de-rating under s. 3 (2) (b) on the respondent's argument in that case. This would have provided a very short answer on the appeal if the contention of the appellants in the present case were sound. Though the point is novel and the circumstances that give rise to it perhaps unusual, the contentions of the appellants must, I think, for the reasons I have given, fail. If the whole is to be excised as being deemed not to form part of the appellants' factory that, in my opinion, is the end of the case.

I would dismiss the appeal.

LORD SOMERVELL OF HARROW: My Lords, I have had the advantage of reading the opinion just delivered by my noble and learned friend on the Woolsack. I have nothing that I wish to add on the question whether there was an error of law in the tribunal's finding as to maintenance. I would wish to add a few words on the construction of s. 3 (2) (b) of the Rating and Valuation (Apportionment) Act, 1928. The appellants are right in their submission that the wording is related to the case where the place used for the housing or maintenance of vehicles is situated within a factory. The word "notwithstanding" is, however, I think the key to the solution of the problem. It means that a place used solely for the housing and maintenance of vehicles is a fortiori not a factory or workshop within s. 3 (1). If this had not been the intended implication of the provision the wording would have been different. It would have run:

"any place used by the occupier for the housing or maintenance of his road vehicles situate within the close, curtilage or precincts forming a factory or workshop and used in connexion therewith, shall be deemed not to form, etc."

I agree that the appeal should be dismissed.

LORD DENNING: My Lords, no one can doubt that this large depot of the appellants is a "factory". It is fully equipped with overhead cranes and machinery of all kinds. Many buses come in for overhaul and reconditioning. Every bus is taken to pieces—every part examined, repaired, reconditioned or renewed—and the parts from many different buses are reassembled to form other

- A buses. No bus that comes out of the depot can be identified with one that went in. It is surprising to find that a depot which is so obviously a "factory" should not be regarded as an "industrial hereditament"; and I must say that I view with some suspicion an interpretation of the statute which leads to such a result. The crucial section on which it depends is s. 3 (2) (b) of the Rating and Valuation (Apportionment) Act, 1928; but, as this refers back to the Factory and Workshop Act, 1901, it is necessary to consider that Act as well. The Factories Act, 1937, does not affect the question: see s. 159 (3) of that Act.
- B

The best way, I think, of understanding these statutes is to take an instance which the legislature clearly had in mind, just as I said in *Escoigne Properties, Ltd. v. Inland Revenue Comrs.* (5) ([1958] 1 All E.R. 406 at p. 414). The most useful instance for present purposes is to take a manufacturing company which

- C has a large main factory equipped with machinery at which it makes articles. It sends them out to its wholesale customers by its own delivery vans. It houses its vans on the premises, and has a maintenance shop in which it does ordinary maintenance so as to keep them in running order. It has a canteen for the workers in the factory; and offices and a restaurant for the executive staff. It happens to have a small workshop in the grounds, too, where it makes different things un-
- D connected with the main factory. The whole of the company's business is carried on in one large area enclosed by a ring fence.

In such a typical case the effect of the Factory and Workshop Act, 1901, is this:

- (i) The factory building itself is, of course, a factory; and, in addition, every other building and place within the ring fence is, prima facie, to be regarded as part of "the factory" because it is "within the close or curtilage or precincts" of it: see s. 149 (1) (c) and *Street v. British Electricity Authority* (6) ([1952] 1 All E.R. 679 at p. 682). The garage for housing the motor vans is, therefore, to be regarded as part of "the factory". So is a coach-house for horse-drawn vans. And stables for the horses. The maintenance shop (in which the vans are washed, cleaned and oiled, brakes adjusted, and so forth) is likewise to be regarded as part of "the factory". So, also, is the canteen for the workers who operate the machinery in the factory: see *London Co-operative Society, Ltd. v. Southern Essex Assessment Committee* (7) ([1941] 3 All E.R. 252). But none of these—the garage, coach-house, stables, maintenance shop, or canteen—would be regarded as factories in themselves. It is only because each is part of a larger factory area
- F that each becomes part of "the factory".
- G

- (ii) The offices and restaurant for the executive staff stand, however, on a different footing. Notwithstanding that they are "within the close, curtilage or precincts", they are not to be deemed part of "the factory". The reason is because they are solely used for some purpose other than the manufacturing process, and are taken out of "the factory" by the first part of s. 149 (4): see *Thomas v. British Thomson-Houston Co., Ltd.* (8) ([1953] 1 All E.R. 29). And, of course, considered separately, they are not a factory.
- H

- (iii) The small workshop where the company makes different things is deemed not to be part of "the factory", but it is to "be deemed a separate factory" under the second part of s. 149 (4): see *Thorogood v. Van Den Berghs & Jurgens, Ltd.* (9) ([1951] 1 All E.R. 682 at p. 686).
- I

In such a typical case, the effect of the de-rating provisions of the Rating and Valuation (Apportionment) Act, 1928, is this:

- (i) The whole of the enclosed area within the ring fence is to be treated for rating purposes as a single hereditament: see *Gilbert v. S. Hickinbottom & Sons, Ltd.* (10) ([1956] 2 All E.R. 101 at p. 103).

(ii) The whole of the hereditament is prima facie to be regarded as an "industrial hereditament" within s. 3 (1) of the Act of 1928. The reason is because,

when you look at it as a whole—as you must—you find it is primarily occupied and used for factory purposes and not for any of the purposes in provisos (a) to (f): see *Dalziel Co-operative Society v. Motherwell & Wishaw Assessor* (11) (1932 S.C. 413 at p. 419). A

(iii) But in preparing the valuation list, an apportionment must be made of the annual value of the hereditament so as to apportion it between the use for industrial purposes and the use for other purposes: see s. 4 (1). B

(iv) In making the apportionment, the main factory building itself is to be classed as “industrial”. So must every other building and place within the enclosed area unless it is, by statute, taken out of the category of a factory: see s. 4 (2) (a). The canteen for the workers is, therefore, to be classed as “industrial”. But the offices and restaurant for the executive staff are to be classed as “non-industrial”, because they are taken out of “the factory” by the Factory and Workshop Act, 1901. And the garage and maintenance shop are to be classed as “non-industrial”, because they are taken out of “the factory” by the Act of 1928. But the small workshop is to be classed as “industrial” because it is deemed to be a separate factory under the Act of 1901. C

That is how the Acts operate in a typical case. The important thing to notice is that there is one whole enclosed factory area—a single hereditament—which is bound to be classed as an “industrial hereditament”, except in so far as, by statute, parts of it are to be excluded. We are here concerned with the excluding sections, and, in particular, with s. 149 (4) of the Factory and Workshop Act, 1901, and s. 3 (2) (b) of the Rating and Valuation (Apportionment) Act, 1928. A perusal of these sections shows, to my mind, quite clearly that they are both dealing with *parts* of a larger whole hereditament, and not with a whole hereditament itself. The wording of both sections is precise and definite on the point. I will set them next to one another to show how close to one another they are and italicise the material words: Section 149 (4) of the Act of 1901 says that D

“Where a place situate within the close, curtilage or precincts forming a factory or workshop is solely used for some purpose other than the manufacturing process or handicraft carried on in the factory or workshop, that place shall not be deemed to form part of the factory or workshop for the purposes of this Act, but shall, if otherwise it would be a factory or workshop, be deemed to be a separate factory or workshop . . .” E

Section 3 (2) of the Act of 1928 says that F

“For the purposes of this Act— . . . (b) any place used by the occupier for the housing or maintenance of his road vehicles or as stables shall, notwithstanding that it is situate within the close, curtilage or precincts forming a factory or workshop and used in connexion therewith, be deemed not to form part of the factory or workshop . . .” G

No one reading those two sections can doubt what Parliament intended. In s. 149 (4), it envisaged a place within a factory—such as the *offices* in my illustration—and enacted that, notwithstanding that those offices were within the larger whole factory area, nevertheless they were to be excluded from “the factory”. In s. 3 (2) (b) it envisaged a place within a factory—such as *the garage and maintenance shop* in my illustration—and enacted that, notwithstanding that they were within the larger whole factory area and, indeed, part of “the factory” for Factory Act purposes, nevertheless they were to be excluded from “the factory” for Rating Act purposes. H

I see no possible justification in either section for supposing that Parliament intended to deal with a single hereditament which was not part of a larger whole. I

- A It certainly did not do so in s. 149 (4). And likewise, in s. 3 (2) (b), which contains identical wording on the point. Section 3 (2) (b) cannot be made to apply to a single hereditament except by rewriting it—and filling in a supposed gap—so as to make it say that the place in question “shall be deemed not (here insert *to be nor*) to form part of (here strike out ‘the’ and put *a*) factory or workshop”. No such drastic filling in of a gap—or alteration of words—is permissible to any court unless there is no other way of making sense of it. The Master of the Rolls (LORD EVERSHERD) saw the difficulty in making this rewriting, but thought that it was the only way in which absurdity could be avoided. But I would suggest that there is nothing unreasonable or absurd about the section—provided always that you construe the word “maintenance” properly. The difficulty has arisen solely because the word “maintenance” has not been properly construed.

C Let me say, then, how the word “maintenance” should, in my opinion, be construed. Its meaning can be gleaned from its context. It is used in company with two associated words “housing” and “stables”; and it is to be known by its associates. *Noscitur a sociis*. The one thing in common about “housing” and “stables” is that neither of them are “factories” by themselves in any sense of the word. Each only becomes part of a “factory” by coming within an enclosed factory area. Likewise, it seems to me that a place for “maintenance” of vehicles, in s. 3 (2) (b), denotes a place which is not by itself a “factory”, but only becomes part of a factory by coming within an enclosed factory area—such as the maintenance shop in my illustration.

E “Maintenance” in this section means, I think, *ordinary maintenance*. It means washing, cleaning, oiling, minor adjustments and running repairs. A garage where minor repairs of that kind are done is not, on that account, to be reckoned as a “factory” with all that that entails. Just as a kitchen of a restaurant is not to be regarded as a “factory” simply because articles are altered, ornamented or finished in it: see *Wood v. London County Council* (12) ([1941]

F 2 All E.R. 230); so, also, a garage is not to be regarded as a factory because ordinary maintenance is done there: see *Potteries Electric Traction Co., Ltd. v. Bailey* (*Stoke-on-Trent Revenue Officer*) (1) ([1931] A.C. 151 at pp. 173, 175, per LORD WARRINGTON). Such is clearly the position since 1937 (see s. 151 (1) (vi) of the Act of 1937), and I see no reason to doubt that it was the same under the Act of 1901. In this respect, the Act of 1937 only declares and clarifies the law.

G It does not alter it. When “maintenance” is so construed, there is nothing unreasonable or absurd in the Act. Every garage which does the *ordinary maintenance* of road vehicles (as I have described it) must bear the full rates. It is on an equal footing with every other such garage. No such garage is entitled to be de-rated, no matter whether it is occupied and used by a carrier or haulage contractor (who has no factory) or by a manufacturer (who has a factory), and no matter whether it is a single hereditament or part of a larger whole. The reason is because, when occupied and used as a single hereditament, it is not a “factory” within the Factory Act; and, when it is part of a larger factory area, it is taken out of “the factory” by s. 3 (2) (b) of the Act of 1928. That, indeed, is the very object of s. 3 (2) (b). It is to see that a manufacturer (who has a factory) is not in a better position—so far as the rating of his garage is concerned—than a carrier or haulage contractor (who has no factory). If it were not for s. 3 (2) (b), the manufacturer who garages his fleet of lorries in his own works would be entitled to have his garage de-rated—which would be very unfair to the carriers and hauliers who have similar garages liable to full rates.

So much for garages. But repair shops—where major repairs are done—stand on a different footing. These are “factories” within the Factory Act. I am quite sure that Parliament did not mean to put a carrier or haulier—who has his own

repair shop—in a worse position than a repairing contractor with a like shop. As I read this Act, every workshop which does major repairs to road vehicles (including overhauling and reconditioning) as distinct from ordinary maintenance—is entitled to be de-rated. (I am speaking, of course, only of workshops proper—not of those which are primarily occupied for the purposes of a “retail shop”.) Every such workshop is entitled to be de-rated, no matter whether it is occupied and used by a carrier or haulage contractor for the repair of his own vehicles, or by one company for the repair of another company’s vehicles, and no matter whether it is a single hereditament or part of a larger whole. If it is a single hereditament, it is a “factory” in itself. If it is part of a larger factory area, it is, again, to be reckoned as a “factory”, either as being “part” of the larger factory, or as being “deemed to be a separate factory” within the second part of s. 149 (4): see *Thorogood v. Van Den Berghs & Jurgens, Ltd.* (9). This explains the use of the words “neither to be nor to form part of a factory” in s. 4 (2) (a) of the Act of 1928. If the words “neither to be” were omitted, every workshop within a larger factory area—of such a character that it is deemed not to form part of the factory but to be a separate factory in itself—would rank as non-industrial, which would be absurd. It is significant that the words “neither to be” are inserted in s. 4 (2) (a)—and also the word “a” is used instead of “the”—whereas there is nothing of the kind in s. 3 (2) (b). This affords strong support for the construction I have put on s. 3 (2) (b), namely, that it applies only to a part of a larger whole. It is also worth noticing that the Act itself, in s. 5 (2), uses “maintenance” as different from “repair”.

Thus the whole Act fits together as a consistent whole when “maintenance” is construed as I have suggested. But, if it is treated as having so wide a meaning as to include overhauling and reconditioning and major repairs (as it was treated by the Railway and Canal Commission in *Re The Charlton Works* (4) ((1942), 13 D.R.A. 64), and by the Lands Valuation Court in *Scottish Motor Traction Co. v. Edinburgh Assessor* (2) (1931 S.C. 416)), you find yourself in these difficulties—

- (i) If you take s. 3 (2) (b) in its natural meaning you are forced into the absurdity (which the Master of the Rolls pointed out) of saying that, if a workshop doing major repairs is a single hereditament, it will be de-rated, but if it is ninety per cent. of a larger factory hereditament, it will not be de-rated. The only way of avoiding this absurdity is to write words into s. 3 (2) (b) for which there is no justification.
- (ii) Even if you rewrite s. 3 (2) (b) in that way, you are still forced into the equal absurdity of saying that, if a workshop is used by the occupier for doing major repairs to his own vehicles, it will not be de-rated; but if it is used by him for doing major repairs to someone else’s vehicles, it will be de-rated. That cannot have been intended by Parliament. It means that a haulage contractor can always get his premises de-rated by forming one company to own the vehicles and another company to occupy the workshop. De-rating should depend on the use to which the premises are put, not on the ownership of the vehicles.
- (iii) In any case, you give so much elasticity to the word “maintenance” that you open the door to inequality of treatment as between similar premises up and down the country. No one can be satisfied with a system of adjudication which results in the de-rating of the workshops in *Hall & Co., Ltd. v. South-East Area of Surrey Assessment Committee* (3) ((1933), 18 R. & I.T. 77): and in the full rating of the workshops in the *Charlton* case (4), when, in truth, no sensible distinction can be drawn on the facts.

In the result, I am clearly of opinion that the right construction of s. 3 (2) (b) is that which I have stated. But it is said that there is a decision of this House which prevents your Lordships adopting this construction, namely, the decision about the paint shop in *Potteries Electric Traction Co., Ltd. v. Bailey (Stoke-on-Trent Revenue Officer)* (1) ([1931] A.C. 151). That is, to my mind, a decision on the

- A particular facts of the paint shop and nothing else. The decision may be binding on your Lordships if there is another such paint shop anywhere, but it is not, in my opinion, binding for anything else. If your Lordships were to elevate that particular precedent into a binding decision on the meaning of "maintenance" you would, I believe, carry the doctrine of precedent farther than it has ever been carried before. Just take the steps in the reasoning. It goes like this: The word "maintenance" included painting in the paint shop. That shows that it goes beyond ordinary maintenance (as I have described it) and includes repairs. Hence it is wide enough to include overhauling and reconditioning—and even reassembling into different vehicles. But when it is pointed out that, if that meaning is adopted, it will lead to an absurdity in the statute—that it leaves a gap which Parliament cannot have intended—then it is said you must fill in the gap by writing into the statute words which are not there and by altering other words. At that point in the argument you come face to face, not with a particular precedent on this Act, but with a fundamental principle on all Acts, which is this—the judges have no right to fill in gaps which they suppose to exist in an Act of Parliament, but must leave it to Parliament itself to do so: see *Magor & St. Mellons Rural District Council v. Newport Corpn.* (13) ([1951] 2 All E.R. 839) No court is entitled to substitute its words for the words of the Act: see *Goodrich v. Paisner* (14) ([1956] 2 All E.R. 176 at p. 185, per LORD REID).

- It seems to me that when a particular precedent—even of your Lordships' House—comes into conflict with a fundamental principle—also of your Lordships' House, then the fundamental principle must prevail. This must at least be true when, on the one hand, the particular precedent leads to absurdity or injustice and, on the other hand, the fundamental principle leads to consistency and fairness. It would, I think, be a great mistake to cling too closely to particular precedent at the expense of fundamental principle. Here every principle of construction requires this House to limit the word "maintenance" to ordinary maintenance and not to extend it to the vast repairs and reconditioning and reassembling done in this depot. It is to my mind clearly an industrial hereditament entitled to be de-rated.

I would, therefore, allow this appeal.

Appeal dismissed.

Solicitors: *M. H. B. Gilmour* (for the appellants); *Solicitor of Inland Revenue* (for the respondent).

[Reported by G. A. KIDNER, ESQ., Barrister-at-Law.]

Re C. (an infant).

[CHANCERY DIVISION (Harman, J.), June 10, 1958.]

Constitutional Law—Diplomatic privilege—Immunity from legal process—Employee of foreign embassy—Extension to member of his family—Application to make infant son ward of court—Law Reform (Miscellaneous Provisions) Act, 1949 (12, 13 & 14 Geo. 6 c. 100), s. 9.

A boy, now aged fifteen, was born in Greece of Greek parents. His mother died when he was four years old. In 1951 his father married an English-woman and from 1952 (except for one year which he spent in Greece) the boy was brought up by her in England. In 1956 the father and the step-mother separated. At the same time the father obtained employment with the Greek embassy in London. He wished to send the boy back to Greece to continue his education there. The stepmother took out an originating summons pursuant to the Law Reform (Miscellaneous Provisions) Act, 1949, s. 9, joining the father as respondent, in order to make the boy a ward of court and to obtain directions for his education. The father claimed diplomatic immunity for himself and his son and asked that all proceedings should be stayed.

Held: as the father had not surrendered his parental rights the boy was to be considered a member of his family and a person to whom diplomatic immunity should be extended, and, therefore, the proceedings must be set aside.

Dictum of LORD PHILLIMORE in *Engelke v. Musmann* ([1928] A.C. at p. 450) applied.

[As to freedom from legal process of an ambassador and his servants, see 7 HALSBURY'S LAWS (3rd Edn.) 269, 270, 272, paras. 574, 577; and for cases on the subject, see 11 DIGEST (Repl.) 628-630, 631-633, 512-526, 537-576.]

For the Law Reform (Miscellaneous Provisions) Act, 1949, s. 9, see 28 HALSBURY'S STATUTES (2nd Edn.) 777.

For the Diplomatic Privileges Act, 1708, s. 3, see 4 HALSBURY'S STATUTES (2nd Edn.) 591.]

Case referred to:

- (1) *Engelke v. Musmann*, [1928] A.C. 433; 97 L.J.K.B. 789; 139 L.T. 586; 11 Digest (Repl.) 631, 543.

Procedure Summons.

This summons was taken out by the respondent, the father of an infant, to set aside the proceedings commenced by his wife, the stepmother of the infant, to make the child a ward of the court on the ground that the respondent and the infant were entitled to diplomatic immunity.

D. A. Thomas for the stepmother.

J. V. Nesbitt for the father.

HARMAN, J.: The stepmother of an infant started proceedings by originating summons under the statutory jurisdiction contained in the Law Reform (Miscellaneous Provisions) Act, 1949, s. 9, to make the infant a ward of the court. The effect of the issue of the summons was to bring that about. The respondent to the summons, the father, is employed at the Greek embassy, and, having entered a conditional appearance, he applied to have proceedings stayed on the ground that he was entitled to diplomatic immunity. No doubt he is entitled to diplomatic immunity, and, therefore, if that were all, I could not

- A continue him as a respondent to the summons. It would, however, be an easy matter to add the infant as a respondent to the summons, as the court has a right to do, and allow the proceedings to be carried on in that way. The question is whether I ought to take that course or whether the immunity which the father has claimed for himself extends to the infant, his son; that turns, in the end, on a question of fact. The father and mother of this boy were Greeks. The boy
- B was born in Greece in 1943; his mother was killed in a motor accident in 1947. Before the mother was killed, the father came to England to study at the London School of Economics and was here from 1945 to 1950. From 1950 to 1955 he worked in Greece. While he was in this country he met an English girl, the applicant, and the father was married to her in 1951, after his return to Greece. The stepmother took charge of the boy shortly after her marriage, a natural
- C thing to do. In 1952, without demur on the father's part, she came to England with the child and installed him at her parents' farmhouse in the country. In 1953 the boy was sent back to Greece for a year to begin his schooling there, but apparently neither the father nor the stepmother thought it satisfactory. The boy came back to England in 1954 and was sent to a boarding school, by arrangement between the two of them. The father came to England in
- D 1955, and in 1956 he obtained employment with the Greek embassy; at the same time he was separated from his wife. In 1957 the stepmother sent the boy to another boarding school in England where he still is, and during the last two years he has spent his holidays with her parents. The father has had nowhere to accommodate the boy and, up to the issue of the summons, there was only
- E one week or so when he was under a roof provided by his father, and that was in the present year. Up to 1956 one gathers that the father was impecunious and did not maintain the boy or educate him. Since that time he has done so, but he owes money to the stepmother which she or her parents laid out on behalf of the boy.

- The father is now minded to send the boy back to Greece to continue his
- F education there. The stepmother is very unwilling for him to do that as she does not want the boy's education to be interrupted. She therefore wants to make him a ward of court and asks for directions as to his education. This is not an uncommon state of affairs, excepting only the question of diplomatic immunity. This court is quite used to dealing with foreign infants, and has jurisdiction over them while they are in this country, whatever their nationality, and it can and
- G will deal with questions regarding their education. The question, however, raised here—and I think that it has never been raised before—is whether, first of all, the father is entitled, under the shield of diplomatic immunity, to reject the paternal jurisdiction of the Crown, exercised through the Court of Chancery. In my judgment, the answer to that question must be "Yes". I do not see
- H why judicial jurisdiction is, so to speak, immune from diplomatic immunity.

The second question is whether the father's immunity extends to his son.

By the Diplomatic Privileges Act, 1708, s. 3, the immunity or protection is thrown round

- "any ambassador or other public minister of any foreign prince or state
- I authorized and received as such by Her Majesty her heirs or successors or the domestic or domestic servant of any such ambassador or other public minister . . ."

Nothing express is said there about the family of the ambassador but I cannot doubt that the immunity extends to the family; LORD PHILLIMORE made a speech in the House of Lords to that effect in *Engelke v. Musmann* (1) ([1928] A.C. 433). After speaking of the ambassador's personal immunity, which he cannot waive, he says (*ibid.*, at p. 450):

"The ambassador further requires, in order that he may effectually do his Sovereign's business, that there should be a like immunity for his personal family, that is to say, his wife and his children if living with him, his diplomatic family, as it is sometimes called, that is to say, his counsellors, secretaries and clerks, whom I take to be intended by the word 'domestic' in the statute of Anne, and his ordinary servants, described in the statute as 'domestic servants' . . ."

LORD PHILLIMORE was of the opinion that "family" was used in the sense of what he called "personal family", i.e., wife and children living with the ambassador. I cannot doubt either that this immunity of the "personal family" extends to the "personal family" of the staff of the ambassador, and by "staff" I mean those included in the list which the Foreign Office accepts and for which there is a certificate in the present case. In 7 HALSBURY'S LAWS OF ENGLAND (3rd Edn.) at p. 272 it is said: "The immunities of a diplomatic agent are extended to his family living with him"—that is because it is considered that the ambassador or his staff ought not to be harassed so as to disturb them in the important duties which they have to perform.

Counsel for the father has drawn my attention to two recent statutes which deal, not with the staff of ambassadors, but with the staff of High Commissioners. The first is the Diplomatic Immunities (Commonwealth Countries and Republic of Ireland) Act, 1952. In that Act immunity from suit and legal process extends to what are called, in s. 1 (1) (c)

"members of the family of a chief representative or of a member of the official staff of a chief representative entitled to immunity . . ."

That, says counsel, shows the view that the legislature took in 1952 of the extent of diplomatic immunity in these days. Similarly, in 1955, the Diplomatic Immunities Restriction Act, 1955, was passed which empowers Her Majesty to restrict the immunities of foreign diplomats in this country, in accordance with the constraint put on the immunities of our diplomats in foreign countries. It provides in s. 1 (1):

"If it appears to Her Majesty that the personal immunities conferred by law on the envoys of foreign sovereign Powers accredited to Her Majesty, their families and servants, and members of the official staff of such envoys and their families . . ."

I ought to conclude that if this boy be regarded as a member of the family of his father, in the sense in which that word is used in LORD PHILLIMORE's speech and the statutes above cited, he is also entitled to the immunity which the law throws over diplomatic representatives. Of course the boy is a member of his father's family in one sense, but not, I think, for this purpose, unless he is ordinarily resident with or under his father's control. The father has to a large extent handed over control of the boy to the stepmother. The question is whether he has so far surrendered his parental rights as not to be able to claim that the boy is for the purpose a member of his family. Looking at it generally, I do not think that I can come to the conclusion that he has so surrendered his parental rights. It is true that the boy has not stayed with his father much, no doubt because he has stayed mostly in the country. However, the father has not surrendered his control over the boy's education. He has always had a say regarding the school to which the boy should go, and now he says that he has changed his mind, and would like the boy to be educated in Greece. This is not unreasonable as the boy has Greek parents on both sides. His stepmother is an Englishwoman and would

A rather have him educated here, but that will not weigh very heavily unless the father has abandoned his rights, which I do not think that he has.

I have come to the conclusion that the boy is a member of the family of the father and is a person to whom diplomatic immunity should be extended, just as it is to the father. He is, therefore, not a person whom I should add as a respondent to the summons. I therefore propose to set the proceedings aside.

B *Order accordingly.*

Solicitors: *J. D. Langton & Passmore* (for the stepmother); *Rutland & Crawford* (for the father).

[*Reported by F. GUTTMAN, Esq., Barrister-at-Law.*]

C

FERRANTI (OWNERS) *v.* AMERICAN JURIST (OWNERS)
& CLAYCARRIER (OWNERS).

D AMERICAN JURIST (OWNERS) *v.* FERRANTI (OWNERS)
& CLAYCARRIER (OWNERS).

THE AMERICAN JURIST AND THE CLAYCARRIER.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Willmer, J., in chambers),
E June 13, 1958.]

Court of Appeal—Time for appeal—Admiralty action—Time for service of notice of appeal—From what date calculated—R.S.C., Ord. 58, r. 4 (1).

The time within which notice of appeal must be served in an Admiralty action is, for the purpose of R.S.C., Ord. 58, r. 4 (1), to be calculated from
F the date when the decree is settled, not sealed, in the Admiralty Registry.

[**Editorial Note.** The normal practice is that the decree, after it has been settled by the Admiralty Marshal, is collected by the solicitor concerned, stamped and then returned to the Admiralty Registry to be sealed. Thus the settling and the sealing of the decree usually occur at different dates. The statement in
G the notes to R.S.C., Ord. 58, r. 4, in the ANNUAL PRACTICE (1958 Edn. at p. 1667), as to the perfecting of an Admiralty decree, for which *The Orient* ((1869), 3 Mar. L.C. 321) is cited as authority, should be viewed in the light of the present decision.]

As to the time for appealing from the Admiralty Division, see 1 HALSBURY'S LAWS (3rd Edn.) 116, para. 269, note (h); and for a case on the subject, see
H 1 DIGEST 235, 1613.]

Summons.

This was a summons by the owners of the *American Jurist* for leave to extend the time for service of notice of appeal under R.S.C., Ord. 58, r. 3 (5).

I The *American Jurist* while taking action to avoid colliding with the *Claycarrier* came into collision with the *Ferranti*. In consequence the plaintiffs, the owners of the *Ferranti*, brought an action against the defendants, the owners of the *American Jurist*, who counterclaimed against the plaintiffs and joined the owners of the *Claycarrier* as second defendants to the counterclaim. The plaintiffs then joined the owners of the *Claycarrier* as defendants in the original action. On Apr. 28, 1958, WILLMER, J., gave judgment for the plaintiffs, holding that the *American Jurist* and the *Claycarrier* were equally to blame for the collision.

In accordance with the normal practice of the Admiralty Registry the notes of the trial were initialled and dated, and the decree was settled by the Admiralty Marshal on May 5, 1958. By R.S.C., Ord. 58, r. 4 (1):

"... every notice of appeal shall be served ... within the following period (calculated from the date on which the judgment or order of the court below was signed, entered or otherwise perfected), that is to say ... (c) in any other case, six weeks."

By the present summons, dated June 9, 1958, the first defendants, the owners of the *American Jurist*, applied for leave to extend the time for service of notice of appeal. The summons was heard on June 13, 1958, by WILLMER, J., in chambers, when the parties were represented by their solicitors, and this case is reported by leave of the judge.

WILLMER, J., held that a decree in an Admiralty action is perfected when it is settled in the registry. In the present case, therefore, time for appealing was from May 5, and the period of six weeks would not expire till June 16. Accordingly, the defendants were still within the time allowed for serving notice of appeal, and the summons to extend the time must be dismissed with costs.

HIS LORDSHIP further intimated that for the future arrangements should be made for the date of settling the decree to appear on the copy which is taken up.

Summons dismissed.

Solicitors: *Hill, Dickinson & Co.* (for the plaintiffs); *Thomas Cooper & Co.* (for the first defendants); *Ince & Co.* (for the second defendants).

[Reported by A. T. HOOLAHAN, Esq., Barrister-at-Law.]

DONALDSON v. DONALDSON.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Karminski, J.), June 11, 1958.]

Husband and Wife—Maintenance—Application to High Court—Amount of periodical payments—Considerations—Husband's realisable capital given to mistress and used by her to purchase mink farm—Husband living free on farm but receiving no wages—Husband in receipt of service pension—Ordered to pay whole of pension to wife for her and two children—Matrimonial Causes Act, 1950 (14 Geo. 6 c. 25), s. 23 (1).

The parties were married in 1940 and there were two children, a boy aged fourteen and a boy aged nine. In 1957, the husband who was then serving as a Group Captain in the Royal Air Force was anxious to be divorced by his wife and to marry another woman. He left the Royal Air Force and received a gratuity of over £2,200. He also commuted so much of his pension as he was allowed to do; and the whole of the cash which he thus received, amounting to £7,624, was handed over by him to the woman whom he wished to marry. She purchased a mink farm which she and the husband ran together, living as man and wife. The husband still received £385 a year as the portion of his pension which he was not allowed to commute and about £90 a year under an insurance policy, making a total of £475 a year; apart from these sums he received no other income or wage, but he lived rent and

A board free at the farm. The running of the farm did not yet show a profit.

The wife was forty-three years of age and had only a limited earning capacity. The older boy was at a boarding school but the husband had given notice that he would no longer be responsible for the fees. The younger boy was at a school near where the wife lived. The wife now applied under the Matrimonial Causes Act, 1950, s. 23, for an order for maintenance. It was not disputed that the husband had paid nothing to the wife since about August, 1957, and that he had wilfully neglected to maintain her.

C **Held:** in assessing the amount to be awarded as maintenance, the court must consider the husband's faculties, i.e., his capacity and ability to provide maintenance, and since he was provided with his living, his home and his food out of the running of the milk farm, into which had been put the whole of his capital, he would be ordered to pay £78 for the benefit of each child and £319 to his wife, viz., a total of £475 yearly being the whole of the husband's remaining income.

D Observations of LORD MERRIVALE, P., in *N. v. N.* ((1928), 138 L.T. at p. 696) and *J. v. J.* ([1955] 2 All E.R. 617) applied.

[**Editorial Note.** This decision illustrates an application of principles applied in *J. v. J.* ([1955] 2 All E.R. 85, 617) for determining the amount of maintenance under s. 19 (3) of the Matrimonial Causes Act, 1950, to a determination of the just amount of periodical payments under s. 23 (1) of the Act in a case where the husband had divested himself of capital assets.

E As to the amount which may be ordered on a s. 23 application, see 12 HALSBURY'S LAWS (3rd Edn.) 289, para. 568, note (e); for cases on the subject, see 3rd DIGEST Supp. to 27 DIGEST (Repl.) 636.

F For the Matrimonial Causes Act, 1950, s. 23, see 29 HALSBURY'S STATUTES 2nd Edn.) 410.]

Cases referred to:

(1) *N. v. N.*, (1928), 138 L.T. 693; 27 Digest (Repl.) 618, 5772.

(2) *J. v. J.*, [1955] 2 All E.R. 85, 617; [1955] P. 215; 3rd Digest Supp.

Originating Summons.

G This was an application by the wife under the Matrimonial Causes Act, 1950, s. 23, for an order for maintenance for herself and the two infant children of the marriage.

H. S. Law for the wife.

Joseph Jackson for the husband.

H **KARMINSKI, J.:** The facts of the case are unusual. The parties were married in April, 1940, and they seemed to have lived together quite happily until about 1956. There are two children of the marriage, both boys, one aged fourteen and the other nine. In 1956 the husband became enamoured of another lady who was serving in the Women's Royal Air Force in Cyprus with him. Latterly, they have lived together as man and wife in Devonshire and I she has adopted his name. I shall refer to her, when necessary, as Mrs. Sonia Donaldson, which is the name under which she now goes.

There is no doubt that the husband was anxious that the wife would divorce him so that he could marry Mrs. Sonia Donaldson who has, in fact, borne a son as a result of her cohabitation with the husband. Having failed to persuade the wife to petition this court for a dissolution of the marriage, the husband took some drastic steps. He had retired in 1957 from the Royal Air Force in the rank of Group Captain and he was, of course, entitled, after some twenty years or

more of distinguished service, to receive a pension and a gratuity. What he did was this: the gratuity was paid to him when he left the Royal Air Force and was a sum of £2,295. In June, 1957, he commuted a part of his pension for a cash payment of £4,213. In January, 1958, he commuted a further part of his pension for a cash payment of £1,116; so that he received in all, by way of cash payments from the R.A.F., a sum of £7,624. These sums he made over to Mrs. Sonia Donaldson. They are, in fact, the whole of his realisable capital. With that not inconsiderable fortune in her hands, Mrs. Sonia Donaldson bought a mink farm near Honiton in Devonshire and stocked it not only with mink but with such further dead stock and equipment that is necessary for carrying on that particular form of agricultural activity. A B

The husband has still some income. He has £385 a year from the remainder of his pension; that, I understand, being a portion which he was not allowed to commute into cash, and he has a policy which produces, for the time being, £90 or so. So that he has an income of his own of £475 altogether; but for the rest he has parted with everything he has in favour of Mrs. Sonia Donaldson. The farm belongs to her, so does the bank account; though she, by her own wish, cannot draw a cheque on her own bank account unless it is countersigned by the husband. The husband receives no wage or other emolument in respect of his activities on the mink farm though he is fully engaged there and, I do not doubt, works on it to the best of his ability. He lives free, and is fed and housed by Mrs. Sonia Donaldson. He has not, in fact, paid anything to his own wife since about August, 1957, and I have no difficulty at all in finding him guilty of wilful neglect to maintain her. Indeed, it is fair to say that the contrary was never argued. C D E

The question in this case is what, if anything, he should pay his own wife. I turn for a moment to the position of the children. At present, the elder boy is at Kings School at Worcester and the husband has given notice that he will no longer be responsible for his fees there. The younger boy was at a boarding school, but is now at a local school near where his mother lives at Norfolk, and I have to do my best to see that adequate provision, or such adequate provision as I can order the husband to pay, is made for these boys at a critical stage in their lives. The wife has substantially no means of her own. She has a rather limited earning capacity in that she has, from time to time, earned modest sums in the hotel business as an employee or in other domestic work of that kind, but the position is not an easy one for her. She is about forty-three years of age (the husband is a little older) and she has to look after these two comparatively young boys. Fortunately her position in that regard is somewhat helped by the fact that she lives with her mother in Norfolk, and the mother is apparently willing to help her to look after the children; but, because I regard the wife's earning capacity as extremely limited, I think I ought not really to take it into account. F G H

The position of the husband is indeed somewhat obscure. It would be idle for me to pretend for a moment that I have any sympathy for him in his position. He has gone out of his way, for reasons which I think are not difficult to see, to try to deprive his lawful wife, and to some extent his children, of any maintenance. It is, I conceive, the duty of the court to discourage conduct of that kind so far as it possibly can, but I must try to have regard to the realities of the situation. The husband, has, in fact, in the name of his mistress invested the whole of his realisable capital in this venture of the mink farm. It is a fairly recent venture and I do not doubt that the farm is sufficiently equipped with live and dead stock; but the mink have only bred once, and not very successfully. As it happens the season appears to have been a bad one for that purpose, and I

A I am quite satisfied that the earliest date at which any possible profit will come to this venture will be about Christmas, 1959. By that time, if the season is successful, there is at any rate a reasonable prospect of this venture beginning to show a profit. In the meantime, the cash, as shown in the bank accounts, is beginning to run low. On June 5, 1958, Mrs. Sonia Donaldson's account was £162 in credit. It has gradually run down, not because, I think, that she and B the husband have been living in any way extravagantly, but because they have not only had to live themselves but also had to provide the day-to-day expenses of this farm. The mink have to be fed with meat, preferably liver, which no doubt costs quite a lot to provide in these days. I have, therefore, to look at that position. The property, which is owned by Mrs. Sonia Donaldson, C is not in any way charged and I have little doubt that some loan secured on this property could be arranged from the bank or from a building society, or perhaps from an insurance company. I am unable to say in the absence of evidence how much can be raised in this way, but I am prepared to assume that they probably would be able to raise £1,000, or perhaps a little more. So far as I can foresee this position, any loan of that kind will be absorbed in the running of the farm D and in the maintenance of the husband's and Mrs. Sonia Donaldson's home until in about eighteen months' time this farm may show some sort of profit. I mention those matters because I was much impressed by the argument of counsel for the wife that I ought to order this man to provide something out of capital for the education, at least, of the elder boy. It is a very attractive E argument because, as he rightly observed, this boy is at a public school and, at fourteen, if he is taken away, the consequences to his education will undoubtedly be very serious. The younger boy who is nine, is perhaps in a slightly less precarious position from the educational point of view.

I was at one stage doubtful whether I could order a husband to provide maintenance for a wife or children out of capital. I think that there is no F objection, either in practice or in law, to such a course when the circumstances permit it. My attention was drawn to the judgment of LORD MERRIVALE, P., in *N. v. N.* (1) ((1928), 138 L.T. 693) and in a passage (*ibid.*, at p. 696), LORD MERRIVALE dealt with the practical wisdom of the ecclesiastical courts who, he said, were not misled by appearances but looked at the realities. He summed up the matter in this way (*ibid.*, at p. 697): G

“The court not only ascertained what moneys the husband had, but what moneys he could have had if he liked, and the term ‘faculties’ describes the capacity and the ability of the respondent to provide maintenance.”

H That is the test which, I think, the Court of Appeal approved in *J. v. J.* (2) ([1955] 2 All E.R. 617), when they upheld, on that matter, the very full and considered judgment of SACHS, J. ([1955] 2 All E.R. 85).

I I think that the position is that if a man has assets which really provide him with his living, as in *J. v. J.* (2), the court should have regard to the realities and deal with them as part of his income. Indeed, in the present case, I propose, I without any hesitation, to deal with the husband's interest in the mink farm which provides him, in kind, with his living, a roof over his head and his food; but I have to consider what LORD MERRIVALE called the realities; in other words, what the statute* calls the “ability” to pay or, as the ecclesiastical court termed it, the “faculties”. The court must try in cases of this nature to make a practical approach to the problem. If I say that the husband is to provide a substantial sum for the education of one or both boys at boarding schools, the

* Matrimonial Causes Act, 1950, s. 19 (2): 29 HALSBURY'S STATUTES (2nd Edn.) 407.

only possible way that I can see in which he can raise the money is by getting Mrs. Sonia Donaldson to charge the property and then himself to get the money out of her and to apply it for the education and advancement of these boys. I am quite ready to assume that his relationship with Mrs. Sonia Donaldson is such that, if he asked her, he could raise the money by a charge and he would be able to use some of it, at least, to keep these two boys at school. There is, however, this difficulty; that, even if the husband were willing to follow that course and if the loan were applied for the education of the boy or boys and not for the financing of the mink farm, then the mink farm venture seems likely to end in failure and, in turn, that will deprive the wife and the boys of the possibility, at least, of a substantial income.

I have decided, with some regret, to deal with the position as I find it—namely that at the moment the husband is getting nothing out of the farm other than his living, and not, I think, a very comfortable living—and to use only that part of his income which comes to him direct. I feel that I am justified here, in the particular circumstances of the present case, to show the absolute minimum of consideration to the husband. I propose so to deal with the matter. In short, I propose this, that I shall take every single penny from him at which I can get. Unfortunately, the only sums available are the ones which I have already mentioned, the pension and the insurance policy money. I shall direct that the whole of that should be paid to the wife and the two boys. The proportion which I think would be most convenient, would be to give each boy a maximum under the small maintenance orders provisions* of 30s. a week and to direct that each shall receive £78 a year from the husband. That leaves £319 less tax for the wife. I direct that this shall be an interim order because I want to make this as clear as I possibly can, that, as soon as I see my way to do so, I propose to increase this interim order to the maximum which circumstances will permit. The order will date from the date of the application, namely, Dec. 13, 1957.

Order accordingly.

Solicitors: *Bernard W. Main*, agent for *Bliss, Sons & Covell*, High Wycombe (for the wife); *Crane & Hawkins* (for the husband).

[*Reported by A. T. HOOLAHAN, Esq., Barrister-at-Law.*]

* Income Tax Act, 1952, s. 206 (1): 31 HALSBURY'S STATUTES (2nd Edn.) 198; see also 12 HALSBURY'S LAWS (3rd Edn.) 449, para. 1011.

A OSTIME (INSPECTOR OF TAXES) v. AUSTRALIAN MUTUAL PROVIDENT SOCIETY.

[COURT OF APPEAL (Jenkins, Parker and Pearce, L.J.J.), June 3, 4, 1958.]

Income Tax—Double taxation—Mutual life assurance society—Resident abroad—Australian company with branch office in the United Kingdom—Assessments to income tax on income of society's life assurance fund—Whether assessments competent—Income Tax Act, 1918 (8 & 9 Geo. 5 c. 40), Sch. 1, Sch. D, Rules applicable to Case III, r. 3—Finance (No. 2) Act, 1945 (9 & 10 Geo. 6 c. 13), s. 51 (1)—Income Tax Act, 1952 (15 & 16 Geo. 6 & 1 Eliz. 2 c. 10), s. 430, s. 437 (1)—Double Taxation Relief (Taxes on Income) (Australia) Order, 1947 (S.R. & O. 1947 No. 806), Schedule, art. II (1) (i), (3), art. III, para. (2), para. (3).

An Australian mutual insurance company resident in Australia carried on business in Australia and, through a branch office in London, also in the United Kingdom. It was assessed to United Kingdom income tax on the notional amount of its profits in the United Kingdom computed by reference to the appropriate part of the investment income of its life assurance fund under r. 3 of Case III of Sch. D to the Income Tax Act, 1918, or (in later years) s. 430 of the Income Tax Act, 1952. On appeal on the ground that it was assessable only under the Double Taxation Relief (Taxes on Income) (Australia) Order, 1947, which gave effect to the Australian double taxation relief agreement that was set out in the schedule to the order,

Held: the assessments must be discharged because—

(i) the notional amount of business profits on which a foreign mutual insurance company having a branch in the United Kingdom was required by r. 3 of Case III of Sch. D to the Income Tax Act, 1918 (or s. 430 of the Income Tax Act, 1952) to pay tax was in this case "industrial or commercial profit of an Australian enterprise" within those words in art. III, para. (2) of the Australian double taxation agreement (*Inland Revenue Comrs. v. Australian Mutual Provident Society*, [1947] 1 All E.R. 600 considered and applied), and

(ii) the amount of the taxable profits of the company must, therefore, be ascertained in accordance with art. III, para. (2) of the Australian double taxation agreement and not in accordance with r. 3 of Case III of Sch. D (or s. 430 of the Income Tax Act, 1952), since the system of estimating profits established by the agreement conflicted with that of r. 3 and, by virtue of s. 51 (1) of the Finance (No. 2) Act, 1945 (or s. 347 (1) of the Income Tax Act, 1952), the agreement prevailed.

Decision of UPJOHN, J. ([1958] 1 All E.R. 305) affirmed.

[**Editorial Note.** The Double Taxation Relief (Taxes on Income) (Australia) Order, 1947, was made under the repealed Finance (No. 2) Act, 1945, s. 51, and is continued in force by virtue of s. 528 (2) of the Income Tax Act, 1952, as if made under s. 347 of that Act; see generally, 20 HALSBURY'S LAWS (3rd Edn.) 455, 741.

As to investment income of foreign and colonial life assurance companies, see 20 HALSBURY'S LAWS (3rd Edn.) 258, para. 473; and as to mutual insurance companies not being taxable on their surplus or profit, see *ibid.*, 211, para. 376.

For the Income Tax Act, 1918, Sch. 1, Sch. D, Rules applicable to Case III, r. 3, see 12 HALSBURY'S STATUTES (2nd Edn.) 169; and for the Income Tax Act, 1952, s. 430, see 31 HALSBURY'S STATUTES (2nd Edn.) 412.

For a summary of the Double Taxation Relief (Taxes on Income) (Australia) Order, 1947, see 11 HALSBURY'S STATUTORY INSTRUMENTS 104; cf. pp. 671, 672, *post*.

For the Finance (No. 2) Act, 1945, s. 51 (1), see 12 HALSBURY'S STATUTES (2nd Edn.) 703; and for the Income Tax Act, 1952, s. 347 (1), see 31 HALSBURY'S STATUTES (2nd Edn.) 333.]

Case referred to:

- (1) *Inland Revenue Comrs. v. Australian Mutual Provident Society*, [1947] 1 All E.R. 600; [1947] A.C. 605; [1947] L.J.R. 690; 177 L.T. 9; 28 Tax Cas. 388; 2nd Digest Supp.

Appeal.

The taxpayer company, Australian Mutual Provident Society, appealed to the Special Commissioners of Income Tax against assessments to income tax in the sum of £100,000 for each of the years 1947-48 to 1952-53 inclusive and in the sum of £50,000 for the year 1953-54. The assessments were made in respect of "life fund interest" under r. 3 of the Rules applicable to Case III of Sch. D to the Income Tax Act, 1918, Sch. 1, so far as the assessments related to the years 1947-48 to 1951-52 inclusive, and under s. 430 of the Income Tax Act, 1952, so far as they related to the years 1952-53 and 1953-54. The grounds of appeal were that the assessments were not competent in law, having regard to the provisions of the Double Taxation Relief (Taxes on Income) (Australia) Order, 1947.

The company was a mutual provident society which was established in New South Wales, Australia, in 1849, was incorporated in 1857, and was governed by the Australian Mutual Provident Society's Acts, 1910-1941. It carried on a life assurance business, including the granting of annuities, and was an assurance company to which the Assurance Companies Act, 1909, applied. It was resident in Australia, its head office was in Sydney, New South Wales, and it carried on business in the United Kingdom through a branch office in London (both parties to the proceedings agreed that the company was not resident in the United Kingdom for income tax purposes). For the years of assessment before 1946-47, the company was assessed to income tax in the United Kingdom under r. 3 of Case III of Sch. D, i.e., on a proportion of its income from the investments of its life assurance fund (excluding the annuity fund) which by virtue of r. 3 was deemed to be profits comprised in Sch. D, and chargeable under Case III, and was granted dominion income tax relief under s. 27 of the Finance Act, 1920 (see *Inland Revenue Comrs. v. Australian Mutual Provident Society* (1) (1945), 28 Tax Cas. 379). For the year 1946-47 and subsequent years this relief was not allowed by reason of s. 51 (2) of the Finance (No. 2) Act, 1945, and the Order of 1947.

The company contended that the assessments were not competent in law and should be discharged for the following reasons:—

(i) by s. 51 (1) of the Act of 1945 (and s. 347 (1) of the Act of 1952), the provisions of the Order of 1947 had effect in relation to income tax so far as they provided for: (a) charging income arising from sources in the United Kingdom to persons not resident in the United Kingdom; (b) determining the income to be attributed to such persons and their agencies, branches or establishments in the United Kingdom; and the provisions had such effect notwithstanding anything in any enactment.

(ii) by art. III (2) of the Schedule to the Order of 1947, where an Australian enterprise was engaged in trade or business in the United Kingdom through a permanent establishment situated therein, United Kingdom income tax might be imposed only on so much of its profits as was attributable to that permanent establishment; and by art. III (3) of the Schedule to the Order the amount of profits so to be attributed was defined to be that amount of industrial or commercial profits which such permanent establishment might be expected to derive in the United Kingdom if it were an independent enterprise engaged in the same or similar activities to those in which the Australian enterprise was in fact engaged and if its dealings with the Australian enterprise were at arm's length.

(iii) rule 3 of Case III of Sch. D (as was made clear by the speeches of the House of Lords in *Inland Revenue Comrs. v. Australian Mutual Provident Society* (1), [1947] 1 All E.R. 600) and s. 430 of the Act of 1952 were charging rules which imposed a charge of United Kingdom income tax, not on the actual or estimated

A profits of a branch office through which a non-resident assurance company carried on business in the United Kingdom, but on a purely notional or conventional figure.

(iv) amounts computed for the purposes of the assessments according to r. 3 (and s. 430 of the Act of 1952) represented purely notional or conventional figures and bore no relation whatever to the amount of industrial or commercial profits

B which a permanent establishment might be expected to derive in the United Kingdom in the circumstances mentioned in art. III (3) of the Schedule to the Order of 1947 and, by the combined effect of the Order of 1947 and s. 51 of the Act of 1945 (or s. 347 of the Act of 1952), the latter amount was the only amount on which income tax might be charged.

C (v) the company was a mutual society carrying on the trade or business of life assurance exclusively with its members so that the surplus arising from such trade or business yielded no profit assessable to United Kingdom tax, and, if its permanent establishment in the United Kingdom had been an independent enterprise engaged in the same activity and dealing at arm's length with the taxpayer, the taxable profits which it might have been expected to derive from that mutual trade or business would have been nil.

D The Crown contended that the assessments were competent in law for the following reasons:

(i) the Order of 1947 did not remove or supersede the charge to United Kingdom income tax made by r. 3 of Case III of Sch. D and s. 430 of the Act of 1952.

E (ii) at the most, the Order of 1947 laid down a condition which had to be satisfied before any charges on profits provided for by the Income Tax Acts might be imposed and put a limit on the extent to which such charges might be imposed.

(iii) the circumstances of the taxpayer were such that the condition imposed by art. III (2) and (3) of the Schedule to the Order of 1947 was satisfied.

F The Special Commissioners held that the assessments were not competent and must be discharged.

The Crown appealed. Notice in writing was given by the Crown to the taxpayer that, at the hearing of the Case Stated, it might be contended as an additional point that the assessments under appeal fell outside the Order of 1947 in that the sums thereby charged to tax, although notionally profits of the business of insurance, were in fact sums received by the taxpayer in the form of dividends, interest and rents.

G On Dec. 20, 1957, UPJOHN, J., dismissed the Crown's appeal by way of Case Stated ([1958] 1 All E.R. 305), holding that the notional profits computed under r. 3 or s. 430 were "industrial or commercial profits" within the Order, which accordingly governed the company's assessment. The Crown appealed to the Court of Appeal.

H *John Pennycuick, Q.C.*, and *A. S. Orr* for the Crown.

Heyworth Talbot, Q.C., and *G. B. Graham* for the company.

I **JENKINS, L.J.:** This is an appeal by the Crown from a judgment of UPJOHN, J., dated Dec. 20, 1957, whereby he affirmed a determination of the Special Commissioners dated July 24, 1956, in favour of the present respondents, a company called Australian Mutual Provident Society. The case concerns the effect on the company's tax liability of the Double Taxation Relief (Taxes on Income) (Australia) Order, 1947. The company is, as is important to observe, a mutual insurance company, which was incorporated in New South Wales in 1849 and is now regulated by certain later Australian statutes. It has a branch office in London and carries on part of its business here. Among the income tax provisions relating to insurance companies, r. 15 of the Rules applicable to Sch. D, Cases I and II, to the Income Tax Act, 1918, provides as follows:

"(1) Where an assurance company carries on life assurance business in conjunction with assurance business of any other class, the life assurance business of the company shall for the purposes of this Act be treated as a separate business from any other class of business carried on by the company."

Rule 3 of the Rules applicable to Case III of Sch. D has an important bearing on this case. It provides:

"(1) Where an assurance company not having its head office in the United Kingdom carries on life assurance business through any branch or agency in the United Kingdom, any income of the company from the investments of its life assurance fund (excluding the annuity fund, if any), wherever received, shall, to the extent provided in this rule, be deemed to be profits comprised in this schedule and shall be charged under this Case.

"(2) Such portion only of the income from the investments of the life assurance fund for the year preceding the year of assessment shall be so charged as bears the same proportion to the total income from those investments as the amount of premiums received in that year from policy holders resident in the United Kingdom and from policy holders resident abroad whose proposals were made to the company at or through its office or agency in the United Kingdom bears to the total amount of the premiums received by the company."

Then there is a proviso in that sub-r. (2) under which other methods of calculation can be adopted.

"(3) Every such charge shall be made by the Special Commissioners as though the company under the provisions of this Act had required the proceedings relating to the charge to be had and taken before those commissioners.

"(4) Where a company has already been charged to tax, by deduction or otherwise, in respect of its life assurance business, to an amount equal to or exceeding the charge under this rule, no further charge shall be made under this rule, and where a company has already been so charged, but to a less amount, the charge shall be proportionately reduced."

These provisions are those contained in the Income Tax Act, 1918. Seven years' assessments are concerned in the case from 1947-48 to 1953-54. The Act of 1918 applies to the five earlier years and the Act of 1952 applies to the last two years. There is no material difference between the Act of 1918 and the Act of 1952 for the present purpose so that I can confine my references to the provisions in the Act of 1918.

The relevance of the fact that the company is a mutual insurance concern is this. It is well settled that a mutual insurance company is not liable to tax on its mutual insurance business on the ground that the surpluses arising arise from transactions by the members inter se which, for income tax purposes, are not regarded as a trade carried on by the company. Rule 3 of the Rules applicable to Case III of Sch. D was introduced, in fact, in 1915 by the Finance Act of that year. I think that for some considerable time it was understood that the effect of that rule was to provide a mode of ascertaining the proportion of the investment income of the company concerned attributable to its business activities in this country, and the method of calculation laid down can be readily understood as a rough and ready method of arriving at a fair proportion of that income. The scheme was to take a sum arrived at by ascertaining the proportion of the premium income received in this country to the premium income received throughout the world. That proportion sum produced a figure which, I think, was long understood as representing simply a proportion of the income from investments corresponding to the proportion of the business done in the United Kingdom to the whole of the business done.

- A However, that view was not accepted by the House of Lords in a case concerning this same company, *Inland Revenue Comrs. v. Australian Mutual Provident Society* (1) ([1947] 1 All E.R. 600), which came before the House of Lords early in 1947, judgment having been delivered on Mar. 31 of that year. As I understand it, the dispute was of this nature: The company had amongst its investments certain investments which were exempt from income tax and the question
- B was at what stage in the calculation prescribed by r. 3 of Case III of Sch. D allowance ought to be made for these tax-free investments. The company contended that the deduction ought to be made from the proportion of income found to be attributable to United Kingdom activities under the provisions of the rule, for it was said that only thus could the company be given the full benefit of the exemption; on the other hand, the Crown's view was that the tax-free investments
- C should be deducted from the totality of investments before applying the calculation to them. The view of the company on this matter prevailed in this court, but when the matter came before the House of Lords their Lordships took a radically different view.

This new way of looking at the matter was introduced into the case by an observation made by VISCOUNT SIMON in the course of the argument. He said

- D ([1947] A.C. at p. 611):

"Why does the existence of exempted income affect the application of r. 3? Does the mere fact that it is included as an item in the computation of the profits charged under r. 3 amount to charging it with tax? The real question to be determined is whether, on the true construction of the rule, there has been any error or mistake in the case of this society which holds in

E its life assurance fund investments exempt from income tax, and, further what is the right decision in view of the fact that the Revenue has, in effect, made the concession that the existence of the exempted income makes a difference to the calculation?"

In his speech LORD SIMON said ([1947] 1 All E.R. at p. 602):

- F "The Finance Act, 1915, s. 15, was, it would seem, aimed at meeting this difficulty [of taxing insurance companies situate as the respondent company in this case was, i.e., foreign insurance companies with branches in this country] and it did so by providing for a conventional figure, which should be 'deemed to be profits' comprised in Sch. D, on which a non-resident life assurance company, with a branch in the United Kingdom, would make a
- G contribution to United Kingdom income tax, however it arranged its investments. The provisions now contained in r. 3 of Case III call for the use of certain factors in order to arrive at this conventional figure on which such an assurance company as the respondent society is required to pay tax in respect of the annual profit of its life assurance business carried on in this country."

- H Then he said (*ibid.*, at p. 603):

"In the application of r. 3, the thing to be taxed is not, in whole or in part, exempted receipts, but is a conventional or notional sum—calculated, it is true, by the use of figures which might include the proceeds of exempted investments—but a sum 'deemed to be profits,' to be charged as such, without any deduction save that provided for in sub-s. (4)."

- I Again he says (*ibid.*):

"Once it is accepted that r. 3 of Case III is not one which taxes income from investments, whether exempted or not, but one which taxes a conventional sum calculated as the rule directs, it becomes reasonably clear that the sum to be taxed is not varied by inquiring whether one of the factors in the calculation contains income from exempted investments. If variation is required on this ground, it must be provided by legislation."

LORD WRIGHT said (*ibid.*, at p. 605):

"The charge was a tax on the investment income only as a machinery to tax the general profits of the British business, and as a manner of measuring the charge by an arbitrary figure derived from a percentage of the investment income. In this connexion it was not material to distinguish between exempted and unexempted income. All that was needed was a yardstick."

There are other observations tending in the same direction elsewhere amongst their Lordships' speeches, but those citations show sufficiently the view that they took, which, in effect, was that the sum arrived at by applying the calculation provided for by r. 3 of Case III of Sch. D was not a figure conventionally arrived at to represent investment income received by the company and attributed to its activities in this country but was a figure representing the profit derived by the company from its business in this country. It was conventionally arrived at or notionally arrived at (as it was put in one place by LORD SIMON), but, when arrived at, it was an actual figure for tax purposes taken as representing for those purposes the profit arising from the company's business in this country.

Their Lordships throughout their speeches made no reference at all to the circumstance that, inasmuch as this was a mutual insurance company, it was not taxable on the profit of its insurance business as distinct from the income of its investments. If the sum so arrived at could be regarded as a figure of investment income conventionally ascertained, there would actually be an end of this case, for income from investments is excluded from the scope of the Australian double taxation relief agreement. On that view, therefore, the position would simply be that the company would be liable to tax on the figure arrived at by the calculation laid down in r. 3 as income from investments and would pay tax accordingly; but, as their Lordships left the matter, there can be no doubt that the figure arrived at under r. 3 should be regarded for tax purposes as being a figure representing business profits and nothing else.

In that state of the law the Double Taxation Relief (Taxes on Income) (Australia) Order, 1947, came into operation. The agreement was signed on behalf of the governments of this country and of the Commonwealth of Australia on Oct. 29, 1946. The necessary steps to bring it into operation and give it statutory effect were taken as regards this country on Apr. 23, 1947, and, no doubt, corresponding steps were taken by the Australian authorities at or about the same time. So that in March, 1947, when judgment was delivered by the House of Lords in *Inland Revenue Comrs. v. Australian Mutual Provident Society* (1), the agreement had in fact already been signed but had not yet been given statutory effect.

The agreement (one of many agreements of this character) was made under the provisions of s. 51 of the Finance (No. 2) Act, 1945, which provided as follows:

"(1) If His Majesty by Order in Council declares that arrangements specified in the Order have been made with the government of any territory outside the United Kingdom with a view to affording relief from double taxation in relation to income tax, excess profits tax or the national defence contribution and any taxes of a similar character imposed by the laws of that territory, and that it is expedient that those arrangements should have effect, then, subject to the provisions of this Part of this Act, the arrangements shall, notwithstanding anything in any enactment, have effect in relation to income tax, excess profits tax and the national defence contribution so far as they provide for relief from tax, or for charging the income arising from sources in the United Kingdom to persons not resident in the United Kingdom, determining the income to be attributed to such persons and their agencies, branches or establishments in the United Kingdom, or determining the income to be attributed to persons resident in the United Kingdom who have special relationships with persons not so resident.

"(2) On the making of an Order in Council under this section with respect to any arrangements relating to a dominion as defined for the purposes of

- A s. 27 of the Finance Act, 1920 (which provides for relief in respect of dominion income tax), the said s. 27 shall cease to have effect as respects that dominion except in so far as the arrangements otherwise provide."

The important words are the words in sub-s. (1)—

- B "then, subject to the provisions of this Part of this Act, the arrangements shall, notwithstanding anything in any enactment, have effect in relation to income tax,"

and so forth. It follows that, if and so far as there is any inconsistency between r. 3 of the Rules applicable to Case III of Sch. D, on the one hand, and the agreement, on the other hand, then the agreement, having duly been given statutory effect, must prevail over the rule.

- C The agreement is scheduled to the Double Taxation Relief (Taxes on Income) (Australia) Order, 1947 (S.R. & O. 1947 No. 806). The body of the order says, by para. 1, that it "may be cited as the Double Taxation Relief (Taxes on Income) (Australia) Order, 1947", and, by para. 2:

- D "It is hereby declared—(a) that the arrangements specified in the agreement set out in the Schedule to this Order have been made with the government of Australia with a view to affording relief from double taxation in relation to income tax, excess profits tax or the national defence contribution and taxes of a similar character imposed by the laws of Australia; and (b) that it is expedient that those arrangements should have effect."

- E The agreement is set out in the Schedule. Article II begins with a number of definitions in para. (1).

"In the present agreement, unless the context otherwise requires—...

(f) The terms 'United Kingdom resident' and 'Australian resident' mean respectively any person who is resident in the United Kingdom for the purposes of United Kingdom tax and is not a resident of Australia..."

and the sub-paragraph continues with the converse case.

- F Then I can go to:

"(h) The terms 'United Kingdom enterprise' and 'Australian enterprise' mean respectively an industrial or commercial enterprise or undertaking carried on by a United Kingdom resident and an industrial or commercial enterprise or undertaking carried on by an Australian resident; and the terms 'enterprise of one of the territories' and 'enterprise of the other territory' mean a United Kingdom enterprise or an Australian enterprise, as the context requires.

- H "(i) The term 'industrial or commercial enterprise or undertaking' includes an enterprise or undertaking engaged in mining, agricultural or pastoral activities, or in the business of banking, insurance, life insurance or dealing in investments, and the term 'industrial or commercial profits' includes profits from such activities or business but does not include income in the form of dividends, interest, rents, royalties, management charges, or remuneration for personal services."

In definition (i) it is noteworthy that insurance and life insurance are expressly included and that income in the form of dividends and interest is expressly excluded. Paragraph (3) of art. II provides:

- I "In the application of the provisions of the present agreement by one of the contracting governments any term not otherwise defined shall, unless the context otherwise requires, have the meaning which it has under the laws of that contracting government relating to the taxes which are the subject of the present agreement."

Article III provides:

"(2) The industrial or commercial profits of an Australian enterprise

shall not be subject to United Kingdom tax unless the enterprise is engaged in trade or business in the United Kingdom through a permanent establishment situated therein. If it is so engaged, tax may be imposed on those profits by the United Kingdom, but only on so much of them as is attributable to that permanent establishment: Provided that nothing in this paragraph shall affect any provisions of the law of the United Kingdom regarding the imposition of excess profits tax and national defence contribution in the case of inter-connected companies.

“(3) Where an enterprise of one of the territories is engaged in trade or business in the other territory through a permanent establishment situated therein, there shall be attributed to that permanent establishment the industrial or commercial profits which it might be expected to derive in that other territory if it were an independent enterprise engaged in the same or similar activities and its dealings with the enterprise of which it is a permanent establishment were dealing at arm's length with that enterprise or an independent enterprise; and the profits so attributed shall be deemed to be income derived from sources in that other territory.”

Article XV provides for the commencement of the agreement. The agreement is to have effect when all formalities are completed:

“(a) in the United Kingdom, as respects income tax for the year of assessment beginning on Apr. 6, 1946, and subsequent years [other provisions are made in regard to its having effect as to surtax] and (b) in Australia, as respects tax for the year of tax beginning on July 1, 1946, and subsequent years.”

The question in the case may be expressed as being whether the sum of business profits (as I have termed it) arrived at by the calculation prescribed by r. 3 of the Rules applicable to Case III of Sch. D is an industrial or commercial profit of an Australian enterprise, namely, the respondent company, within the meaning of the double taxation relief agreement. If it is, then the result would appear to be that the company can claim to be assessed in accordance with the provisions of paras. (2) and (3) of art. III of the agreement and cannot properly be assessed to tax on the sum arrived at by the calculation prescribed by r. 3.

On the Crown's side it is contended that, although actual business profits are by definition “industrial or commercial profits” for the purposes of the double taxation relief agreement, the r. 3 sum of business profits has nothing whatever to do with the provisions of that agreement. Counsel argues that it is a purely notional sum. It has no substratum of fact. It is not a sum arrived at by a conventional calculation but, when so arrived at, one representing actual profit. It is a purely notional sum. He contends that the agreement is concerned with actual profits, though they may be artificially estimated in accordance with income tax principles. He says that the true view is that the company's liability to tax under r. 3 of Case III on the sum of business profits arrived at by the r. 3 calculation is wholly outside the agreement and that the company remains liable to tax on it.

In my view that contention should not be accepted. It appears to me that for the present purpose it does not greatly matter whether the sum of profit referred to in r. 3 is to be regarded as an actual or a notional sum. The purport of the rule, as I understand the construction placed on it by the House of Lords, is to impute to an establishment of a foreign insurance company (operating here) a sum representing the profits arising to that company from its life insurance business in the United Kingdom. That is the object of it and to carry out that object it applies the proportion formula. On the other hand, the agreement (which, as I have mentioned, must be taken to override the Act where the two conflict) provides in para. (3) of art. III its own method of estimating and arriving at the profit arising to an Australian company (including an insurance company) from its business (including life insurance business) in the United Kingdom.

A The system adopted in r. 3 is a rough and ready method of taking the proportion to which I have referred. The system prescribed by the agreement is of a far more elaborate and detailed character; but both, in the case here relevant of an Australian company carrying on life insurance business in this country, aim at the same object, which they seek to achieve by different means. It may be that the figures arrived at by applying one or other of the two formulae would be

B widely different, but, in my view, the agreement must prevail by the terms of the Act under which it was made.

It follows from that that, for the purpose of assessing this company to tax for the years in question on the profits of its business in the United Kingdom, one may completely ignore r. 3 and the figure arrived at by applying the calculation laid down in that rule. The company's liability is to be measured in accordance

C with the agreement and not otherwise.

What the effect of applying the agreement in substitution for r. 3 may be it is not for me to say. It may be that it will be found that the fact that this is a mutual society will result in the liability being reduced to nil; on the other hand, one can see that there might be room for argument to the effect that the various hypotheses postulated by para. (3) of art. III of the agreement, when

D applied, might involve the assumption that the company was not a mutual company; but questions of that kind do not concern us at this stage and I would prefer to say nothing about them.

The case has been most elaborately argued. I have confined myself, in effect, to one aspect of it which appears to me to be decisive in favour of the company, but I intend no disrespect to the careful and elaborate argument presented. In

E the result I see no reason at all to disturb the concurrent views of the Special Commissioners and the learned judge and I would dismiss this appeal.

PARKER, L.J.: I agree. The short though difficult question in this case is whether the Relief Order, viz., the Double Taxation Relief (Taxes on Income) (Australia) Order, 1947, applies in the circumstances of this case. If it does not,

F then it is clear—and, indeed, it is conceded—that the seven assessments in this case, five made under r. 3 of Case III of Sch. D to the Income Tax Act, 1918, and two under s. 430 of the Income Tax Act, 1952, are valid assessments; if, on the other hand, it does apply, then, by virtue of s. 51 of the Finance (No. 2) Act, 1945, the measure of liability under the Relief Order prevails and supersedes the liability under r. 3 of Case III and accordingly the seven assessments in question

G must be discharged.

The Relief Order in effect provides that none of the enterprises there referred to shall be taxed in the United Kingdom unless certain conditions are fulfilled. The first is that it must be an enterprise of the type laid down in the Relief Order and the Relief Order provides that one of the enterprises in question shall be one carrying on the business of life insurance; accordingly, albeit that the company

H in this case is a mutual society, it is clearly an enterprise within the order. Secondly, that enterprise must have a permanent establishment in the United Kingdom and there is no doubt that this company had. The third condition is that what may be taxed are only profits from the activities or business of that enterprise not including income in the form of dividends, interest, etc. The sole question really in this case is whether the profits on which the company was

I assessed to tax are profits within that Relief Order.

I am conscious of my inability fully to understand the decision of the House of Lords in *Inland Revenue Comrs. v. Australian Mutual Provident Society* (1) ([1947] 1 All E.R. 600) in 1947, but it is a decision clearly binding on this court. As I understand it, their Lordships were there construing r. 3 of Case III as providing that a certain proportion of the investment income of such a company as this should be deemed to be the business profits of that company and that, be it observed, whether the company in question was a proprietary company or a mutual society as, indeed, was the case before the House of Lords. Now, if that be right, then,

albeit that they were deemed to be business profits, it seems to me that those profits so deemed come within and come plainly within the words of the Relief Order. I would add this: that it does seem to me that, in so far as one can look at the surrounding circumstances and the intention of the parties, that must have been their intention. For, more than forty years before the agreement incorporated in the Relief Order was made, a foreign enterprise such as this was not taxed under Case I of Sch. D but under r. 3 of Case III.

As VISCOUNT SIMON put it in the case in the House of Lords to which I have referred ([1947] 1 All E.R. at p. 602):

"It is true that the company might be regarded as carrying on in this country a trade through its branch, but there was much practical difficulty in arriving at the figure under Case I of Sch. D of annual profits of such a branch for, in the case of life assurance business, the true profits attributable to the branch could not be ascertained in the normal manner, as is shown by provisions in the Assurance Act, 1909, for a quinquennial valuation. The Finance Act, 1915, s. 15 was, it would seem, aimed at meeting this difficulty, and it did so by providing for a conventional figure, which should be 'deemed to be profits' comprised in Sch. D, on which a non-resident life assurance company, with a branch in the United Kingdom, would make a contribution to United Kingdom income tax, however it arranged its investments. The provisions now contained in r. 3 of Case III call for the use of certain factors in order to arrive at this conventional figure on which such an assurance company as the respondent society is required to pay tax in respect of the annual profit of its life assurance business carried on in this country."

That being so, it being the case that for some forty years taxation of a life insurance company under Case I of Sch. D was to all intents a dead letter, one arrives at this: That, if the Crown's argument is right, the inclusion in the Relief Order of an enterprise carrying on the business of life insurance would have been there for purely theoretical interest in that only theoretically and not practically did such a life insurance company earn trading profits liable to tax.

For these reasons and the reasons given by my Lord I would dismiss this appeal.

PEARCE, L.J.: I agree with what my Lords have said and I have nothing to add.

Appeal dismissed. Leave to appeal to the House of Lords granted.

Solicitors: *Solicitor of Inland Revenue; Bell, Brodrick & Gray* (for the company).

[*Reported by F. A. AMIES, Esq., Barrister-at-Law.*]

A BAXTER v. STOCKTON-ON-TEES CORPORATION.

[COURT OF APPEAL (Jenkins, Parker and Pearce, L.JJ.), May 16, 19, 20, 21, June 23, 1958.]

Highway—Negligence—Construction of highway by county council—Subsequent taking over by borough council—Road accident alleged to be due to negligent construction of island on road and absence of sufficient protection for public against danger—Misfeasance and non-feasance—Whether borough council liable—Development and Road Improvement Funds Act, 1909 (9 Edw. 7 c. 47), s. 8 (1) (a), s. 10, as amended—Local Government Act, 1929 (19 Geo. 5 c. 17), s. 32.

Between 1938 and 1940 a county council constructed a road under the powers conferred by the Development and Road Improvement Funds Act, 1909, s. 8 and s. 10*. In 1941 a county borough council took over the road pursuant to s. 32 of the Local Government Act, 1929†, and thus became the highway authority for it. One night in October, 1955, a motor cyclist collided with the kerb of an approach island to a roundabout in the road, the siting and lighting of which had not been altered since it was originally made, and sustained injuries which proved fatal. In an action by the motor cyclist's widow for damages under the Fatal Accidents Acts, 1846 to 1908, and the Law Reform (Miscellaneous Provisions) Act, 1934, against the borough council as highway authority,

Held: (i) the action failed in limine because the borough council had merely kept the island as they found it when they took over the road.

(ii) moreover, (a) even if the county council had so negligently constructed the island and road as to be liable for injuries caused by the danger so created while the county council remained in charge of the road (which the court did not find to be the case), yet any such liability would not have been transferred to the borough council (see p. 684, letters D to G, post); and (b) if the county council had been under a duty to protect the public from danger from the island, viewing it as an obstruction placed on the highway by the county council, any such duty would have flowed from misfeasance in creating the obstruction and would not have been inherited by the borough council (see p. 685, letters A and B, post).

Nash v. Rochford Rural Council ([1917] 1 K.B. 384) applied.

Per CURIAM: the immunity afforded to a private owner of land who dedicates it as a public highway has no application to a highway authority which constructs a new road pursuant to s. 10 of the Development and Road Improvement Funds Act, 1909 (see p. 680, letter I, post).

Appeal allowed.

[As to non-feasance, misfeasance and the liability of a highway authority, see 19 HALSBURY'S LAWS (3rd Edn.) 149-152, paras. 227-229; and for cases on the subject, see 26 DIGEST 398 et seq., 1239 et seq.]

For the Development and Road Improvement Funds Act, 1909, s. 8 (1) (a), s. 10, as amended, see 11 HALSBURY'S STATUTES (2nd Edn.) 200, 202, and for the Local Government Act, 1929, s. 32, see 14 HALSBURY'S STATUTES (2nd Edn.) 273.]

Cases referred to:

- (1) *Cowley v. Newmarket Local Board*, [1892] A.C. 345; 62 L.J.Q.B. 65; 67 L.T. 486; 56 J.P. 805; 26 Digest 400, 1251.
- (2) *Russell v. Men of Devon*, (1788), 2 Term Rep. 667; 100 E.R. 359; 26 Digest 587, 2780.
- (3) *Sydney Municipal Council v. Bourke*, [1895] A.C. 433; 64 L.J.P.C. 140; 72 L.T. 605; 59 J.P. 659; 26 Digest 400, 1254.

* The relevant parts of s. 8 and s. 10, as amended, are printed at p. 678, letter G, to p. 679, letter A, post.

The relevant parts of s. 32 are printed at p. 697, letters E to G, post.

- (4) *Swain v. Southern Ry. Co.*, [1939] 2 All E.R. 794; [1939] 2 K.B. 560; 108 A.L.J.K.B. 827; 160 L.T. 606; Digest Supp.
- (5) *Pictou Municipality v. Geldert*, [1893] A.C. 524; 63 L.J.P.C. 37; 69 L.T. 510; 26 Digest 400, 1252.
- (6) *Dublin United Tramways Co. v. Fitzgerald*, [1903] A.C. 99; 72 L.J.P.C. 52; 87 L.T. 532; 67 J.P. 229; 43 Digest 344, 37.
- (7) *Fisher v. Ruslip-Northwood Urban District Council & Middlesex County Council*, [1945] 2 All E.R. 458; [1945] K.B. 584; 115 L.J.K.B. 9; 173 L.T. 261; 110 J.P. 1; 2nd Digest Supp.
- (8) *Nash v. Rochford Rural Council*, [1917] 1 K.B. 384; 86 L.J.K.B. 370; 116 L.T. 129; 81 J.P. 57; 26 Digest 405, 1272.
- (9) *McClelland v. Manchester Corpn.*, [1912] 1 K.B. 118; 81 L.J.K.B. 98; 105 L.T. 707; 76 J.P. 21; 26 Digest 404, 1270.
- (10) *Thompson v. Bradford Corpn. & Tinsley*, [1915] 3 K.B. 13; 84 L.J.K.B. 1440; 113 L.T. 506; 79 J.P. 364; 26 Digest 406, 1278.
- (11) *Baldwin's, Ltd. v. Halifax Corpn.*, (1916), 85 L.J.K.B. 1769; 80 J.P. 357; 26 Digest 407, 1289.
- (12) *Geddis v. Bann Reservoir Proprietors*, (1878), 3 App. Cas. 430; 43 Digest 1075, 116.
- (13) *Great Central Ry. Co. v. Hewlett*, [1916] 2 A.C. 511; 85 L.J.K.B. 1705; 115 L.T. 349; 80 J.P. 365; 26 Digest 419, 1383.

Appeal.

The defendant highway authority appealed from the decision of BARRY, J., in a reserved judgment dated Nov. 4, 1957, and given at Durham Assizes, awarding £4,500 damages under the Fatal Accidents Acts, 1846 to 1908, and the Law Reform (Miscellaneous Provisions) Act, 1934, to the plaintiff as widow and administratrix of her deceased husband, who had died as a result of an accident on a highway in respect of which the defendants were the highway authority. The facts, which are summarised in the headnote, are fully set out in the judgment.

Phineas Quass, Q.C., R. Withers Payne and R. A. R. Stroyan for the defendants, the highway authority.

G. S. Waller, Q.C., and C. P. Heptonstall for the plaintiff, the widow.

Cur. adv. vult.

June 23. JENKINS, L.J.: The judgment that I am about to read is the judgment of the court in this case.

This is an appeal by the Stockton-on-Tees Corporation from a judgment of BARRY, J., dated Nov. 4, 1957, whereby he awarded the plaintiff, Eileen Elizabeth Baxter, a total of £4,500 damages under the Fatal Accidents Acts, 1846 to 1908, and the Law Reform (Miscellaneous Provisions) Act, 1934, against the defendants as the highway authority responsible for the highway known as Fleet Bridge Road in the County of Durham in respect of the death of her husband, Alexander Ralph Baxter, from injuries sustained by him when a motor cycle on which he was riding at night along Fleet Bridge Road came into collision with the kerb of an approach island adjacent to the Portrack roundabout. The basis of the claim was (in effect) that the accident was brought about by the negligence of the defendants as highway authority, in that the approach island was so shaped and sited that the part of it with which the motor cycle collided projected into the carriage way along which the deceased was riding, but the defendants nevertheless failed to light the island or the part of it so projecting, or to give users of the highway (including the deceased) warning (by means of traffic signs or otherwise) of the existence of the projection, which amounted to a concealed danger or trap.

The accident took place at about midnight on Oct. 14/15, 1955, when the plaintiff's husband, a company quartermaster sergeant in the R.A.S.C., and a

- A highly skilled motor cyclist, was riding his motor cycle eastwards along the Fleet Bridge Road on his way from Norton near Billingham to Middlesbrough. In order to reach Middlesbrough he had to negotiate the Portrack roundabout, situated at the point where the Haverton Hill Road is intersected by the Fleet Bridge Road and its continuation towards Middlesbrough known as the Tees (Newport) Bridge Approach Road, which takes off from the roundabout nearly opposite the point at which the Fleet Bridge Road enters it.

- Where it approaches the roundabout the Fleet Bridge Road is laid out as a dual carriage way by means of a central strip of grass edged with concrete kerbing, the northern carriage way being reserved for eastbound, and the southern for westbound, traffic. At the point of junction of the Fleet Bridge Road with the roundabout the central strip ends on the western side of an accommodation road joining the two carriage ways, and immediately beyond that comes the relevant approach island. This was a plot of grass in the shape of an irregular quadrilateral bordered by concrete kerbing some four inches high, its western and shortest side forming the eastern side of the accommodation road, its southern side in line with the kerbing on the south side of the central strip, its eastern side facing the central island of the roundabout and its northern side (the one with which the motor cycle collided) slanting or splayed outwards (or to the left from the point of view of eastbound traffic) from the line of the northern kerb of the central strip at a fairly pronounced angle. This slant or splay, though to a great extent compensated by a more gradual curve of the opposite side of the northern carriage way in the same direction, would give the effect to a person driving along the middle or right-hand side of the northern carriage way of a sudden turning of the off-side kerb diagonally across his front. We should mention, as some point was made of it, that shortly before it reaches the approach island the northern carriage way makes a very slight turn to the right.

- The position as regards lighting and traffic signs at the time of the accident was this. There was a number of street lamps illuminated by gas disposed about the outer perimeter of the roundabout but these were operated on the half-night system, which means that they were automatically turned off at eleven p.m. On the perimeter of the central island of the roundabout there were four illuminated keep-left bollards, one facing down the northern carriage way of Fleet Bridge Road, one down the southern (or incoming) carriage way of Tees (Newport) Bridge Approach Road (which was also laid out as a dual carriage way), and one down each of the two sections of the intersected Haverton Hill Road (which were not dual carriage ways). These four bollards were accompanied by reflecting arrows pointing to the left. There was also an illuminated keep-left bollard on each of the approach islands. In the case of Fleet Bridge Road the bollard on the approach island faced diagonally to the right from the point of view of eastbound traffic, for the purpose of guiding westbound traffic into the southern carriage way, and could not be seen by anyone travelling east. The bollard on the approach island in the case of the other dual carriage way was similarly faced from the point of view of westbound traffic to guide eastbound traffic into its proper path. We should note that in this case the shape and positioning of the approach island was very much the same as in the case of Fleet Bridge Road, but the leftward slant or splay was perhaps somewhat less pronounced. The two sections of Haverton Hill Road, not being dual carriage ways, were each provided with a central approach island on which was mounted an illuminated keep-left bollard facing down the road by way of warning to incoming traffic. The dual carriage way in the case of the Tees (Newport) Bridge Approach Road appears to have begun only a short distance from the roundabout, and its beginning was marked by another illuminated keep-left bollard facing down the road. Each of the four roads had on its near side coming in towards the roundabout an advance direction sign with reflector studs. In the case of Fleet Bridge Road, however, this sign was sited some twenty feet to the left of the carriage way. There were

some red lamps placed round the central island to warn of certain work in progress, but there is a doubt whether these were alight at the material time and it is agreed that they should be disregarded for the purposes of this case.

The deceased was accompanied on his abortive trip to Middlesbrough by a friend, Sergeant Stockdale, also of the R.A.S.C. They had met at a dance at Norton, and agreed to go on to some other attraction in Middlesbrough. The deceased led the way on his motor cycle, Sergeant Stockdale following in a small car. The deceased's headlight was burning brightly, though apparently there was some question as to the condition of his dynamo. They set off, with the deceased leading at perhaps thirty-five miles per hour. Sergeant Stockdale lost sight of the deceased before they reached the roundabout (which was only about a mile from the hall where the dance was held) but attributed this to the fact that he slowed down because the road surface was bumpy. There was some degree of mist over the roundabout, which Sergeant Stockdale attributed to the I.C.I. works nearby. Sergeant Stockdale went on to Middlesbrough without seeing the deceased again, and waited for him there in vain. A police constable on his way home from duty soon after midnight found the deceased lying on the central island of the roundabout near the keep-left bollard facing down Fleet Bridge Road, seriously injured, with his machine lying on the same island some fifteen feet away. The deceased shortly afterwards died.

Another police constable who came on the scene a little later made a sketch plan based on his inspection of the area. This showed marks on the projecting kerbs and on the ring-road of the roundabout indicating that the motor cycle struck the kerb much where one would expect it to strike if the deceased had been driving straight along the middle of the northern carriage way, and had continued in that line without observing the slant or splay of the approach island towards his left; and that the impact was such that the motor cycle jumped the island, landing in the ring-road, and then bouncing or running on out of control to the place at which it was found on the central island, throwing the deceased at some stage in its course to the point where he was found near the keep-left bollard.

The Fleet Bridge Road was constructed between 1938 and 1940 by the Durham County Council under s. 8 and s. 10 of the Development and Road Improvement Funds Act, 1909, which by s. 8 (1) (a), as amended*, provides as follows. The side-note is "Powers of Minister of Transport". Then:

"The Minister of Transport† shall have power, with the approval of the Treasury—(a) to make to any highway authority advances in respect of the construction of new roads or the maintenance or improvement of existing roads, or to make such advances in conjunction with a highway authority, to any company or person."

Then s. 10 reads:

"(1) Where the Minister of Transport makes an advance to a highway authority in respect of the construction of a new road, the Minister may authorise the authority to construct the road, and where so authorised the highway authority shall have power to construct the road and to do all such acts as may be necessary for the purpose, and any expenses of the authority, so far as not defrayed out of the advance, shall be defrayed as expenses incurred by the authority in exercise of their powers as highway authority, and the enactments relating to such expenses, including the provisions as to borrowing, shall apply accordingly.

"(2) Where the highway authority to whom the advance is made are a county council, the new road, when constructed, shall be a main road and in

* The amendments were made by the Roads Act, 1920, s. 4 and Sch. 1.

† The Minister of Transport was substituted for the Road Board by the Roads Act, 1920, s. 4 and Sch. 1. He is now styled the Minister of Transport and Civil Aviation.

- A any other case shall be a highway repairable by the inhabitants at large: Provided that the maintenance of any such road within the administrative county of London shall devolve upon the local authority responsible for the maintenance of streets and roads in whose district the same is situate."

It should be noted that "county road" is substituted for "main road" by s. 29 (1) of the Local Government Act, 1929.

- B The construction of this new road was projected in 1933, but apparently no funds for the purpose were available at that time. The plans were re-submitted by the Durham County Council to the Minister of Transport in 1936 and approved by the Minister in 1937 when a seventy-four per cent. grant was authorised. Work on the road was begun towards the end of 1938 and it was finished in 1940.
- C It is not in dispute that the completed road (including the roundabout) was in conformity with the approved plans, and we understand it also to be agreed that the gas lamps, keep-left bollards, reflecting arrows, and advance direction signs which I have described were installed in the positions in which they stood at the time of the accident. We ignore for the purposes of this case work in progress at the time of the accident for the substitution of electric street lamps for the gas ones, as this change had not then become effective.

- D The defendants took over the Fleet Bridge Road from the county council in 1941 under s. 32 of the Local Government Act, 1929, which provides as follows. The side-note is "Rights of certain urban district councils to maintain county roads" and sub-s. (1) provides:

- E "Where an urban district has a population exceeding twenty thousand, the urban district council may claim to exercise the functions of maintenance and repair of any county road within their district, and if a claim is made within the time hereinafter limited, then, as from such date as is hereinafter mentioned, the urban district council shall be entitled to exercise those functions, and the road shall vest in that council, and for the purpose of the maintenance, repair and improvement of, and other dealing with, any such
- F road, that council shall have the same functions as if they were as respects that road the highway authority and the road were an ordinary road vested in them."

Then sub-s. (2) says:

- G "Such claim as aforesaid must be made . . . (e) in the case of any road which becomes a county road after the appointed day, or after the date mentioned in any of the last three foregoing paragraphs, as the case may require, within twelve months after the date when it so becomes a county road."

We should mention that the county council were in the first instance joined as defendants, but that proceedings were later discontinued against them, no doubt because it had become clear that by reason of its transfer to the defendant corporation the county council had long since ceased to be in any way responsible for the road.

- H From the time when they took over the road until the time of the accident to the deceased the defendants did not make any alterations to the roundabout or its approaches or the lights and traffic signs to which we have referred. They simply took over the road, roundabout, islands, lights, traffic signs, and all, from the Durham County Council and left them as they were, though no doubt doing what was necessary in the way of maintenance. The road which, we understand, carries considerable traffic, was, so far as is known, used without accident from its completion in 1940 down to Aug. 9, 1954, a matter of fourteen years. On the latter date there was an accident in which a motor cyclist collided with the same approach island, and there was another accident on May 9, 1955, in which something similar happened to a car. One of the police witnesses gave evidence about these two accidents from the police records, but no details were
- I

forthcoming as to the circumstances in which they took place. In these circumstances, it would appear to us that *prima facie* if the defendants were at fault at all in the matter of the approach island with which the deceased's motor cycle collided, their fault consisted exclusively in non-feasance with no element of misfeasance whatever. A

The learned judge found it possible to hold the defendants liable. On the facts, he formed an extremely serious view of the danger constituted during the hours of darkness by the projecting part of the approach island, with the arrangements in regard to lights and direction signs as they were at the time of the accident. B
Accepting to the full the various criticisms of it put forward on the plaintiff's side he described it as a dangerous trap. In fairness to the county council and the defendants we feel obliged to say that we think that the learned judge took a somewhat exaggerated view of the danger. A person travelling the way the deceased was going would have to guide him (apart from the gas lamps up to eleven p.m.) the reflecting advance direction sign on his left, the illuminated keep-left sign and reflecting arrow to his front, and the light-coloured concrete kerb on his right. C
We should have thought that the driver of a car or motor cycle with moderately good headlights or headlight and not travelling at excessive speed might reasonably be expected to pick up these indications unless the weather conditions were exceptionally bad. D
It was said that the advance direction sign was too far out to the left, and that a driver would not notice the keep-left bollard and arrow until he had made his turn to the left. It was also said that the very slight curve to the right before reaching the approach island added to the danger. We are not altogether convinced by these criticisms, and are impressed by the apparent record of fourteen years without accident, the effect of which is not to our minds displaced by the bare fact of two accidents, one in 1954 and the other in 1955, with no information as to the circumstances in which they took place. E
Be that as it may, the learned judge, having found this to be a dangerous trap, went on to consider the question of liability. He began by rejecting (as we think, rightly) an argument raised by the defendants to the effect that when Fleet Bridge Road was completed and opened to the public the county council had dedicated the road as a public highway with the like legal consequences as attend the dedication of land as a public highway by a private owner. F
If this were right, then the consequences would ensue that the county council as dedicators of the road must be taken to have made it over to the public such as it was and subject to all hazards and inconveniences existing on it at the time of dedication, and that neither they nor the defendants as their successors in the office of highway authority could be held liable for any damage arising from the approach island complained of, or under any obligation to obviate or mitigate that danger by lighting or traffic signs or other warning devices. G
We think that it is plain that when a highway authority constructs out of public funds a new road for the use of the public under statutory powers delegated to the authority by the Minister pursuant to s. 10 of the Development and Road Improvement Funds Act, 1909, and opens it to the public on completion, there is no question of the dedication of the road to the public by the constructing highway authority in any relevant sense of that expression. H
The highway authority in such a case constructs in exercise of the delegated statutory powers a road which, constructed as it is under those powers, cannot from first to last be anything else than a public highway, and comes into being as such. I
The immunity afforded to a private owner of land who dedicates it as a public highway in our view has no application to such a case. On the contrary, there is authority, to which we will later refer*, for the proposition that a highway authority constructing a road for the use of the public under statutory powers is under a positive duty to take reasonable care to construct it properly.

It does not follow, however, that because a public highway originated as a new

* See p. 684, letters A to D, post.

A construction under statutory powers, as opposed to originating from dedication by some private owner, therefore the exemption from liability in damages for mere non-feasance does not extend to the highway authority for the time being responsible for its maintenance. In the case of a new road constructed by a highway authority the constructing authority may, as already mentioned, be under a special duty to construct it properly, but apart from that the origin of the road appears to us to be in itself irrelevant to the application of the exemption in respect of mere non-feasance; and if the learned judge regarded the exemption as excluded by the circumstances of the present case, as at one point in his judgment he appears to suggest, we cannot agree with him. The exemption, as we think, undoubtedly applies to all highway authorities made responsible by statute for the maintenance of any roads as successors to the surveyors of highways unless it is excluded by the terms of some special enactment, which is not the case here. The general principle is stated by LORD HALSBURY, L.C., in *Cowley v. Newmarket Local Board* (1) ([1892] A.C. 345). He said (*ibid.*, p. 349):

D “The facts were that the defendants are the Newmarket Local Board of Health, and the footway and the highway referred to were within the limits and under the care and management of the defendants as such local board of health; and the question appears to resolve itself into whether the public authorities in whom the highways are vested by the statute can be held liable in an action for any defect in the repair. I think in this case the liability would have to be put upon the ground that there was default in the construction of the highways through which an accident happened to a passenger. The wide consequences of the existence of such a right of action would be very serious.

E “As long ago as 1788 a question of an analogous character was raised in the Court of King’s Bench; and the argument, then as now, was that where one person receives an injury by reason of any other person or persons omitting to do that which by law he or they are bound to do, he may maintain an action in the circumstances to recover satisfaction for the damage he has received in consequence of that omission. In that case it was said (which seems to me to be decisive of this case) that the principle which decides against this kind of action is accurately stated in BROOKE’S ABRIDGMENT, tit. Action on the Case, pl. 93, where it is said that ‘if an highway be out of repair by which my horse is mired no action lies, “car est populus et surra reforme per presentment,” which must be understood to mean that as the road ought to be repaired by the public no individual can maintain an action against them for any injury arising from their neglect’: *Russell v. Men of Devon* (2) ((1788), 2 Term Rep. 667).”

G In *Sydney Municipal Council v. Bourke* (3) ([1895] A.C. 433), the principle was applied to roads constructed in Sydney, New South Wales, under certain local enactments. LORD HERSCHELL, L.C., delivering the judgment of the Judicial Committee, said this (*ibid.*, at p. 435):

I “It is admitted that the highway on which the disaster occurred was constructed by the appellants in the first instance quite properly. No complaint of misfeasance is made against them. The sole charge is one of non-feasance: that when the road had fallen into a bad condition, they failed to execute the necessary repairs. If, then, they are liable in the present action, it must be either because that liability has been expressly imposed by some enactment, or because the legislature has imposed some duty upon them for the breach of which a right of action accrues to any person injured by it.”

Later he said this (*ibid.*, at p. 443):

“In the series of cases ending with *Cowley v. Newmarket Local Board* (1), in which it has been held that an action would not lie for non-repair of a

highway, the duty to repair was unquestionable, and it was equally clear that those guilty of a breach of this duty rendered themselves liable to penal proceedings by indictment or otherwise; the only question in controversy was whether an action could be maintained. The ground upon which it was held that it could not—even where the duty of keeping the roads in repair had been in express terms imposed by statute on a corporate body—was, that it had long been settled that though a duty to repair rested on the inhabitants, subjecting them to indictment in case of its breach, they could not be sued, and that there was nothing to show that the legislature in transferring the duty to a corporate body had intended to change the nature or extent of their liability.”

Not to multiply citations unduly we will only add on this part of the case the following passages from the judgment of this court delivered by FINLAY, L.J., in *Swain v. Southern Ry. Co.* (4) ([1939] 2 All E.R. 794) where it was sought to extend the exemption in respect of mere non-feasance to the road on and approaches to a bridge for which the defendant railway company was responsible. FINLAY, L.J., said this (*ibid.*, at p. 805):

“We* may refer, as HUMPHREYS, J., in the court below referred, to *Pictou Municipality v. Geldert* (5) ([1893] A.C. 524) where the law is thus summarised by LORD HOBHOUSE, delivering the judgment of the Board (*ibid.*, at p. 527): ‘The latest English case is that of *Cowley v. Newmarket Local Board* (1), decided in the House of Lords. It must now be taken as settled law that a transfer to a public corporation of the obligation to repair does not of itself render such corporation liable to an action in respect of mere non-feasance. In order to establish such liability it must be shown that the legislature has used language indicating an intention that this liability shall be imposed’.”

That is LORD HOBHOUSE. Then FINLAY, L.J., said this ([1939] 2 All E.R. at p. 806):

“It is plain, in our opinion, that the principle originally applicable to the inhabitants, and applicable now to any public authority which may stand in the shoes of the inhabitants, has no application to a case such as the present, where a company carrying on its business for profit, as one of the terms upon which it is given power to make its line, comes under an obligation with reference to bridges and the approaches thereto.”

Later on, FINLAY, L.J., made this reference (*ibid.*, at p. 807) to the judgment of PALLES, C.B., in the Court of King’s Bench in Ireland in *Dublin United Tramways Co. v. Fitzgerald* (6) ([1903] A.C. 99):

“In that judgment, after quoting the principle stated in BROOKE’S ABRIDGMENT, and after referring to the principle established by *Russell v. Men of Devon* (2) and *Cowley v. Newmarket Local Board* (1) [PALLES, C.B.] said: ‘This principle, however, has never been applied to a trading corporation such as the present, and the principle upon which its extension has hitherto proceeded prevents it from being ever so applied. That principle rests upon the fact that in the matters complained of the exempted corporation represents the citizens that for the discharge of the duties entrusted to them, they are responsible to those whom they represent, and that if they fail to use their powers well they can be displaced at the next election. Bodies of this description in principle answer the description of the populus mentioned by BROOKE. This principle can have no application to the present case, in which the defendants are a private trading company’.”

After discussing and rejecting the argument for the defendants based on

* FINLAY, L.J., was delivering the judgment of the court.

A dedication, BARRY, J., went on to state what we take to be his essential ratio decidendi in these terms:

B “Here, the county council made the road, and they themselves created the source of danger of which complaint is made. It is not suggested, of course, that this approach island was a nuisance. The county council no doubt had power to erect islands, bollards and other obstructions as had the county council in *Fisher v. Ruislip-Northwood Urban District Council & Middlesex County Council* (7) ([1945] 2 All E.R. 458). This case, however, clearly establishes that the local authority must itself use reasonable care to give warning against obstructions however lawfully those obstructions may have been erected provided their erection was the act of the authority itself. I would also refer to the other cases relating to bollards, and the like, which are collected in PRATT AND MACKENZIE'S LAW OF HIGHWAYS (19th Edn.) at pp. 121 and 122. The extent of the duty to warn varies, of course, with circumstances, but, had the county council remained the authority responsible for the ‘maintenance, repair and improvement’ of this road, they would, in my view, in the year 1955 have been under a duty to give some adequate warning in the hours of darkness of the danger which they themselves had created by the construction of this protruding kerb. Having regard to the statutory provisions to which I have referred, a ‘dedication to the public’—if such an act had any legal significance—would not, in my view, have absolved them from this duty. Therefore, had the county council still been the highway authority responsible for the maintenance of this road, I do not think they would have had any answer to the present claim. I have, of course, to consider whether this duty has been transferred to the present defendants.”

Then after quoting the terms of s. 32 of the Local Government Act, 1929, the learned judge proceeded as follows:

F “Under this section, as I read it, the function of maintaining the road is transferred to the defendants after the machinery provided for in s. 32 of the Act of 1929 has been put into operation. If I am right in my view, that as part of the exercise of this function the county council were obliged to take reasonable care to give warning against dangers which they had created, a similar duty in relation to this approach island and roundabout now, I think, vests in the defendants. The present position, as I see it, is quite different from that considered by the Court of Appeal in *Nash v. Rochford Rural Council* (8) ([1917] 1 K.B. 384). Here there is no question of the transfer of a ‘liability’ in the legal sense of that term. What is in fact transferred to the present defendants under s. 32 of the Local Government Act, 1929, is a ‘function of maintenance’, and that function includes, in my view, a duty of care in relation to this roundabout and this approach island.”

I It will be seen that the learned judge reaches his conclusion by holding first that the county council would have been liable to the plaintiff if they had retained responsibility for Fleet Bridge Road down to the time of the accident, on the ground that they were under a duty to take reasonable care to give warning against dangers which they themselves had created in the shape of the approach island and roundabout; and, secondly, that a similar duty devolved on the defendants when they took over the road, with the result that they were under the like liability to the plaintiff for the accident as the county council would have been under it if they had retained the road; and that he assigned this duty of care to the “function of maintenance” transferred to the defendants under s. 32.

As to the hypothetical case against the county council, there is, as we have

said, authority for the proposition that a highway authority constructing a road for the public use under statutory powers owes a duty to the public to take reasonable care to construct the road properly, so that it will be reasonably safe for the purposes for which it is intended to be used. See, for example, *McClelland v. Manchester Corpn.* (9) ([1912] 1 K.B. 118, per LUSH, J., at pp. 129, 130 and 131); *Thompson v. Bradford Corpn. & Tinsley* (10) ([1915] 3 K.B. 13, per BAILLACHE, J., at p. 21) and *Baldwin's, Ltd. v. Halifax Corpn.* (11) ([1916], 85 L.J.K.B. 1769, per ATKIN, J., at pp. 1771, 1772). Such cases are illustrations of the general principle enunciated in *Geddis v. Bann Reservoir Proprietors* (12) ((1878), 3 App. Cas. 430), where LORD BLACKBURN said (*ibid.*, at p. 455):

"For I take it, without citing cases, that it is now thoroughly well established that no action will lie for doing that which the legislature has authorised, if it be done without negligence, although it does occasion damage to anyone; but an action does lie for doing that which the legislature has authorised, if it be done negligently",

and see also per LORD PARKER OF WADDINGTON in *Great Central Ry. Co. v. Hewlett* (13) ([1916] 2 A.C. 511 at p. 519). One may add that the positive act of constructing a road, if it be done negligently, may be said to amount to misfeasance and not mere non-feasance.

If there had been negligence on the part of the county council in the construction of Fleet Bridge Road and some person had been injured by a danger created by that negligence, while the county council was still in charge of the road, it may very well be that the county council would have been liable for such injury on this principle. We are not wholly satisfied, however, that a case of negligence could have been made out against the county council on the facts of this case. The road was built in accordance with plans approved by the Minister, and there is no doubt that it was soundly constructed. The islands and roundabout and in particular the angle of splay of the Fleet Bridge Road approach island, which was designed to guide traffic into the roundabout headed in the right direction, conformed to the Ministry's requirements, and the elaborate system of traffic signs which we have described was installed. It would not have sufficed for the purposes of a charge of negligence against the county council merely to show that the system of traffic signs or the lighting arrangements might have been improved on. Be that as it may, we fail to see how the defendants could be held liable on this principle, inasmuch as they were not the constructors of the road.

There is, no doubt, another well established principle (on which the learned judge chiefly founded himself) to the effect that if a highway authority place an obstruction on the highway they must take proper steps by lighting or otherwise to protect the public from the danger constituted by the obstruction. See the case cited by the learned judge, *Fisher v. Ruislip-Northwood U.D.C. & Middlesex County Council* (7). Counsel for the plaintiff forcibly maintained before us that although the approach island was a perfectly proper feature or adjunct of the highway it was one which would be dangerous at night in the absence of lighting or some other form of warning, and consequently that the county council on this principle brought itself under a duty to guard against danger constituted by the island they themselves had constructed, by means of lighting or some other form of warning. He said that this was a continuing obligation which passed to the defendants when they took over the road. He disclaimed reliance on the defendants' duty as lighting authority under s. 161 of the Public Health Act, 1875 (on mere non-feasance in relation to which it is plain that no claim could be founded) but said there was a special duty, arising out of the presence of the island, to light it or to provide some other warning of its presence. Counsel for the defendants sought to meet this submission by contending that the island was not an obstruction but part and parcel of the highway itself. We doubt if this

A distinction is sound. It appears to us that the real answer to the submission of counsel for the plaintiff is that failure to light or give some other form of warning of an obstruction on the highway by a highway authority who themselves created the obstruction is taken out of the category of mere non-feasance and brought within the category of misfeasance by their positive act of creating the obstruction giving rise to the need for lighting or other means of warning. But

B no positive act in relation to the approach island was done by the defendants. They merely kept the island as they found it when they took over the road. The theory that the defendants inherited from the county council the duty to light or provide some other form of warning of the presence of the approach island appears to us (with respect to the learned judge) to be untenable in view of

C *Nash v. Rochford R.C.* (8) ([1917] 1 K.B. 384). If, therefore, the defendants are to be held liable it can only be by virtue of some express words in the Act under which the road became vested in them. There is, however, nothing in s. 32 of the Act of 1929 to impose on an urban district council taking over a county road any special obligation as to the maintenance of the road so as to exclude the ordinary immunity from civil action in respect of mere non-feasance. On the contrary, the concluding words of sub-s. (1)

D “that council shall have the same functions as if they were as respects that road the highway authority and the road were an ordinary road vested in them ”

appear to us to indicate that in such a case the general principle of immunity in respect of mere non-feasance applies.

E It does not appear to us that the improvement of the lighting of the roundabout, or the provision of better means of warning by traffic signs or otherwise of the situation and shape of the Fleet Bridge Road approach island, can, as the learned judge thought, be classed as maintenance. Even if measures of that kind could be so classed, that would be no ground for holding that the ordinary immunity in respect of mere non-feasance in regard to maintenance was excluded. Such

F measures being, to our minds, clearly works of improvement as distinct from maintenance, one might say that the ordinary immunity must a fortiori apply to the defendants’ omission to take them.

For these reasons, we are of opinion that this action should have been held to fail in limine and would accordingly allow this appeal.

G Discussion of the issue of contributory negligence is thus rendered unnecessary, but it must not be assumed that we accept the learned judge’s finding on this aspect of the case.

Appeal allowed. Leave to appeal to the House of Lords refused.

Solicitors: *Cohen, Jackson & Scott*, Stockton-on-Tees (for the defendants, the highway authority); *Archer, Parkin & Townsend*, Stockton-on-Tees, agents for *Mace & Jones*, Liverpool (for the plaintiff, the widow).

[Reported by HENRY SUMMERFIELD, Esq., Barrister-at-Law.]

KELLEHER v. T. WALL & SONS, LTD.

[QUEEN'S BENCH DIVISION (Barry, J.), June 24, 25, 26, 27, 30, 1958.]

Document—Admissibility in evidence—"Person interested"—Employee's action for damages for personal injuries against employers—Statement made by employers' supervisor in department where accident occurred sought to be put in evidence by employers—Supervisor present when accident occurred—Efficient administration of department called into question in action—Whether supervisor's statement admissible in evidence after his death—Evidence Act, 1938 (1 & 2 Geo. 6 c. 28), s. 1 (3).

The plaintiff, having incurred injuries while moving a heavy machine in a department of his employers' factory, sued them for damages. He had moved the machine on the instructions of W., the defendants' manager of the department, in the presence of A., the supervisor in the department. The nature of the plaintiff's claim impugned the efficiency of the defendants' administration of the department. The defendants sought to put in evidence a statement which had been made some three months after the plaintiff incurred his injuries by A., who had died. At the time when he made the statement, A., was still employed by the defendants as a supervisor in the department where the accident occurred. A.'s statement being tendered in evidence it was objected that when he made it, A. was "a person interested" within s. 1 (3)* of the Evidence Act, 1938.

Held: A.'s statement was not admissible in evidence because, though the mere fact that the maker of a statement was employed by one of the parties to an action did not render him "a person interested" within s. 1 (3) of the Evidence Act, 1938, yet, as criticism of the administration of the department (such as was involved in the plaintiff's claim) would reflect on A. as supervisor, he was "a person interested" within s. 1 (3).

Barkway v. South Wales Transport Co., Ltd. ([1948] 2 All E.R. 460) considered.

Dictum of MORTON, J., in *Plomien Fuel Economiser Co., Ltd. v. National Marketing Co.* ([1941] 1 All E.R. at p. 314); and *In the Estate of Hill* ([1948] 2 All E.R. 489) followed.

[As to what constitutes interest in the proceedings by the maker of a statement otherwise admissible under the Evidence Act, 1938, see 15 HALSBURY'S LAWS (3rd Edn.) 318, para. 578.]

For the Evidence Act, 1938, s. 1 (3), see 9 HALSBURY'S STATUTES (2nd Edn.) 627.]

Cases referred to:

- (1) *Plomien Fuel Economiser Co., Ltd. v. National Marketing Co.*, [1941] 1 All E.R. 311; [1941] Ch. 248; 110 L.J.Ch. 180; 165 L.T. 119; 2nd Digest Supp.
- (2) *Barkway v. South Wales Transport Co., Ltd.*, [1948] 2 All E.R. 460; [1949] 1 K.B. 54; [1948] L.J.R. 1921; *revsd. on other grounds*, H.L., [1950] 1 All E.R. 392; [1950] A.C. 185; 2nd Digest Supp.
- (3) *In the Estate of Hill, Braham v. Haslewood*, [1948] 2 All E.R. 489; [1948] P. 341; [1948] L.J.R. 1634; 2nd Digest Supp.

Action.

This was an action by Cornelius Kelleher, the plaintiff, for damages for personal injuries against his employers, T. Wall & Sons, Ltd., the defendants;

* Sub-section (3) of s. 1 of the Evidence Act, 1938, provides: "Nothing in this section shall render admissible as evidence any statement made by a person interested at a time when proceedings were pending or anticipated involving a dispute as to any fact which the statement might tend to establish."

- A the plaintiff alleged that his injuries were caused by the negligence and breach of statutory duty of the defendants. At the material time the plaintiff was employed by the defendants as a charge-hand at their factory and on Apr. 30, 1956, the plaintiff together with two other employees of the defendants was required to move a heavy fruit feeding machine from one part of the factory to another; as the machine was being lifted and tilted on to a trolley in order to
- B transport it, the machine slipped on the wet tiles of the floor and trapped the plaintiff's right hand between the edge of the machine and the wall, thereby causing him injury to his right hand. The plaintiff alleged that the defendants were negligent in that they caused or permitted the floor of the factory to be wet and slippery; that the floor was not effectively drained contrary to s. 6 of the Factories Act, 1937; that the defendants failed to provide proper equipment with
- C which to move or lift a heavy machine and that they failed to provide a safe system of work and exposed the plaintiff to unnecessary risk of injury. The defendants denied that they were negligent or in breach of statutory duty as alleged by the plaintiff and contended that the injury was wholly caused or contributed to by the plaintiff's own negligence.

- In the course of the trial the defendants sought to put in as evidence a statement made to the defendants' insurers some three months after the plaintiff sustained his injury, by a Mr. Atkins who at that time was employed by the defendants as a supervisor on the production side of their business; Mr. Atkins had since died. The plaintiff objected to the statement being put in as evidence on the ground that at the time it was made Mr. Atkins was "a person interested" within sub-s. (3) of s. 1 of the Evidence Act, 1938. The case is reported on the
- E ruling of BARRY, J., as to the admissibility in evidence of this statement.

Stephen Chapman, Q.C., and A. C. H. de Piro for the plaintiff.

W. L. Mars-Jones, Q.C., and D. J. Stinson for the defendants.

- BARRY, J.:** Some three months after the accident with which the court is at present concerned, a Mr. Percy Edward Coxhead, who was a representative
- F of the defendants' insurers, very properly took a statement from a Mr. Atkins, who has since died. Counsel for the defendants has sought to tender that statement in evidence under the provisions of the Evidence Act, 1938. It is conceded by counsel for the defendants that at the time when the statement was made, proceedings were at least contemplated; and it is conceded, on the other hand,
- G by counsel for the plaintiff that apart from the provisions of s. 1 (3)* of the Act, all the other requirements provided for in s. 1 have been complied with. Therefore, it rests with me to consider, and to consider only, whether on the authorities it can be properly said that at the time when this statement was made, Mr. Atkins was "a person interested". I think that it is clear, as was said by
- MORTON, J., in *Plomien Fuel Economiser Co., Ltd. v. National Marketing Co.* (1) ([1941] 1 All E.R. 311 at p. 314), that "a person interested" means a person who
- H cannot in a true sense be regarded as an independent person.

- A number of authorities has been cited to me. I do not propose to occupy time by considering them in detail. I am satisfied that some qualification must be placed on the very broad proposition stated by ASQUITH, L.J., in *Barkway v. South Wales Transport Co., Ltd.* (2) ([1948] 2 All E.R. 460). In that case, speaking of the maker of the statement, the learned lord justice used these words (*ibid.*,
- I at p. 473):

"His reputation as a tyre-tester was involved, and, apart from that, he was interested as an employee in his employers winning the case."

The lord justice cited as an authority for the latter part of that proposition *Plomien Fuel Economiser Co., Ltd. v. National Marketing Co.* (1), to which I have already referred. Having regard to sub-s. (3) of s. 1 of the Act of 1938, I do not think that ASQUITH, L.J.'s words can properly be read as laying down any

* For the terms of sub-s. (3) of s. 1 of the Evidence Act, 1938, see footnote, p. 686, ante.

general proposition that because the maker of the statement is in the employment of one or other of the parties to an action, that fact in itself must necessarily render any statement which he made inadmissible on the ground that he must necessarily be "a person interested". With respect, I agree with what was said by WALLINGTON, J., in *In the Estate of Hill, Braham v. Haslerwood* (3) ([1948] 2 All E.R. 489). WALLINGTON, J., uses these words (*ibid.*, at p. 490):

"It follows, as it seems to me, that in every case to decide the question of admissibility the facts must be ascertained both as to the person whose statement it is sought to put in evidence, as to the character and subject-matter of the 'proceeding', and as to the relation of the person to the subject-matter of the proceeding."

I have not a great deal of evidence before me as to the exact position of Mr. Atkins in the defendant company. I do, however, know this: he was a supervisor on the production side of the defendants' business. He came immediately below Mr. Whittager* in the defendants' hierarchy, and was clearly the superior of the plaintiff who was a charge-hand, also on the production side. Further than that, the plaintiff's evidence is (and it is unchallenged) that at the time when he received instructions from Mr. Whittager to move the machine which ultimately caused his injuries, Mr. Atkins was in fact present.

Without going into any details here, it is quite clear that from the outset the plaintiff's claim called into question the efficient administration of the production side of the defendants' business, particularly in relation to No 1. plant. Mr. Whittager was, of course, primarily responsible for the system of work adopted and for the general run of the production part of it. Mr. Atkins, as the supervisor immediately below Mr. Whittager in the hierarchy, was also to a lesser extent responsible. In an action in which (to use the broadest possible term) the method of conducting the production side in No. 1 plant is called into question, I feel bound to hold that Mr. Atkins cannot be regarded in a true sense as an independent person. It is not necessary for me to find that his conduct must necessarily be called into question or impugned, but one can imagine circumstances in which it certainly would have been. If, for example, Mr. Atkins had known or if it had been reported to him that this machine which the plaintiff had been told to move was in fact immobile owing to a rusting-up of its wheels, and if Mr. Atkins had remained silent when Mr. Whittager gave the order for its removal, then his conduct would in a very real sense be called into question. However, quite apart from any definite criticisms which might have been made against him, it seems to me that any criticism of the conduct of this department would necessarily reflect not only on the manager of the department but also on the supervisor. In those circumstances, I think that Mr. Atkins was so closely associated with the management of the department which, as I have said, is clearly being called into question by the plaintiff, that it would be wrong to treat him as anything other than "a person interested" within the meaning of s. 1 (3) of the Act of 1938.

I do not think that it would be right for me to receive this statement in evidence.

Evidence inadmissible.

Solicitors: *Edward Mackie & Co.* (for the plaintiff); *Gascoin & Co.* (for the defendants).

[Reported by WENDY SHOCKETT, Barrister-at-Law.]

* Mr. Whittager was the defendants' manager.

A **R. v. NATIONAL INSURANCE (INDUSTRIAL INJURIES)**
COMMISSIONER, *Ex parte* RICHARDSON.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Slade and Devlin, JJ.), July 2, 1958.]

B *Industrial Injury—Right to benefit—Burden of proof whether accident arose out of employment—National Insurance (Industrial Injuries) Act, 1946 (9 & 10 Geo. 6 c. 62), s. 7 (4).*

The applicant, an omnibus conductor, was in uniform on the platform of his bus when he was injured in an assault by one of a gang of youths. It was not shown that he was singled out because of any circumstance connected with his employment. The youths had previously assaulted other persons. The applicant's claim for disablement benefit under the National Insurance (Industrial Injuries) Act, 1946, was disallowed by the National Insurance (Industrial Injuries) Commissioner on the ground that, though the injury was sustained in the course of his employment, it did not arise out of his employment as the attack was made on him as a person in the street. By s. 7 (4) of the Act, "an accident arising in the course of an insured person's employment shall be deemed, in the absence of evidence to the contrary, also to have arisen out of that employment". The applicant applied for certiorari on the ground that the commissioner misdirected himself in law by not having treated the onus as being on the insurance officer to prove that the accident did not arise out of the employment.

E **Held:** the facts in evidence before the commissioner amounted to "evidence to the contrary", within s. 7 (4) of the National Insurance (Industrial Injuries) Act, 1946; there was, therefore, no presumption as to the burden of proof, and, no error in law being apparent on the face of the decision, certiorari would not be granted.

[For the National Insurance (Industrial Injuries) Act, 1946, s. 7, see 16 F HALSBURY'S STATUTES (2nd Edn.) 814.]

Motion for certiorari.

The applicant, Clifford Richardson, was employed by Salford Corporation as an omnibus conductor. On Aug. 7, 1954, he was standing in uniform on the platform of his bus making up his way bills, when the driver of the bus, noticing a number of youths standing in the roadway, slowed down the bus. Two of the youths jumped on to the platform of the bus, and one of them kicked the applicant in the stomach. The applicant fell to the floor and knocked his head on the stairs of the bus, receiving head injuries and injury to his right eye. The applicant was not robbed. Previous to the assault on the applicant the youths had assaulted other persons. The applicant claimed disablement benefit under the National Insurance (Industrial Injuries) Act, 1946. He now applied for an order of certiorari to quash a decision of the National Insurance (Industrial Injuries) Commissioner, case No. C.I. 15/58, dated Jan. 30, 1958, wherein the commissioner allowed an appeal by the insurance officer from a decision of the Local Appeals Tribunal for the District of Salford thereby disallowing the applicant's claim for disablement benefit, on the grounds that (i) the applicant having been found and held and admitted to have been in the course of his employment when he sustained the injuries resulting in his disability, the commissioner erred in point of law in holding that the onus was on the applicant to establish that his injuries arose out of his employment; (ii) having regard to the National Insurance (Industrial Injuries) Act, 1946, s. 7 (4), once it was found or held or conceded that the applicant was in the course of his employment, there was a statutory presumption in his favour that his injuries arose out of his employment; (iii) the onus was on the insurance officer to negative the presumption in favour of the applicant, that is, to establish that the injuries did

not arise out of the employment; (iv) on the evidence adduced before the commissioner, or alternatively on the facts as found by him, there was no evidence which could reasonably be regarded as negating the presumption that the injuries arose out of the applicant's employment; (v) for these reasons, the commissioner had no jurisdiction to allow and/or erred in law in allowing the insurance officer's appeal. A

Stephen Chapman, Q.C., and J. D. Stocker for the applicant. B

Rodger Winn for the Minister of Pensions and National Insurance.

LORD GODDARD, C.J., stated the facts and continued: The question arises whether the applicant is or is not entitled to claim disablement benefit because, to claim disablement benefit, the insured person must suffer injury caused by accident arising out of and in the course of his employment. The National Insurance (Industrial Injuries) Commissioner has held that the accident did not arise out of his employment, although it arose in the course of his employment, because, on the evidence before him, it was not shown that the applicant was specially singled out by reason of any particular circumstance connected with his employment, such as that he was wearing a particular uniform or might have money on him. The commissioner held that it was an attack made on the applicant as a person in the street, as these youths had been attacking other people. C D

This is a motion for certiorari on the ground that the commissioner misdirected himself with regard to the law, because, so it is said, the onus of proof was put on the applicant whereas, according to counsel for the applicant's contention, the onus of proof was on the insurance officer. Counsel has conceded that the question comes, in the end, to the true construction of s. 7 (4) of the National Insurance (Industrial Injuries) Act, 1946. Sub-section (4) provides: E

"For the purposes of this Act, an accident arising in the course of an insured person's employment shall be deemed, in the absence of evidence to the contrary, also to have arisen out of that employment."

Therefore, if a person proves merely that he suffered an accident in the course of his employment, and there is no other evidence, then it is to be deemed that the accident arose out of the employment. If, however, the facts which are in evidence before the commissioner can amount to evidence to the contrary, then the presumption disappears, and it is then for the applicant to prove that the accident did arise not only in the course of but also out of his employment. The words of the sub-section are not "in the absence of proof to the contrary" or "unless the contrary is proved"; the words of the sub-section are "in the absence of evidence to the contrary". That has been held by commissioners quite correctly, in my opinion, to mean no more than that, if there is evidence before the commissioner that the accident does not arise out of or in the course of the employment, then there is no presumption at all and it is left to the parties to prove the case in the ordinary way. It is always necessary to bear in mind that, where this court is asked to grant certiorari, this court has no power to sit as a court of appeal on the facts. The only ground on which we are asked to grant certiorari in this case is that, on the face of the decision, there is an error of law. The error of law which is alleged is that the commissioner misdirected himself with regard to the onus of proof and held that there was an onus on the applicant instead of there being an onus on the insurance officer. That does not seem to me, with all respect to counsel for the applicant's argument, to be right. It is not here a question of the onus of proof. The question is: Was there evidence to the contrary? If there was, it is left to the applicant to make out his case. There being, in my opinion, evidence before the commissioner which would prevent the presumption which otherwise would arise from being applicable, he has come to the conclusion that the accident did not arise out of and in the course of his employment. It is not for this court to sit as a court of appeal from him on that. F G H I

A In my opinion, there is no error of law on the face of this decision and the commissioner has correctly interpreted s. 7 (4) of the Act of 1946. For these reasons this application fails.

B SLADE, J.: I agree. I think s. 7 (4) of the National Insurance (Industrial Injuries) Act, 1946, on its true construction, either creates a conclusive presumption or gives rise to no presumption at all. In this case it was admitted that the accident arose in the course of the employment. Evidence was given that it did not arise out of the employment. Therefore, there was no conclusive presumption established under the sub-section and, as I have said, in my opinion it creates no rebuttable presumption.

C DEVLIN, J.: I also agree. I think that the short point is whether the word "evidence" in s. 7 (4) of the National Insurance (Industrial Injuries) Act, 1946, in its context means proof, or whether it means evidence in the sense of a very familiar expression, "evidence fit to be left to the jury". In my judgment, it means the latter. I do not think that, if the decision of the National Insurance (Industrial Injuries) Commissioner were looked at by itself, it would be a perfect statement of the legal position. That is, I think, because (so we are told) this question of the true interpretation and effect of s. 7 (4) was not specifically argued before him. If it had been, no doubt he would have put the matter a little differently, but he did refer in his decision to an earlier decision in 1951* and that, in turn, refers to a decision of 1949† which puts the matter entirely correctly and in the sense which this court is putting on the construction of s. 7 (4). The right view of the matter is that the commissioner must be taken to have addressed himself to the question whether there was evidence to the contrary, to have satisfied himself that there was and, as my Lord has pointed out, that there was evidence of an indiscriminate attack which is referred to in the decision. Accordingly, his decision is to be interpreted in the light that there was no presumption at all as to the burden of proof, because s. 7 (4) did not apply as there was evidence to the contrary.

Motion dismissed.

Solicitors: *G. Howard & Co.* (for the applicant); *Solicitor, Ministry of Pensions and National Insurance.*

[*Reported by G. A. KIDNER, ESQ., Barrister-at-Law.*]

* R (I) 41/51.

† C.I. 3/49.

ESPRESSO COFFEE MACHINE CO., LTD. v. GUARDIAN ASSURANCE CO.

[CHANCERY DIVISION (Harman, J.), June 27, 1958.]

Landlord and Tenant—New tenancy—Business premises—Opposition by landlord—Intention to occupy premises on termination of current tenancy—Resolution of board passed—Landlord negotiating for lease of other premises—Undertaking given to court to occupy—Intention—Landlord and Tenant Act, 1954 (2 & 3 Eliz. 2 c. 56), s. 30 (1) (g).

The tenants were the assignees of business premises for the residue of a term of years expiring on Lady Day, 1958. On Sept. 24, 1957, the tenants applied for a new lease beginning on the expiration of their existing lease, and the landlords (a well-known insurance company) served a notice of opposition under the Landlord and Tenant Act, 1954, s. 30 (1) (g), on the ground that on the determination of the current tenancy they intended to occupy the premises for the purpose of a business to be carried on by themselves therein. On Feb. 19, 1958, the board of directors of the landlords passed a resolution expressing their intention that the landlords should occupy the demised premises "at the end of the current tenancy". The landlords were also negotiating with a view possibly to obtaining accommodation in other premises which were being erected nearby. It was alleged that if they obtained this it would render unnecessary the occupation by them of the demised premises. The landlords offered the court an undertaking to occupy the demised premises. The tenants argued that they could by legal action considerably delay the taking of possession by the landlords, probably until the end of 1958, and that, the board of directors of the landlords not having taken that into account when resolving to take possession at the end of the current tenancy, their resolution could not be accepted as showing a settled intention for the purposes of s. 30 (1) (g).

Held: a new tenancy should not be granted to the tenants because the court should accept the undertaking of a company of such standing as the landlords at its face value, and this, coupled with the resolution, showed at the time of the hearing an intention on their part, sufficient to satisfy s. 30 (1) (g) of the Landlord and Tenant Act, 1954, to occupy the premises for their own business.

[As to a landlord's objecting to the grant of a new tenancy of business premises on the ground that he intends to occupy them on termination of tenancy, see 23 HALSBURY'S LAWS (3rd Edn.) 894, para. 1718.

For the Landlord and Tenant Act, 1954, s. 30 (1), see 34 HALSBURY'S STATUTES (2nd Edn.) 414.]

Cases referred to:

- (1) *Betty's Cafés, Ltd. v. Phillips Furnishing Stores, Ltd.*, [1958] 1 All E.R. 607.
- (2) *Lennox v. Bell* (May 31, 1957), unreported.

Adjourned Summons.

By their originating summons, dated Jan. 20, 1958, the applicants asked for an order for the grant of a new tenancy of premises comprising the ground floor and basement of Nos. 227/228, Strand, London, W.C.2, for a term of fourteen years from Mar. 25, 1958, at a rent of £3,500 per annum exclusive.

L. A. Blundell for the tenants.

C. J. S. French for the landlords.

HARMAN, J.: This is a very peculiar case, and the facts are few and not in dispute. The lease under which the question arises was one of five and a quarter years from Christmas, 1952, granted by the respondents, the Guardian Assurance Company, who had purchased the freehold of the property, No. 227, The Strand, opposite these courts, with an eye to its possible occupation when

- A the lease of premises occupied by their "Law Courts branch" runs out. It is necessary for them, if they are to maintain the Law Courts branch, which they have had since 1883, to remain somewhere in the vicinity of the Law Courts, and No. 227, The Strand, fills that bill completely. At the end of 1955 the lessees under this short lease obtained leave to assign the residue of the term to the applicants, the Espresso Coffee Machine Co., Ltd., who have been in
- B occupation since the beginning of 1956, and during almost the whole of that period have been trying to get a longer term. The date for the determination of the lease was Lady Day, 1958. Before these tenants went in they knew of the existence of the Landlord and Tenant Act, 1954, and that once they could get into occupation they might be very difficult to remove, for it was the view of the legislature in 1954 that leases for business purposes should not come
- C to an end at the contractual date, but should run on until notices were given.

- The application for a new lease was made on Sept. 24, 1957, and it was for a new lease of fourteen years beginning at Lady Day, 1958. The notice of opposition was served in due time and followed s. 30 (1) (g) of the Act of 1954 fairly closely, the ground being that "on the determination of the current tenancy we intend to occupy the premises for the purpose of a business to be carried on by us therein." There seems no doubt at all that at that time that was certainly the intention of the landlords. If that had been all, they would have had a perfect answer to the claim, under s. 30 (1) (g). If they established the ground on which they relied, the court would not be entitled, having regard to s. 31 (1) of the Act of 1954, to make an order for the grant of a new tenancy; it is not a discretionary matter, the court is bound not to grant a new tenancy if the landlord
- E proves his case.

- The controversy is whether the landlords have proved their case, it being admitted that the burden of doing so is on them. It is said that they fail to prove their case because in the affidavit made by the deputy general manager of the landlords it is disclosed that they have their eye on other possible premises. There is a new building going up further down the Strand, at No. 199, being
- F built by the Huddersfield Building Society, and it appears to be at least a possibility that that society will not require the whole of the building for its own occupation, and will be willing to let two floors upstairs, which might be suitable for the landlords to occupy. The landlords have, through their agents, been negotiating with a view to seeing on what terms such a tenancy might be offered. There has been no finality, and there has not even been a draft contract or draft
- G lease forwarded to the landlords. The most ingenious argument of counsel for the tenants is that the possibility of that chance materialising must have unsettled the minds of those in control of the landlords so that whatever was their intention some months ago, it has now no longer the necessary quality to rank as an intention within s. 30 (1) (g) of the Landlord and Tenant Act, 1954.

The words of s. 30 (1) (g) are that

- H "on the termination of the current tenancy the landlord intends to occupy the holding for the purposes . . . of a business to be carried on by him therein . . ."

- It is said that if the landlords can succeed in obtaining a lease of this future building at No. 199, The Strand, that would be more suitable to their business, and it would be futile, things being as they are, for them to go into occupation
- I of No. 227 for whatever short period may elapse between the end of the current tenancy and the making-ready of the new building. Counsel for the tenants makes no bones about the fact that he intends to use every tactic open to him to stay in occupation. The law allows him various methods of delaying a final order in favour of the landlords, and he says it will be the end of the year at least, perhaps longer, before every legal artifice has been exhausted, even if he does not in this, or in some higher court, succeed, and that by the time he has finished with the landlords they will be so heartily sick of him and No. 227 that they

will have no intention of ever going there at all. That may not be a very admirable attitude, but it is one which the law entitles the tenants to take up, and they unblushingly do so.

There have been a large number of cases about s. 30 (1) (f) of the Act of 1954, dealing with intention, and it is said that I am bound to find that the intention has to be "settled" or "fixed" or "unlikely to be changed". Those are various phrases that have been used in the Court of Appeal or the House of Lords as glosses on the words of the Act. Judges of necessity have to find synonyms for the words they construe, but other judges' synonyms do not bind their brothers. I have to find an intention. I shall use some epithets of my own. It must be an honest intention, it must be a present intention, and it must be a real intention, but the only word which I have to construe is "intention". Do the landlords intend, when they get possession of this property, to occupy it?

On Feb. 19, 1958, the board of directors of the landlords passed a resolution on that subject, expressing their then intention*. Counsel for the tenants criticises that on the ground that the directors had not then realised to the full the expedients to which they might be subjected by his clients. He said that if they had really thought about it, they would have realised they could not get possession this year, or at any rate not till the very end of the year. They not having thought of that, counsel says that the resolution is of no value. I do not accept that view of it at all. What the resolution says is: "at the end of the current tenancy", and that means whenever that happens to be. I appreciate counsel's argument that the value of that expression of intention has rather to be looked at askance when one thinks that the end of the tenancy is not nearly so early as those who passed the resolution thought it might be. I cannot see, however, that the fact that they did not realise how long it might be before they went into possession, disentitles me from giving any value to their expression of intention. As I understand it, at the time of the resolution, the possibility of obtaining a lease of No. 199 had already been raised. Nevertheless, the board expressed the intention to occupy No. 227, not contingently, not in the event of nothing better turning up, but absolutely, and they were willing to offer an undertaking to the court, and authorised that to be done. I was reminded by counsel for the tenants that undertakings have been freely offered in analogous cases, notably in *Betty's Cafés, Ltd. v. Phillips Furnishing Stores, Ltd.* (1) ([1958] 1 All E.R. 607), which went to the House of Lords, and also in *Lennox v. Bell* (2) which has not been reported, but I have a transcript of the shorthand note of the judgment of LORD GODDARD, C.J., delivered on May 31, 1957. There a lady had offered the county court, through her solicitor, an undertaking to carry on a greengrocer's business if she got possession, and the county court judge found as a fact that she would not be able to perform the undertaking even if she gave it. He thought that she was in fact motivated by spite against a neighbour, and that the whole thing was unreal. The Lord Chief Justice accepted that view. If these landlords give an undertaking, there is no question but that they have the power to honour it, and I think that there is no doubt that they will honour

* The resolution was in the following terms:

"1. That in the event of the company obtaining possession of those parts of the premises Numbers 227/228, Strand, London, W.C.2, now occupied by the Espresso Coffee Machine Co., Ltd. as tenants the company will as soon as practicable perform all necessary works, redecoration, conversion and reconstruction in respect of all these parts to make the same suitable for the purpose of carrying on therein the Law Courts Branch of its business and when these works are completed will forthwith take up occupation of these parts for the said purpose;

"2. That counsel appearing for the company in the application by Espresso Coffee Machine Co., Ltd., now proceeding in the Chancery Division be authorised to give an undertaking either to the court or to Espresso Coffee Machine Co., Ltd. that in the event of possession being obtained as aforesaid the company will as soon as practicable perform the works aforesaid and when they are completed will forthwith take up occupation of the said parts of the premises for the purpose of carrying on therein the Law Courts Branch of its business."

A it. They are not the sort of company whose undertakings in a suitable case the court would hesitate to accept. It is not suggested that they could not carry out the undertaking. Therefore, as counsel at the Bar today is still authorised to make this offer to me and to the tenants, I must take the offer at its face value. If that is the case, I do not see how I can any longer doubt that the intention today exists. Whether by the end of the year it will exist

B any longer, I do not know. The tenants may so harass the landlords that they will change their mind; but that is wrapped in the future. The landlords may never get this lease at No. 199. If so, it seems certain that they will want to occupy No. 227. Even if they do get the lease, they have declared to me, and are willing to undertake to make that declaration good, that it is their intention, if they get possession of No. 227, to move into it. They

C have given that undertaking, and I feel bound to accept from a company of this standing that expression of their intention. They have not to prove that they will have the intention of occupying No. 227 next year or in six months' time. The date that is relevant is here and now, and the intention seems to me to be present here and now. That being so, I am of opinion that the landlords have established their objection and that it is mandatory on me to refuse

D to grant a new tenancy, and that I do by dismissing this summons.

Application dismissed.

Solicitors: *Charles Caplin & Co.* (for the tenants); *Trower, Still & Keeling* (for the landlords).

[*Reported by F. GUTTMAN, Esq., Barrister-at-Law.*]

E

AGRIMPEX HUNGARIAN TRADING COMPANY FOR AGRICULTURAL PRODUCTS v. SOCIEDAD FINANCIERA DE BIENES RAICES S.A.

F

[COURT OF APPEAL (Lord Goddard, C.J., Parker, L.J., and Lloyd-Jacob, J.), June 18, 19, 20, 24, 27, 1958.]

Shipping—Demurrage—Port charterparty—Time lost waiting for berth—Delay due to cargo not being available—No berthing permit until cargo available—Ship kept lying in roads—Whether ship an arrived ship.

G

Shipping—Port charterparty—Duty of charterer to provide cargo—Breach of duty—Whether matter of defence or counterclaim.

In August, 1954, the charterers, who had bought a cargo of maize f.o.b. Argentine ports, entered into a charterparty wherein they agreed with the owners of a vessel that she, having loaded a part cargo of maize at an Argentine port, should proceed to load the rest of the cargo in the port of Buenos Aires. The vessel duly arrived at the intersection in Buenos Aires roads and anchored there at 1.30 p.m. on Oct. 12, 1954; this point was twenty-two miles distant from the dock area of the port. No vessel could proceed from the intersection to the dock area without a permit, and at this time, by virtue of a resolution passed by the port authority on Sept. 1, 1954, a vessel would not be granted a permit unless her cargo of grain was ready to load. Loading of such a cargo never took place in the roads. The cargo was not ready to load until Oct. 29, when a permit was obtained and the vessel reached her loading berth at 2 p.m. The charterers, having paid under protest to the owners demurrage for the period Oct. 12 to Oct. 29, recovered in an action against them the demurrage and also despatch money on the footing that the vessel was not an arrived ship at Buenos Aires until Oct. 29; the owners recovered by counterclaim damages for delay from Oct. 12 to Oct. 29 on the ground that the charterers were in breach of obligation by not having a cargo ready for the vessel on Oct. 12. On appeal,

H

I

Held: (i) under a port charterparty a vessel was not an arrived ship until she was within the commercial area of the port, viz., the area where she could be loaded when a berth was available; on the facts the intersection in Buenos Aires roads was not within the commercial area of the port, and therefore the vessel was not an arrived ship until Oct. 29, 1954 (see p. 698, letter I, and p. 699, letters D and G, post).

Leonis S.S. Co., Ltd. v. Joseph Rank, Ltd. ([1908] 1 K.B. 499) followed.

(ii) where, as in the present case, the provision of a cargo ready to load was necessary to enable a vessel to become an arrived ship the obligation of the charterers to provide a cargo, and so to enable the owners' obligation that the vessel should become an arrived ship to be fulfilled, was absolute (see p. 701, letter E, post); and the charterers, not having had a cargo ready until Oct. 29, 1954, were liable in damages for breach of this obligation.

Ardan S.S. Co. v. Andrew Weir & Co. ([1905] A.C. 501) applied.

(iii) the charterers' breach of duty was a matter of counterclaim, not of defence (see p. 702, letters F to H, post).

Mackay v. Dick ((1881), 6 App. Cas. 251) considered and explained.

Decision of ASHWORTH, J. ([1957] 3 All E.R. 626) affirmed.

[As to when a ship is an arrived ship, see 30 HALSBURY'S LAWS (2nd Edn.) 422-427, para. 592; as to readiness to load, see *ibid.*, 427, 428, paras. 593, 594; and as to the charterer's duty to provide a cargo, see *ibid.*, 434-442, paras. 602-605.

For cases on when a ship is an arrived ship, see 41 DIGEST 568-572, 3921-3957; for cases on readiness to load, see *ibid.*, 447-450, 2804-2819; and for cases on the charterer's duty to provide a cargo, see *ibid.*, 453-456, 2843-2867.]

Cases referred to:

- (1) *Leonis S.S. Co., Ltd. v. Rank (Joseph), Ltd.*, [1908] 1 K.B. 499; 77 L.J.K.B. 224; 41 Digest 569, 3937.
- (2) *Tapscott v. Balfour*, (1872), L.R. 8 C.P. 46; 42 L.J.C.P. 16; 27 L.T. 710; 41 Digest 559, 3851.
- (3) *Davies v. McVeagh*, (1879), 4 Ex.D. 265; 48 L.J.Q.B. 686; 41 L.T. 308; 41 Digest 572, 3961.
- (4) *Postlewaite v. Freeland*, (1880), 5 App. Cas. 599; 49 L.J.Q.B. 630; 42 L.T. 845; 41 Digest 539, 3666.
- (5) *Mackay v. Dick*, (1881), 6 App. Cas. 251; 39 Digest 647, 2424.
- (6) *Vergottis v. Cory (William) & Son, Ltd.*, [1926] 2 K.B. 344; 95 L.J.K.B. 1002; 135 L.T. 254; 41 Digest 565, 3899.
- (7) *Ardan S.S. Co. v. Weir (Andrew) & Co.*, [1905] A.C. 501; 74 L.J.P.C. 143; 93 L.T. 559; 41 Digest 453, 2848.
- (8) *Little v. Stevenson & Co.*, [1896] A.C. 108; 65 L.J.P.C. 69; 74 L.T. 529; 41 Digest 457, 2874.
- (9) *Inverkip S.S. Co., Ltd. v. Bunge & Co.*, [1917] 2 K.B. 193; 86 L.J.K.B. 1042; 117 L.T. 102; 41 Digest 580, 4037.
- (10) *Einar Bugge A.S. v. Bowater (W. H.), Ltd.*, (1925), 31 Com. Cas. 1; 41 Digest 459, 2908.
- (11) *Jones, Ltd. v. Green & Co.*, [1904] 2 K.B. 275; 73 L.J.K.B. 601; 90 L.T. 768; 41 Digest 457, 2872.
- (12) *Lilly & Co. v. Stevenson (D. M.) & Co.*, (1895), 22 R. (Ct. of Sess.) 278; 32 Sc. L.R. 212; 41 Digest 561, 3868*ii*.
- (13) *Krog & Co. v. Burns & Lindemann, The Avis*, (1903), 5 F. (Ct. of Sess.) 1189; 40 Sc.L.R. 874; 41 Digest 456a.
- (14) *Hogarth v. Cory Brothers & Co.*, (1926), L.R. 53 Ind. App. 230; 95 L.J.P.C. 204; 136 L.T. 172; 32 Com. Cas. 174; 41 Digest 579, 4030.

Appeal.

This was an appeal by the defendants, the owners and a cross-appeal by the plaintiffs, the charterers, from a decision of ASHWORTH, J., given on Nov. 18,

A 1957, and reported [1957] 3 All E.R. 626, where the facts are fully stated at pp. 628 to 631.

A. A. Mocatta, Q.C., and R. A. MacCrindle for the appellants, the owners.

Eustace Roskill, Q.C., and J. F. Donaldson for the respondents, the charterers.

Cur. adv. vult.

B June 27. LORD GODDARD, C.J.: PARKER, L.J., will deliver the first judgment.

PARKER, L.J., read the following judgment: This case comes before us on appeals by both parties from a judgment of ASHWORTH, J., dated Nov. 18, 1957, whereby he awarded to the plaintiffs (charterers) a sum of £2,751 14s. 8d. on their claim and to the defendants (owners) a sum of £2,726 14s. 8d. on their counter-claim, in each case without costs. The net result is a balance of only £25 in favour of the charterers, but we are told that this is a test case, arising out of the congestion of ships arriving to load maize at Buenos Aires in September-December, 1954. Though a number of points has been taken, the two main issues which fall to be determined are: (1) Whether the owners' ship the Aello became an arrived ship when she anchored in the roads at Buenos Aires on Oct. 12, 1954; and this depends on the application to the facts of the case of the principle laid down in *Leonis S.S. Co., Ltd. v. Joseph Rank, Ltd.* (1) ([1908] 1 K.B. 499); (2) Whether, if the Aello was not then an arrived ship, the charterers were themselves in breach of any duty which prevented her from being an arrived ship at any time before Oct. 29, 1954.

E The matter arises in this way. The charterers are a Hungarian state trading concern responsible for the purchase of grain. On June 23, 1954, they contracted with Bunge Aktiengesellschaft of Zurich for the purchase of Plate maize f.o.b. Argentine ports at sellers' option and in accordance with the allocation as received from a body known as the Direccion Nacional de Granos y Elevadores, Buenos Aires, hereinafter called the "Grain Board". Under the contract the charterers were to supply tonnage. On Aug. 5, 1954, Bunge, through Bunge & Born Limitada, in turn contracted to buy the maize from the Instituto Argentino de Promocion del Intercambio, a state concern having the monopoly of purchase from farmers and of sale for export, hereinafter called "I.A.P.I." The purchase was f.o.b. ports of the rivers not above Lorenzo, completing in the port of Buenos Aires. On Aug. 27, the charterers entered into a charterparty on the Centrocon form for the charter of the Aello to carry the maize so purchased to Hamburg. So far as is material the charterparty provided as follows. By cl. 2, the ship was to proceed as ordered by the charterers to the undermentioned ports or places and there receive from them a full and complete cargo of wheat and/or maize and/or rye in bulk which cargo the charterers bound themselves to ship. Clause 3 provided that the ship should load at one or two safe loading ports or places in the River Parana not higher than San Lorenzo and the balance of the cargo in the Port of Buenos Aires or Eva Peron (now renamed La Plata) or Montevideo at charterers' option. Pausing there, it is clear that the charterparty was a port and not a berth charterparty. Clause 13 provided for payment of demurrage, and cl. 16 provided for despatch money. Clause 30 is an exceptions clause, but I need not read it as it is immaterial to the facts of the case. The charterparty also contained an arbitration clause. Both parties, however, agreed to waive arbitration in order to get the legal points decided by the courts without delay.

I In due course the Aello went to Rosario and there loaded a part cargo. No question arises as to what happened there. On Oct. 11 she was ordered to Buenos Aires to complete loading, and at 1.30 p.m. on Oct. 12 she arrived at what is called the intersection in Buenos Aires roads, which is about twenty-two miles (three hours' steaming time) from the dock area of the port of Buenos Aires. She had obtained free pratique, and so far as she was concerned she was ready, when so permitted by the port authorities, to move up to the dock area

and to a loading berth. In fact no permission was forthcoming, and she remained in the roads until Oct. 29, 1954, when for the first time she was allowed to proceed to the dock area and to a berth where she arrived at 2 p.m. on Oct. 29, 1954. Loading, partly from lighters and partly from the elevator, was completed on Nov. 6, when she sailed for Hamburg. Pausing there, it will be observed that if the ship was an arrived ship at 1.30 p.m. on Oct. 12, lay days would have expired by 1 p.m. on Oct. 28, and in that event demurrage in the sum of £1,887 10s. had become due. If, on the other hand, she was not an arrived ship until Oct. 29, no demurrage was due, but the charterers would in that event have earned despatch money in the sum of £864 4s. 8d. In fact the owners demanded the former sum by way of demurrage before the ship sailed, and the charterers paid the same under protest in order to get delivery of the bills of lading. On May 5, 1953, the charterers issued a writ in the present proceedings, claiming these two sums, and, as I have said, obtained judgment therefor, on the basis that, as held by the learned judge, the Aello was not an arrived ship until Oct. 29.

Now what was the reason for the delay between Oct. 12 and 29? Though the affidavit evidence is far from clear, certain admissions were made by the parties before the learned judge, and these were revised and supplemented in the course of the proceedings in this court. It is now, I think, clear that in the normal way a ship cannot proceed beyond the intersection without a permit, known as a "giro", which is issued by the Customs Authority on the application of the ship. In the ordinary way, this giro will be issued so soon as the shipper has obtained a certificate from the Grain Board to the effect that a cargo is available. Once the giro has been issued, the ship will proceed to the dock area or inner harbour and there wait until a loading berth is available. It appears, however, that in 1954 maize was very slow in coming down to the port and as a result there was a congestion of vessels arriving to load maize. In these circumstances, the port authority on Sept. 1, 1954, resolved that no giro should be issued to enable a ship arriving to load maize to proceed beyond the intersection until not only such certificate had been obtained, but also the cargo was ready to be loaded. This resolution of the port authority, which was designed to meet a temporary emergency, remained in force until the middle of December, 1954. From the admissions it is clear that, though the shippers obtained the necessary certificate from the Grain Board on Oct. 13, a cargo of maize was not ready to be loaded until Oct. 29, 1954, so that a giro could not under the resolution be issued until that date.

Before turning to the law there are a few further facts which I should state: (1) At all material times the intersection was a place where a ship would be examined by the sanitary authorities and by the customs officers. (2) Inflammable materials and explosives exceeding twenty-five tons in amount have to be discharged there before a ship can proceed to the dock area. (3) In addition, discharge of cargo takes place at the intersection where necessary to lighten the ship before she proceeds up river. (4) Loading of grain at the intersection would be quite impracticable and is never done.

As regards the law applicable, the position prior to 1908 in regard to a port charterparty was in some confusion. In that year *Leonis S.S. Co., Ltd. v. Joseph Rank, Ltd.* (1) came before this court. KENNEDY, L.J., in what has often been regarded as the leading judgment on the question, held that under such a charterparty a ship became an arrived ship when she was ready and at the freighters' disposal within the named port in its commercial sense, i.e., within the commercial area of the port. He sets out what he means by "the commercial area" and he says this ([1908] 1 K.B. at p. 521):

"In the absence of any proof of a custom of this kind—and I may note in passing that no evidence of such a custom was given in the present case—the commercial area of a port, arrival within which makes the ship an arrived ship, and, as such, entitled to give notice of readiness to load, and at

- A the expiration of the notice to begin to count lay days, ought, I think, to be that area of the named port of destination on arrival within which the master can effectively place his ship at the disposal of the charterer, the vessel herself being then, so far as she is concerned, ready to load, and as near as circumstances permit to the actual loading 'spot' (I use the convenient word which was employed by DENMAN, J., in *Tapscott v. Balfour* (2) ((1872), L.R. 8 C.P. 46) and by BRAMWELL, L.J., in *Davies v. McVeagh* (3) ((1879), 4 Ex.D. 265)), be it quay or wharf, or pier, or mooring, and in a place where ships waiting for access to that spot usually lie, or, if there be more such loading spots than one, as near as circumstances permit to that one of such spots which the charterer prefers."
- C Applying that test to the facts of the present case, it is claimed that all the conditions were fulfilled. Reading the test literally that may be true, but there is a real danger of interpreting words of a judgment as if they were in a statute and without regard to the facts of the case. In *Leonis S.S. Co., Ltd. v. Joseph Rank, Ltd.* (1) the ship in question was not twenty-two miles away from the dock area—she was anchored but a few ship's-lengths off the pier alongside which loading took place. I agree, of course, that distance is not a conclusive factor, but what KENNEDY, L.J., was, I think, contrasting throughout his judgment was an area where loading takes place as opposed to the actual loading spot. The commercial area was intended to be that part of the port where a ship can be loaded when a berth is available, albeit she cannot be loaded until a berth is available.
- E The judgment of BUCKLEY, L.J., is, I think, to the same effect ([1908] 1 K.B. at p. 512). He contrasts a "berth", meaning thereby a berth, wharf or quay or place where, by the use of lighters or other means, a vessel can load or discharge, with the expression "place of discharge" as meaning a place of larger area than a "berth" within which area there are a "berth" or "berths". The "place of discharge" there referred to is, I think, the same as "the commercial area" referred to by KENNEDY, L.J. I cannot think, as has been suggested in the present case, that there is any conflict between the two judgments; and it is to be observed that LORD ALVERSTONE, C.J., agreed with both. Further, if the argument on behalf of the owners is correct, it would have been sufficient in *Leonis S.S. Co., Ltd. v. Joseph Rank, Ltd.* (1) to define the commercial area as that area within the fiscal, legal and administrative limits of the port which embraced any place beyond which ships could not proceed without some steps being taken by the shipper. For my part, I am satisfied that the intersection was not within the commercial area of the port before the resolution of Sept. 1, 1954. The giro was merely the traffic signal which enabled the ship to proceed into the commercial area, namely, the dock area or inner harbour. Nor, like the learned judge, do I think that it is possible to say that that resolution had the effect of extending the commercial area to embrace the intersection. The giro remained a traffic signal as before. Accordingly, the learned judge was, in my judgment, right in holding that the Aello was not an arrived ship until Oct. 29, 1954.
- H In the premises, it becomes unnecessary to consider whether, as the charterers contend, the intersection is not even within the fiscal, legal and administrative limits of the port, nor whether the absence of a police permit or of the giro itself prevented the ship from otherwise being an arrived ship.

I I turn now to the second main issue which arises on the basis that the Aello was not an arrived ship on Oct. 12. There is undoubtedly an absolute obligation on a shipper to provide a cargo (see *Postlewaite v. Freeland* (4) ((1880), 5 App. Cas. 599, per LORD BLACKBURN at p. 619), and the real question is as to the point of time when that obligation has to be fulfilled. I confess that apart from authority binding on this court I should have thought that this obligation only had to be fulfilled as and when the ship had fulfilled its obligation of becoming an arrived

ship and then only to the extent which would enable the shipper to load within the lay days or within a reasonable time if no lay days were fixed. Prior to the ship becoming an arrived ship the shipper might well be under an implied duty to concur in doing what is necessary to enable the ship to arrive or not to prevent the ship from arriving (see *Mackay v. Dick* (5) (1881), 6 App. Cas. 251). That duty, however, would be fulfilled by taking reasonable steps to that end. I would adopt the words of GREER, J., in *Vergottis v. William Cory & Son, Ltd.* (6) ([1926] 2 K.B. 344). He says this (*ibid.*, at p. 354):

"In my judgment the obligation to provide the cargo would be fulfilled if the shipper made and carried out arrangements for the delivery of the cargo at the ship's side in time to load her in accordance with the terms of the charterparty. Further, it is difficult to understand how there can be any duty to provide the cargo before the ship completes her inward journey and becomes an arrived ship. It seems to me that it must be the duty of the ship to become an arrived ship before the shippers' duty to provide the cargo can arise. The promises on the part of the shipowner to present his vessel in the agreed place, and on the part of the charterer to there provide her with the agreed cargo and load it in the agreed time, are mutual interdependent promises. And until the ship has performed its part by arriving at the agreed place, the shipowner cannot complain that the cargo has not been provided."

And he says (*ibid.*, at p. 355):

"I think there is an implied term in the charterparty that the defendants would do whatever was reasonable in order to enable the plaintiff's ship to get into the dock and so become an arrived ship."

On this view of the law and on the admissions made by the parties a cargo was provided by Oct. 29, when the ship arrived in the commercial area, and prior thereto the charterers had taken all reasonable steps to provide a cargo and thus enable the ship to proceed from the intersection into the commercial area and become an arrived ship. On the other hand, if this view of the law is wrong and there was an absolute obligation on the charterers to have a cargo ready on Oct. 12, then they were in breach, and, since there was no congestion of ships in the inner harbour, that breach prevented the ship from proceeding there and becoming an arrived ship.

The learned judge, however, felt that he was bound by the decision of the House of Lords in *Ardan S.S. Co. v. Andrew Weir & Co.* (7) ([1905] A.C. 501). The charterparty in that case was undoubtedly a berth charterparty. There were no fixed lay days, and the obligation to load within a reasonable time commenced from the time the ship was berthed. The ship reached Newcastle on July 14 to load coal from a particular colliery, but owing to shortage of available cargo from that colliery she was not allowed to berth until Aug. 13. Even when she did berth continuous loading was impossible, and she had twice to be removed from her berth before the loading was completed. The shipowners sued for and recovered damages for detention for the thirty-one days before the ship was allowed to berth. The House of Lords held that the absolute obligation to provide a cargo fell to be fulfilled on July 14, so as to enable the ship to get a berth. The charterers in that case strongly relied on *Little v. Stevenson & Co.* (8) ([1896] A.C. 108), in which a berth unexpectedly became vacant but no cargo was available, and the EARL OF HALSBURY, L.C., had disputed the proposition of law

"that a merchant must be always ready with his cargo at all times and in all places, and under all circumstances to take advantage of any such contingency, if it should arise."

In *Ardan S.S. Co. v. Andrew Weir & Co.* (7), LORD HALSBURY explained that while the merchant was not obliged to be ready to meet every contingency, however remote, he was obliged to have a cargo ready in the circumstances of that case. LORD DAVEY put the matter in this way ([1905] A.C. at p. 512):

A "I think that what was there laid down [in *Little v. Stevenson & Co.* (8)] must be read with regard to the facts of that case, and that all that was meant was that the shipper's or charterer's obligation is only to have his cargo ready when the ship is ready to receive it in ordinary course, and that he is not bound to be prepared for a contingency or fortuitous circumstance not contemplated by either of the parties."

B And he said [1905] A.C. at p. 514):

C "But, however the argument is put, I cannot accede to it. It appears to me that it is only putting the old question in another way. By whose default was it that the ship did not get a loading order? The answer, in my opinion, can only be that it was the default of the respondents in not providing the cargo when the ship was ready to go on the berth to receive it. It is said that the respondents did nothing unreasonable. Be it so. But through their misfortune (it may be) they have failed to perform their contract with the shipowners. In short, the respondents have not satisfied my mind that it was any part of their contract with the appellants that the latter should await the turn of the colliery or take the risk of the cargo not being ready."

D It is clear from that latter passage that he was treating the obligation as absolute and rejecting any test based on reasonableness.

E Now it is true that in that case the ship had undoubtedly got to the commercial area of the port, and was only prevented by the absence of cargo from getting a berth. Further, as counsel for the charterers points out, there is no case in which it has been held that a cargo must be ready to enable a ship to get into the commercial area. However, bearing in mind that the charterparty in *Ardan S.S. Co. v. Andrew Weir & Co.* (7) was a berth charterparty, I should have thought that the principle was plain, namely, that if the provision of a cargo is necessary to enable the ship to perform its obligation, viz., to become an arrived ship, the absolute obligation of the shipper is to provide the cargo, or at any rate a reasonable part of it, in time to enable the ship to perform its obligation. It is true that GREER, J., in *Vergottis v. William Cory & Son, Ltd.* (6), felt that if necessary he might be able to distinguish *Ardan S.S. Co. v. Andrew Weir & Co.* (7), but in fact he decided the case on another point, and it became unnecessary to seek to do so. Further, SCRUTTON, L.J., in *Inverkip S.S. Co., Ltd. v. Bunge & Co.* (9) ([1917] 2 K.B. 193 at p. 202), found the decision difficult to understand, and, in *Einar Bugge A.S. v. W. H. Bowater, Ltd.* (10) ((1925), 31 Com. Cas. 1), was clearly anxious to confine the decision to its special facts. However that may be, I myself can see no valid ground on which *Ardan S.S. Co. v. Andrew Weir & Co.* (7) can be distinguished, and like the learned judge I follow it.

H Before leaving this part of the case I should mention two further arguments that were raised, one by counsel for the owners and one by counsel for the charterers. Counsel for the owners relied strongly on the fact that the charterers had extensive options under the charterparty. Thus, they could have loaded wheat or rye instead of maize, and they could have ordered the ship to complete at Montevideo. Yet, with knowledge of the conditions at Buenos Aires after Sept. 1, 1954, they ordered the ship to that port to load maize. Thus, it is said, they prevented the ship from being an arrived ship until Oct. 29. Attractive as this argument may appear at first sight, I am unable to accept it. Having by the contract obtained the right to exercise different options, it seems to me that they can choose which to exercise regardless of how it may affect the owners. Otherwise one would be introducing a qualification into the exercise of what is by the contract an absolute right. Further, as a matter of business, it was not the charterers' option but the option of the sellers.

I Counsel, on behalf of the charterers, strongly relied on such cases as *Jones, Ltd. v. Green & Co.* (11) ([1904] 2 K.B. 275), in which it was held that where particular conditions at the port are known to both parties the charterers' obligation to

provide a cargo does not arise until such time as in the light of those conditions the ship's turn to load arises. Such cases were relied on by the charterers in *Ardan S.S. Co. v. Andrew Weir & Co.* (7), but it was held that that principle only applied where it was clear that both parties contracted with knowledge of those conditions. Here, for the reasons given by the learned judge, it is clear that the owners at the time the charterparty was entered into had no knowledge of the particular conditions at Buenos Aires.

In these circumstances, there only remains the subsidiary question whether, as the learned judge held, the charterers' breach is a matter of counterclaim or whether, as the owners contend, it is a matter of defence. Based on the decision in *Mackay v. Dick* (5), it is said on behalf of the owners that the Aello must be deemed to have been an arrived ship on Oct. 12 and, accordingly, that despatch money had not been earned and that the demurrage paid under protest was properly payable. Reference was also made to *Lilly & Co. v. D. M. Stevenson & Co.* (12) ((1895), 22 R. (Ct. of Sess.) 278) and *Krog & Co. v. Burns & Lindemann, The Avis* (13) ((1903), 5 F. (Ct. of Sess.) 1189), in which it is pointed out that the shipowners recovered demurrage eo nomine and not unliquidated damages. The question, however, was not argued in those two cases, no doubt because it was merely of academic interest. Indeed, the same was true in *Hogarth v. Cory Brothers & Co.* (14) ((1926), 32 Com. Cas. 174), a Privy Council case, where LORD PHILLIMORE said this (*ibid.*, at pp. 178, 179):

"If a ship is prevented from getting to a loading berth owing to an obstacle created by the charterer, or owing to the default of the charterer in performing his duty, then it is well established that the shipowner has done all that is needful to bring the ship to the loading place, and that the charterer must pay for the subsequent delay. Whether the latter's measure of liability is arrived at by giving to the shipowner damages for the delay, or whether the lay days are antedated to the date when they ought to have begun, and the charterer pays for them at the agreed rate of demurrage, does not seem to have been determined. But no point as to which of these two measures of payment should prevail has been made by the parties in this case."

For myself, I think that the breach of the charterers' obligation is a matter of counterclaim and not of defence. The reason, as I understand it, why the plaintiff in *Mackay v. Dick* (5) recovered the price and not damages was that the machine had been delivered and the property had passed subject only to the defendant's right to reject if the machine on a special test failed to come up to a particular standard of performance. The defendant, having prevented the holding of that test, was held to be in the same position as if the condition had been fulfilled. In other words, the price became payable not because the property was deemed to have passed but because the condition was deemed to have been fulfilled.

If, in such a case as this, the ship had arrived, but it was provided that lay days were not to begin until something had been done which depended on the charterers' co-operation, then, if the charterers refused or neglected to co-operate, that something might well be deemed to have been done. But here, if I am right, the primary obligation to arrive geographically was never fulfilled, and, that being so, I think that the charterers' breach is a matter for counterclaim.

Accordingly, I would dismiss the appeals.

LORD GODDARD, C.J.: I entirely agree with the judgment just delivered by PARKER, L.J., and do not find it necessary to add anything.

LLOYD-JACOB, J.: I also agree.

Appeal and cross-appeal dismissed. Leave to appeal to the House of Lords granted.

Solicitors: *Holman, Fenwick & Willan* (for the appellants, the owners); *Richards, Butler & Co.* (for the respondents, the charterers).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

A

WRIGHT v. BOYCE (INSPECTOR OF TAXES).

[COURT OF APPEAL (Jenkins, Sellers and Pearce, L.J.J.), June 17, 18, 1958.]

Income Tax—Income—Voluntary payments—Huntsman—Christmas gifts—Income Tax Act, 1952 (15 & 16 Geo. 6 & 1 Eliz. 2 c. 10), s. 156, Sch. E, paras. 1 and 2, Sch. 9, Rules applicable to Sch. E, r. 1.

B

A huntsman engaged by the master of the hunt on a weekly wage received annually over a period of seven years Christmas gifts from followers of the hunt and persons interested in it. There was no contractual title to the gifts, nothing had been said about them at the time of the huntsman's appointment and there was no organised collection or solicitation for them. They were purely voluntary payments and it was found that the givers were influenced to some extent by personal regard for the huntsman, who was a noted personality; but it was also found that the personal regard had its origin in the way in which the huntsman performed his duties, and that it was a widespread and long-standing custom for gifts of cash to be made to the huntsman at Christmas time, normally at the meet on Boxing Day. There was no evidence that the gifts were made otherwise than in pursuance of the custom. The huntsman was assessed to income tax under Sch. E in respect of the gifts, and on appeal the Special Commissioners of Income Tax held that they accrued to the huntsman by virtue of his employment and were taxable. On appeal,

C

D

E

Held: the gifts were taxable as profits of the huntsman's employment received by the huntsman in his capacity as huntsman because, in the absence of evidence to the contrary, the gifts, being regularly made year by year, must be taken to have been made in pursuance of the custom to make gifts to the huntsman at Christmas time with the consequence that the object of the gifts was the huntsman (whoever he was) by virtue of his office, though personal consideration also entered into the matter particularly as regards the amount of the gifts.

F

Cooper v. Blakiston ((1909), 5 Tax Cas. 347) applied.
Seymour v. Reed ((1927), 11 Tax Cas. 625) distinguished.
 Decision of VAISEY, J. ([1958] 1 All E.R. 864) affirmed.

[As to taxation of voluntary payments to the holder of an office or employment, see 20 HALSBURY'S LAWS (3rd Edn.) 322-324, para. 592; and for cases on the subject, see 28 DIGEST 85-88, 490-507.]

G

For the Income Tax Act, 1952, s. 156, Sch. E, paras. 1 and 2, and Sch. 9, Rules applicable to Sch. E, r. 1, see 31 HALSBURY'S STATUTES (2nd Edn.) 149, 150, 522.]

Cases referred to:

H

- (1) *Herbert v. McQuade*, [1902] 2 K.B. 631; 71 L.J.K.B. 884; 87 L.T. 349; 66 J.P. 692; 4 Tax Cas. 489; 28 Digest 86, 492.
- (2) *Seymour v. Reed*, [1927] A.C. 554; 96 L.J.K.B. 839; 137 L.T. 312; 11 Tax Cas. 625; Digest Supp.
- (3) *Blakiston v. Cooper*, [1909] A.C. 104; 78 L.J.K.B. 135; 100 L.T. 51; sub nom. *Cooper v. Blakiston*, 5 Tax Cas. 347; 28 Digest 86, 495.
- (4) *Moorhouse v. Dooland*, [1955] 1 All E.R. 93; [1955] Ch. 284; 36 Tax Cas. 1, 12; 3rd Digest Supp.

I

Appeal.

The taxpayer appealed to the Special Commissioners of Income Tax against assessments to income tax under Sch. E made on him as follows: additional assessments in respect of gratuities only 1948-49 £200, 1949-50 £200; first assessments: 1950-51 £341, 1951-52 £353, 1952-53 £583, 1953-54 £709, 1954-55 £658. The question for determination was whether certain sums received by the taxpayer, the huntsman successively of the Bathurst Hunt and the Woodland

Pythchley Hunt, about Christmas time by way of gifts from followers of the hunts and other persons interested in the hunts, were taxable emoluments of his employment. The taxpayer contended that the sums were not such taxable emoluments. The Crown contended that the sums were a profit accruing to the taxpayer by reason of his employment as huntsman and were properly assessable to tax under Sch. E. The commissioners found that gifts, except certain gifts in kind and gifts which came from persons not connected with the hunt in which the taxpayer was employed in each of the relevant years, came to the taxpayer because he was employed as huntsman and accrued to him by virtue of that appointment, notwithstanding that the giver was influenced by personal regard for the taxpayer, such personal regard having had its origin in the way in which the taxpayer performed his duties as huntsman. The appeal, therefore, failed. On appeal by the taxpayer by way of Case Stated, VAISEY, J., held on Mar. 6, 1958 ([1958] 1 All E.R. 864) that the gifts were taxable because they came to the huntsman by virtue of his employment as huntsman and were not mere presents or testimonials. The taxpayer appealed to the Court of Appeal.

H. B. Magnus, Q.C., and *R. A. Watson* for the taxpayer.

Cyril King, Q.C., and *A. S. Orr* for the Crown.

JENKINS, L.J.: This is an appeal from a judgment of VAISEY, J., dated Mar. 6, 1958, whereby he upheld a decision of the Special Commissioners in favour of the Crown to the effect that the appellant taxpayer, Mr. Joseph Wright, was taxable under Sch. E on certain voluntary payments made to him at Christmas in each of the seven years 1948-49 to 1954-55. The taxpayer was employed as a professional hunt servant. He had been a hunt servant all his life, and in 1946 he was appointed huntsman to the Bathurst Hunt. He remained there from 1946 to 1952 or thereabouts and he then went from the Bathurst Hunt to the Woodland Pythchley Hunt. In his capacity as huntsman successively with these two hunts he was the senior member of the hunt staff and occupied a responsible position. It is important to observe that he was engaged in the case of each hunt by the master and not by any body which could be said to be representative of the hunt as such. In each case the constitution of the hunt (as described in para. 3 of the Case Stated) may be said to have been nebulous in the extreme.

The payments in dispute were voluntary payments and came from persons who can be succinctly described as followers or supporters of the hunt. The main points which counsel for the taxpayer put in the forefront of his argument were these: the taxpayer had no contractual title to the payments, i.e., there was nothing in the terms of his engagements which said that he would be entitled to receive and retain presents of money made to him by followers or supporters of the hunt at Christmas time; secondly, both with the Bathurst and with the Woodland Pythchley, he was engaged as huntsman by the master at a weekly wage; and further, not only was there no contract about the presents of money at Christmas, but nothing was said about them on the occasion of the taxpayer's engagement in either case. Then the payments were made by persons other than the taxpayer's employer; they were, in fact, made by followers and supporters of the hunt and were purely voluntary payments inasmuch as the persons making them were under no legal obligation to do so.

Counsel said that the taxpayer was well known in the district because of his employment as huntsman, and he had many personal friends in the area. The importance of that was that it made it possible to account for the voluntary payments as having been made from motives of personal regard for the taxpayer. Counsel pointed out that there was no organised collection, there were no circulars and there was no solicitation of any kind with respect to these voluntary payments at Christmas and, finally, that what was given by each donor was given purely spontaneously as a mere present.

As against these points I should mention that (as will appear from the Case)

- A it was—and is, I think—a well-established practice in most hunts in this country, and in the Bathurst and Woodland Pytchley hunts in particular, to make presents of money to the huntsman at Christmas and presents of money in this case were made regularly each year. I am not saying that the payers were necessarily always the same persons; but the subvention (if I may so describe it) was regularly made: the making of the payments took place every single Christmas
- B during the taxpayer's employment and at the first Christmas just as much as at the last.

The Case shows in para. 3 that in the case of both the Bathurst Hunt and the Woodland Pytchley Hunt the taxpayer was engaged by the master. It continues:

- C “4. The [taxpayer] (who had been a hunt servant since boyhood) was engaged as huntsman of the Bathurst Hunt in 1946 by the then master. He was engaged orally, at an interview, when he was told what his wages and other terms of his employment would be; nothing was said about tips or Christmas presents. In 1952 he was engaged as huntsman of the Woodland Pytchley Hunt by one of the joint masters, Captain Goddard Jackson; this engagement was also oral; Captain Goddard Jackson told him the wages and other terms of the employment, and nothing was said about tips or Christmas presents.
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- “5. In each year when the [taxpayer] was huntsman to the Bathurst Hunt and the Woodland Pytchley Hunt he received presents of cash at or about Christmas time. Some of these presents came to him from persons with whom he had come into contact in his capacity as a hunt servant earlier in his career, but who had no connexion with the hunt to which he was huntsman at the time the presents were given. These, however, were few in number, and most of the presents of cash given to the [taxpayer] at Christmas came from persons with whom he was at the time in contact in his capacity as huntsman. Such persons would mostly be people who regularly rode with the hunt, but would also include persons who only occasionally rode, and persons who did not ride but had an interest in the hunt. Many of these were personal friends of the [taxpayer], who, in his capacity as huntsman, had become a personality of some note to a wide circle of people in the district, not only to people who hunt, but also to people who voluntarily assist in the work of the kennels, to farmers, and to people who attend meets on foot. He also got presents in kind from farmers.
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- “6. It is a widespread custom in hunts in most parts of the country (including the Bathurst and Woodland Pytchley Hunts) for followers of the hunt to give the huntsman presents of cash at Christmas time, and the usual occasion for the gifts is the meet on Boxing Day. The custom is one of long standing and well known to people who hunt, and soon becomes known to people who take up hunting. There is no compulsion on followers of the hunt to give such presents nor (in the case of the Bathurst and Woodland Pytchley Hunts) was any form of circular or reminder given to followers about it, or any organised collection or cap, either on Boxing Day or at any other time. There is no conventional amount to give; a person would give a larger amount if he liked or respected the [taxpayer], or a smaller one or none at all if he disliked him. About half of the persons riding at the Boxing Day meet would give the [taxpayer] a present (where several members of the same family were riding, the [taxpayer] generally receives one present from the head of the family only); some people (particularly those who could not attend the Boxing Day meet) give the [taxpayer] a present before or after Boxing Day; if, however, there is no meet on Boxing Day the [taxpayer] does not receive many presents. For example in one year when hunting was stopped by frost from October to February and in another year when the [taxpayer] was prevented by illness from hunting during the Christmas season he received very few presents of cash.”
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I can omit paras. 7 and 8. The commissioners expressed their decision in these terms: A

"9 (1). We, the commissioners who heard the appeal, found on consideration of the evidence before us that (with the exception of the gifts referred to in sub-para. (2) below) the sums of money in question came to the [taxpayer] because he was employed as huntsman and accrued to him by virtue of that employment. In coming to this conclusion we did not overlook the fact that in the case of many of the said sums the giver was influenced to some extent by personal regard for the [taxpayer], but we found that such personal regard had its origin in the way in which the [taxpayer] personally performed his duties as huntsman. B

"(2) We held that the appeal failed in principle, but we directed that in arriving at the amount assessable there should be excluded from assessment the amount of any gifts which came from persons who had no connexion with the hunt with which the [taxpayer] was employed in each of the relevant years." C

The appeals against the assessments were disposed of on that basis. An adjustment was made in respect of the payments referred to in para. 9 (2). D

The question is whether on those facts the payments voluntarily made at Christmas to the taxpayer by followers and supporters of, and, I should add, persons interested in, the hunt, were profits of his employment within the meaning of Sch. E. I do not think that it is necessary to refer to the statutory provisions, because I think that it is not open to doubt that the expression "profits of his employment" sufficiently conveys the purport of Sch. E for the purposes of this case. This is one of those cases in which it is sought to tax payments made voluntarily on the part of the persons who made them. It is well settled, of course, that payments may be taxable in the hands of the recipient as profits of an office or employment although they are voluntarily made by the persons making them; even so they may be profits of the employment if, from the standpoint of the recipient, they accrue to him by virtue of his employment. E F

SIR RICHARD HENN-COLLINS, M.R., in *Herbert v. McQuade* (1) ((1902), 4 Tax Cas. 489), after reference to another case, said (*ibid.*, at p. 500):

"Now that, whether the particular facts justified it or not, is certainly an affirmation of a principle in law, that a payment may be liable to income tax although it is voluntary on the part of the persons who make it, and that the test is whether from the standpoint of the person who receives it, it accrues to him in virtue of his office; if it does, it does not matter whether it was voluntary or whether it was compulsory on the part of the persons who paid it. That seems to me to be the test; and if we once get to this—that it has come to him by virtue of his office, accrued to him in virtue of his office—it seems to me that it is not negatived, that it is not impossible merely by reason of the fact that there was no legal obligation on the part of the persons who contributed the money, to pay it." G H

There is an almost equally well-worn passage from the judgment of STIRLING, L.J. (*ibid.*, at p. 501):

"I think that a profit accrues by reason of an office when it comes to the holder of the office as such—in that capacity—and without the fulfilment of any further or other condition on his part; and what we have got to look to see is whether the sum in question does so come to the holder of this office." I

In *Seymour v. Reed* (2) ((1927), 11 Tax Cas. 625), VISCOUNT CAVE, L.C., made the following often quoted observations (*ibid.*, at p. 646):

"... and it must now (I think) be taken as settled that they [the relevant

- A words of r. 1 of Sch. E to the Income Tax Act] include all payments made to the holder of an office or employment as such—that is to say, by way of remuneration for his services, even though such payments may be voluntary—but that they do not include a mere gift or present (such as a testimonial) which is made to him on personal grounds and not by way of payment for his services. The question to be answered is, as ROWLATT, J., put it, ‘Is it in the end a personal gift or is it remuneration?’ If the latter, it is subject to the tax; if the former, it is not.”
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Mr. Magnus, who said all that could possibly be said for the taxpayer in his interesting argument, dealt with the matter, in effect, in this way. He referred us at the outset to the well-known cases of *Herbert v. McQuade* (1) and *Cooper v. Blakiston* (3) ((1909), 5 Tax Cas. 347), the case of *Herbert v. McQuade* (1) relating to the clergy sustentation fund for augmentation of the stipends of clergy and *Cooper v. Blakiston* (3) being concerned with the customary Easter offerings made for the benefit of the vicar of a parish. In both those cases the sums received by the clergymen concerned were held to be taxable notwithstanding that the contributions to the funds from which they were derived were voluntarily made by the persons making them. According to counsel for the taxpayer, that is the background, if I may so describe it, of the principle that the question whether a payment voluntarily made is taxable in the hands of the recipient as profits of his employment depends on whether from the standpoint of the recipient it comes to him in that capacity.

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Counsel for the taxpayer said that this principle presented no difficulty in its application to cases such as these clergy cases, because in each of those cases there was a definite machinery of collection and organisation which really made it quite plain in what capacity the sum was received by the clergyman once it had found its way into the fund in question. He said that again no difficulty arose where, as in *Moorhouse v. Dooland* (4) ([1955] 1 All E.R. 93) the contract of service itself provided a right for the employee to receive and retain the voluntary payments in question. But he went on to point out that in this case there was no machinery or organisation of collection at all; there was the bare fact that the taxpayer, during the relevant years of assessment, held the office or employment of huntsman first to one hunt and then to another; there was the bare fact that payments were voluntarily made to him at Christmas by followers and supporters of and persons interested in the hunts in question. He said that in a case such as that it was plain that one must look and see why the payment was made because, until that had been found out, it was impossible to answer the question whether it was received by the recipient as holder of the relevant office or employment. Counsel has shown us references to the intention of the donors in some of the reported cases. He pointed out in particular that in the well-known case of *Seymour v. Reed* (2) all turned on an inference as to the intention of the donors, who in fact were the people who had paid gate money in order to witness the benefit match. Applying that view of the matter to the present case, he said that the Crown had not established its claim to tax, for, as there was no machinery of collection and no fund to identify or earmark the payments, as and when they were paid into the fund, as made for a particular purpose, there was nothing here to show what the intention of the donors was.

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Counsel's sheet-anchor was really *Seymour v. Reed* (2) and he said that the facts here (to put the matter at its lowest) were wholly consistent with the view that this was a *Seymour v. Reed* (2) case, i.e., that the voluntary payments were made, not to the taxpayer in his capacity as the holder of the employment of huntsman, but to “Joe Wright” the man, in recognition of his skill and daring and so forth in carrying out his duties as huntsman. In counsel's submission, once that was made good, then it followed from *Seymour v. Reed* (2) that the amounts were not taxable.

I

I think that it must be remembered that *Seymour v. Reed* (2) was a case turning very much on its particular facts and, as I see it, it was a vital element in the case that the benefit match was held and the gate money was collected on the eve of the retirement of Seymour after a long and brilliant career as a county cricketer playing cricket for the county of Kent. It was a "once and for all" payment after very long service and after a long career spent in entertaining the public. It was made at the proper time for making a testimonial, i.e., on the eve of the retirement of the person to whom it was being given. That was not so in the present case; these payments were made just as much at the first Christmas after the taxpayer's assumption of the office or employment of huntsman as at the last.

As to the contention that the motives of the contributors of the voluntary payments should be looked at (or, perhaps one should say, the objects that they had in view), I agree that, generally speaking, where there is no definitely determining factor, like a reference in the contract of employment of the person concerned, it is hardly possible to assess the quality of the payment without considering the position both of the payer and of the payee, and it may well be that, where it is sought to tax a man on receipts of this general character, he can repel the claim to tax by proving that the persons who gave him the sums alleged to be taxable gave them to him on some entirely different account. Then, however, the first test would still hold good: what was the quality of the payment from the point of view of the recipient? In the case put, from the point of view of the recipient the payment would have nothing to do with his employment at all; it would have been made for the wholly extraneous purpose that I am postulating.

It is little to the purpose to multiply citations in cases of this kind, where all that can be done is to deduce from the authorities such general propositions as they lay down. I do not think that the general propositions are really in dispute; the difficulty concerns their application to the facts of the particular case.

First of all, I would observe the evidence as to the existence of a wide-spread custom in the hunts in most parts of the country, including the two hunts with which we are concerned, to give the huntsman presents of cash at Christmas time. Pausing there, I think that it is reasonably plain that that custom is a custom to make presents of cash at Christmas time to the person for the time being holding the office or employment of huntsman. It is the huntsman as such by virtue of his office or employment who is the object of the custom. Now, where a custom such as that exists, the usual occasion for the gifts being the meet on Boxing Day, and where one finds people on Boxing Day making payments to the huntsman, I should have thought that those payments must be taken *prima facie* to have been made in pursuance of the custom; if they were made in pursuance of the custom, then, *prima facie*, they were not payments to the taxpayer as an individual but, in accordance with custom, payments to the huntsman for the time being who, at that particular Christmas Day or Boxing Day, happened to be the taxpayer. Thus it appears to me so far that, from the standpoint of the taxpayer, the payments would be received by him in his capacity as huntsman or, in other words, by virtue of his office or employment as huntsman. Further, it is important to bear in mind that this custom produced a regular annual subvention (if I may use that expression) every Christmas from the date of the taxpayer's engagement as huntsman to the Bathurst hunt.

That appears to me really to exclude this case from the *Seymour v. Reed* (2) class of case. I do not think any question of a testimonial or of admiration, respect or regard for the outstanding personal qualities of the taxpayer can well come into the matter. I apprehend that one does not start giving testimonials to huntsmen so soon as they are engaged. The time when one would expect a testimonial is on the huntsman's retirement. I am far from saying that, if he did retire and if on the eve of his retirement a testimonial by way of a collection of money was organised in his favour, that would necessarily be taxable, but, to

A my mind, the regular character of the subvention does strongly support the view that the payment is made to the holder of the office or employment as such and not to the particular individual holding it on personal grounds. The recurrent quality of the subvention, besides negating the idea of a testimonial, is also in itself an indication that the taxpayer received these payments by virtue of his office or employment.

B I would add this. It appears to me to be clear that the taxpayer's hope or expectation of payments pursuant to the custom was at all times a hope or expectation attached to the office or employment. He was in a position to hope for or expect the Christmas payments by virtue of his tenure of the office or employment of huntsman, and I should say again that from his point of view he got whatever he got under the custom by virtue of his tenure of the office or employment of huntsman. Of course, he had no legal title to receive any payment from anybody at Christmas. The matter depended on custom only, but it appears to me that he would have been not unreasonably aggrieved if, in fact, the custom had been discontinued. He might then quite legitimately have regarded his office or employment as huntsman to the hunt in question as having been docked of a customary profit.

D To return to the argument of counsel for the taxpayer that each gift or payment must be considered individually and that, in the circumstances of this case, it is impossible to predicate of all or any of them that they were in respect of the taxpayer's office or employment, it appears to me that when the custom is established and payments are shown to have been made by followers or supporters of the hunt at the time when payments pursuant to the custom are customarily made, there being no indication that the payments were made otherwise than in pursuance of the custom, then the payments must be taken to have been made in pursuance of the custom as a matter of *prima facie* proof. It might have been open then to the taxpayer to contest particular payments and say that this or that payment was made on some other account, but I think that a *prima facie* case has been made out when the custom has been proved and payments apparently made pursuant to the custom have been proved. In my judgment, there was ample evidence on which the commissioners could have come to the conclusion at which they arrived and, in my view, their conclusion is wholly correct, as also is the conclusion of the learned judge who dismissed the appeal which was before him.

G Counsel for the taxpayer has criticised the findings of the Special Commissioners as regards para. 9 (1) on the ground that, after holding that the sum of money in question came to the taxpayer because he was employed as huntsman and accrued to him by virtue of that employment, the commissioners go on to say:

H "In coming to this conclusion we did not overlook the fact that in the case of many of the said sums the giver was influenced to some extent by personal regard for the [taxpayer], but we found that such personal regard had its origin in the way in which the [taxpayer] personally performed his duties as huntsman."

I Counsel uses that as indicating that, if the Special Commissioners had appreciated the effect of these words, they could not have included them appropriately unless they were going to hold that this was, in effect, a *Seymour v. Reed* (2) case, for the motivation of the gift or payment in *Seymour v. Reed* (2) was this very matter: it had its origin in the particular brilliant way in which Mr. Seymour personally had performed his duties as a professional cricketer.

That seems to me to be hypercritical. No doubt the payments made under the custom would vary in amount according to the view taken by the contributor of the taxpayer as a huntsman and possibly as a man. If the taxpayer was a popular character and liked by a given contributor, that contributor might well make a more generous contribution than a man who happened to dislike the

taxpayer or to take a poor view of his ability as a huntsman; but these matters, as it seems to me, go to the quantum of the payments and not to their character. A

In *Cooper v. Blakiston* (3), passing over the well-known paragraph which deals with whether a sum of money has accrued to an incumbent by reason of his office (5 Tax Cas. at p. 355), LORD ASHBOURNE said (*ibid.*, at p. 356):

"It was suggested that the offerings were made as personal gifts to the vicar as marks of esteem and respect. Such reasons no doubt played their part in obtaining and increasing the amount of the offerings, but I cannot doubt that they were given to the vicar as vicar, and that they formed part of the profits accruing by reason of his office." B

Similarly, in the present case I would say with LORD LOREBURN, L.C., in *Cooper v. Blakiston* (3) that, if, as the Special Commissioners found, in many cases the giver was influenced to some extent by personal regard for the taxpayer, such reasons no doubt played their part, but I cannot doubt that the sums in question were given to the huntsman as huntsman, and I do not think anything is really added to the finding by the words: C

"but we found that such personal regard had its origin in the way in which the [taxpayer] personally performed his duties as huntsman." D

That merely means that a person contributing in accordance with the custom might have a personal regard for the taxpayer originating in his appreciation of the efficiency with which the taxpayer performed his duties as huntsman and might on that account increase the contribution given by him pursuant to the custom, or perhaps make up his mind to make such a contribution which possibly he would otherwise have omitted to do. E

I have now dealt with the essential points taken in Mr. Magnus's very able and careful argument. I hope I have done justice to it, but, for the reasons I have endeavoured to state, I have come to a clear conclusion that the decision of the Special Commissioners and the judgment of the learned judge in this case were right and, accordingly, that this appeal fails and should be dismissed. F

SELLERS, L.J.: I agree. As I am so much of the same opinion as my Lord and as we are upholding the learned judge, I hope it will not be thought to be any disrespect to the interesting and sustained argument of Mr. Magnus if I add no further reasons of my own.

PEARCE, L.J.: I also agree and for the same reasons.

Appeal dismissed.

Solicitors: *Withers & Co.* (for the taxpayer); *Solicitor of Inland Revenue.*

[Reported by F. A. AMES, Esq., Barrister-at-Law.]

A

Re TRANSPLANTERS (HOLDING COMPANY), LTD.

[CHANCERY DIVISION (Wynn-Parry, J.), June 24, 1958.]

Limitation of Action—Acknowledgment—Loan to company by director—Balance sheet signed by creditor director—Signature of accountants to their certificate of the balance sheet and accounts—Whether accountants agents to give acknowledgment—Limitation Act, 1939 (2 & 3 Geo. 6 c. 21), s. 23 (4), s. 24 (2)—Companies Act, 1948 (11 & 12 Geo. 6 c. 38), s. 155 (1).

B

On Dec. 19, 1955, a company was ordered to be wound up. The applicant sought to prove for money lent to the company by him but the liquidator rejected his proof on the ground that the debt was statute-barred. The applicant relied on two balance sheets of the company, those for 1951 and 1953, as acknowledgments of the company's indebtedness within the Limitation Act, 1939, s. 23 (4). At all material times the applicant was one of the two directors of the company, and the balance sheets were signed by the two directors and certified by the auditors, whose signature was appended to the balance sheets for the purpose of such certification.

C

Held: the balance sheets did not constitute acknowledgments of the debt for the purposes of the Limitation Act, 1939, s. 23, because—

D

(a) the applicant himself had signed the balance sheets, his signature being necessary in order to comply with the Companies Act, 1948, s. 155 (1), and it was not competent to the applicant, in his fiduciary capacity as director, to give such an acknowledgment to himself.

E

Re Coliseum (Barrow), Ltd. ([1930] 2 Ch. 44) and *Ledingham v. Bermejo Estancia Co., Ltd.* ([1947] 1 All E.R. 749) applied.

(b) the auditors were not agents of the company for the purpose of giving any such acknowledgment, and their signature of their certificate of the balance sheets was not the signature of agents within s. 24 (2) of the Limitation Act, 1939.

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Jones v. Bellgrove Properties, Ltd. ([1949] 2 All E.R. 198) distinguished.

[As to acknowledgment made by agents under the Limitation Act, 1939, s. 23, s. 24, see 20 HALSBURY'S LAWS (2nd Edn.) 628, para. 796 and SUPPLEMENT; and for cases on the subject, see 32 DIGEST 352, 352-355 and SUPPLEMENTS.

For the Limitation Act, 1939, s. 23 (4), s. 24, see 13 HALSBURY'S STATUTES (2nd Edn.) 1184, 1186.]

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Cases referred to:

(1) *Re Coliseum (Barrow), Ltd.*, [1930] 2 Ch. 44; 99 L.J.Ch. 423; 143 L.T. 423; [1929-30] B. & C. R. 218; 9 Digest (Repl.) 500, 3294.

(2) *Ledingham v. Bermejo Estancia Co., Ltd.*, *Agar v. Bermejo Estancia Co., Ltd.*, [1947] 1 All E.R. 749; 2nd Digest Supp.

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(3) *Jones v. Bellgrove Properties, Ltd.*, [1949] 2 All E.R. 198; [1949] 2 K.B. 700; 10 Digest (Repl.) 756, 4920.

(4) *Cuff v. London & County Land & Building Co., Ltd.*, [1912] 1 Ch. 440; 81 L.J.Ch. 426; 106 L.T. 285; 9 Digest (Repl.) 587, 3882.

Adjourned Summons.

By this summons, dated Oct. 26, 1956, a creditor of Transplanters (Holding Company), Ltd., applied for an order that the decision of the liquidator of the company in rejecting the proof of the applicant for £36,392 11s. 10d., being money lent, be reversed and for the proof to be ordered to be admitted in full. The company was ordered on Dec. 19, 1955, to be wound up. On Jan. 18, 1956, in response to advertisement, the creditor, one of the original directors of the company in 1929, lodged a proof for this debt. It was common ground that, subject to the question of acknowledgment, the debt was statute-barred.

I

I. J. Lindner, Q.C., and *P. Panto* for the applicant.

Lionel Edwards, Q.C., and *G. F. Dearbergh* for the liquidator.

WYNN-PARRY, J.: This is a summons taken out in the compulsory liquidation of the company by the applicant, who asks that the decision of the liquidator rejecting a proof which the applicant put in for £36,392 11s. 10d. for money lent and interest may be reversed, and that the proof may be admitted in full. It is not to be doubted that at the date of the liquidation, the company was indebted in a principal sum to the applicant. A question has been raised as to the rate of interest, but I can decide this matter merely on the admission by the liquidator that there was a principal sum owing in the liquidation. A

It is common ground that at the commencement of the winding-up the debt, whatever its amount, was statute-barred. The applicant seeks to overcome that difficulty by alleging that there exists an acknowledgment or acknowledgments within the Limitation Act, 1939, s. 23 (4) and s. 24. A number of documents were referred to, but it appears to me that the applicant must either succeed or fail according to the correct view of the effect in the circumstances of the two balance sheets which are in evidence, viz., the balance sheet of the company as at Dec. 31, 1951, and the balance sheet of the company as at Dec. 31, 1953, either of which would be, as far as time is concerned, sufficient for the applicant's purposes because the compulsory winding-up commenced on Sept. 2, 1955. I proceed on the basis that, having regard to the state of the authorities, there is a sufficient indication on the face of the balance sheets of the amount owing to the applicant. At all material times there were only two directors of the company, of whom the applicant was one, and that is the difficulty which stands in his way. B

In *Re Coliseum (Barrow), Ltd.* (1) ([1930] 2 Ch. 44) MAUGHAM, J., clearly took the view that, other things being equal, a statement made in the balance sheet of a company that the company owed a specific sum to a shareholder to whom that balance sheet was sent in the ordinary way would have amounted to a sufficient acknowledgment within the authorities; and it was found as a fact that the balance sheets were in each year duly presented by the directors to the shareholders at the annual general meeting, and were duly passed by the company. The difficulty in the way of the directors in that case was that they were interested, as is the present applicant, and that without their signatures to the balance sheet s. 113 of the Companies (Consolidation) Act, 1908, would not have been complied with. MAUGHAM, J., expressed the difficulty in these words (*ibid.*, at p. 47): C

"The difficulty in the present case is that the promise, if any, is a promise by the directors, as a board acting on behalf of the company, to pay to themselves the amount of the directors' fees, and it seems to me that this is not, in the circumstances, a promise to pay on behalf of the company. Having regard to the position which a director, as agent of the company, necessarily occupies in relation to the company, it would not have been competent action to the board, acting as a board, to authorise the giving of a definite promise to pay to themselves." D

At that date, viz., 1930, the position was that the Statute of Limitations, 1623 (21 Jac. 1 c. 16), which was in force, contained no provision keeping alive by acknowledgment a claim liable to be barred thereunder. But, as MAUGHAM, J., pointed out*, the courts have from time to time held that if there has been a promise to pay after the six years, or during the course of the six years, that promise to pay would give rise to a new cause of action; and therefore, but for the difficulty to which I have referred, that the directors were interested in the matter, no doubt an effective promise could have been spelt out. In this case the same type of difficulty arises, as I have said, because the applicant was one of the two directors, and he signed the documents, the two balance sheets to which I have alluded, which are relied on as acknowledgments. E

* See, generally, on the judge-made rule that a fresh promise to pay was necessary for reviving a debt statute-barred by the Statute of Limitations, 1623, the speech of LORD SUMNER in *Spencer v. Hemmerde* ([1922] 2 A.C. at pp. 520, et seq.). F

A It is made clear from the judgment of ATKINSON, J., in *Ledingham v. Bermejo Estancia Co., Ltd., Agar v. Bermejo Estancia Co., Ltd.* (2) ([1947] 1 All E.R. 749), that for such purposes as this there is no difference between a promise to pay, and a mere acknowledgment. ATKINSON, J., deals with the matter thus in his judgment (*ibid.*, at p. 753):

B “There is this further point. It is said that MAUGHAM, J., [in *Re Coliseum (Barrow), Ltd.* (1)] was dealing with an acknowledgment that had to be one from which a promise to pay could be inferred. The Limitation Act, 1939, has made a mere acknowledgment sufficient, and it is said: ‘There is a difference now because all you want now is an acknowledgment and you have not to consider whether the circumstances are such as to amount to a promise to pay. You do not need the promise to pay. It is only an acknowledgment, an acknowledgment made to the creditor, and upon that the principle of that decision ought not to apply’. I have difficulty in seeing the distinction there. I think that, if a trustee cannot rely on a promise to himself, it would be difficult to say he could rely on an acknowledgment which he makes to himself. So I am not disposed to draw that distinction . . .”

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I must apply that reasoning to the case before me, and it therefore comes to this, that the difficulty mentioned by MAUGHAM, J., in *Re Coliseum (Barrow), Ltd.* (1) remains a difficulty even if all that is relied on is a mere acknowledgment. In those circumstances, it does not appear to me possible for the applicant to rely on these two documents as acknowledgments having regard to the fact that over the material period one of the two signatories was himself and he was interested in the loan.

E

Another point was taken, and that was that the balance sheets had a certificate in each case by the auditors certifying the correctness of the contents of the balance sheets which, as I have said, contained on the face of them reference to the loan; and some reliance was sought to be placed on the judgment of LORD GODDARD, C.J., giving the judgment of the court in *Jones v. Bellgrove Properties, Ltd.* (3) ([1949] 2 All E.R. 198). In that case a balance sheet was presented to the shareholders at an annual general meeting of the company which was signed by chartered accountants described as agents of the company, and by two directors, containing the statement: “Sundry creditors, £7,638 8s. 10d.”, and the plaintiff attended the meeting as a shareholder. The plaintiff was owed £1,807, the balance of moneys lent to the company by him. The debt did not accrue within six years of an action brought by the plaintiff against the company to recover the debt. The annual general meeting was held within that period. In those circumstances, the Court of Appeal dismissed an appeal from BIRKETT, J., holding ([1949] 1 All E.R. 498) that the balance sheet contained an acknowledgment to the plaintiff, in writing, signed by the agents of the company, and that therefore, by virtue of s. 23 and s. 24 of the Limitation Act, 1939, the debt was recoverable. At the beginning of his judgment, LORD GODDARD, C.J., said ([1949] 2 All E.R. at p. 200): “. . . it really depends on its own facts and I wish to make it clear that our decision is based on those special facts”. The court held (and this is in accordance with the view of MAUGHAM, J., in *Re Coliseum (Barrow), Ltd.* (1)) that a balance sheet can amount to an acknowledgment within the meaning of the Limitation Act, 1939. LORD GODDARD, C.J., however, proceeded on the basis that at the annual general meeting of the defendant company on Dec. 31, 1946, at which the plaintiff was present in his capacity of shareholder, the accounts of the company for the years 1939 to 1945 inclusive were presented to the meeting; and that these accounts were signed by the company’s accountants as agents for the defendant company, and by two directors of the company. That was in accordance with the statement of facts to which I have referred; and in my view, in considering this judgment

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one should not go further than the language used by the court. One must proceed on the basis that the accountants signing the balance sheets did so as agents for the defendant company. That is far from supporting the view that a certificate by the auditors to a company will have any such effect as the signing of the balance sheets by those accountants in *Jones v. Bellgrove Properties, Ltd.* (3). In the present case, the only part which the auditors play are as auditors to give the necessary certificate; and the mere fact that they are described as chartered accountants is nothing more than purely descriptive matter. Their signatures are appended in their capacity as auditors.

In my view, an auditor of a company is not (apart from any special contract, and there is none in this case) an agent of the company, at any rate for the purpose of being able to bind the company by merely signing the normal certificate at the foot of the balance sheet. To hold otherwise would, I think, be contrary to the Companies Act, 1948. No doubt for certain purposes the auditors may be regarded as servants of the company, so that the court will not, by mandatory injunction, force on the company auditors whom the shareholders do not desire to act; see *Cuff v. London & County Land & Building Co., Ltd.* (4) ([1912] 1 Ch. 440). Apart, however, from any special contract, the relations between the company and its auditors are governed by the provisions of the Companies Act, 1948, and their duty, as expressed by s. 162 (1), is to make a report to the members on the accounts examined by them, and on every balance sheet and every profit and loss account, and their report is to contain statements as to the various matters mentioned in Sch. 9 to that Act. That scheme seems to me designed to produce the result that a skilled professional man or a firm of skilled professional men is or are appointed in order that there shall be before the company all the requisite information indicated in the Companies Act, 1948, and by his certificate the auditor pledges himself that he has properly performed his statutory duty. But I cannot spell out of the certificate anything which would amount to an acknowledgment within s. 23 (4) and s. 24 (2) of the Limitation Act, 1939, because I cannot spell out of his relations with the company, as to be extracted from the Companies Act, 1948, any authority to do anything in the nature of giving an acknowledgment within the Limitation Act, 1939, or any authority to do more than to perform the duties laid on him as auditor by the Companies Act, 1948.

On both those two grounds, therefore, I hold that this application fails, and in those circumstances it is unnecessary for me to consider further the point as regards the rate of interest on the loan.

Application dismissed.

Solicitors: *Bernard Oberman & Co.* (for the applicant); *Hillearys* (for the liquidator).

[Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.]

STONE v. BOREHAM.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Slade and Devlin, JJ.), July 2, 3, 1958.]

Shop—Sunday closing—Mobile van equipped as shop—Sale of goods in street from van—Whether van a shop—Whether retail trade or business carried on in van—Whether portion of street at which van stationary a “place” where retail trade or business is carried on—Shops Act, 1950 (14 Geo. 6 c. 28), s. 58, s. 74 (1).

A mobile van from which sales are made in the course of travelling on rounds is not a shop within s. 74 (1) of the Shops Act, 1950.

Eldorado Ice Cream Co., Ltd. v. Clark ([1938] 1 All E.R. 330) followed.

The respondent being the owner of a motor van which was equipped as a mobile shop and stocked with a variety of goods, stopped the van in a street one Sunday, while on his usual Sunday round, and there sold to a customer who was standing in the roadway a packet of tea. The respondent was charged with contravening s. 47 and s. 58* of the Shops Act, 1950, by carrying on a retail trade or business, on a Sunday, in a certain place, viz., at that part of the street where he had stopped his van. Shop was defined in s. 74 (1) of the Act of 1950 as including any premises where any retail trade or business was carried on and, by s. 58, the provisions as to Sunday closing were extended to “any place where any retail trade or business is carried on as if that place were a shop”. On appeal from justices acquitting the respondent,

Held: the piece of ground where the respondent stopped his van was not a place where he was carrying on a retail trade or business within the meaning of s. 58 of the Shops Act, 1950, because the van had merely stopped there for the sale to be made; and therefore s. 58 did not extend s. 47 to the place of sale.

Appeal dismissed.

[As to Sunday trading generally, and as to Sunday retail trading elsewhere than in shops, see 17 HALSBURY'S LAWS (3rd Edn.) 203, para. 337, and p. 206, para. 346.]

As to the meaning of “shop”, see 17 HALSBURY'S LAWS (3rd Edn.) 17, 18, para. 23.

For the Shops Act, 1950, s. 58, s. 74, see 29 HALSBURY'S STATUTES (2nd Edn.) 238; 246.]

Cases referred to:

- (1) *Eldorado Ice Cream Co., Ltd. v. Clark, Eldorado Ice Cream Co., Ltd. v. Keating*, [1938] 1 All E.R. 330; [1938] 1 K.B. 715; 107 L.J.K.B. 290; 158 L.T. 249; 102 J.P. 147; Digest Supp.
- (2) *Nixon v. Capaldi*, 1949 S.C. (J.) 155; 2nd Digest Supp.
- (3) *Cowlawrs Co-operative Society, Ltd. v. Glasgow Corpn.*, [1957] S.L.T. 288.

Case Stated.

This was a Case Stated by justices for the County of East Suffolk, in respect of their adjudication as a magistrates' court sitting at Woodbridge on Jan. 9, 1958.

On Dec. 23, 1957, an information was preferred by Oswald John Stone, the appellant, against Keith Ramon Boreham, the respondent, that the respondent, on Nov. 10, 1957, at Woodbridge, being the person then carrying on retail trade at a certain place, viz., outside No. 106, Peterhouse Crescent, Woodbridge, did not close that place for the serving of customers on Nov. 10, which was a Sunday, in that he sold a packet of tea at the above place contrary to s. 47 and s. 58 of the Shops Act, 1950. The following facts were found by the justices.

* For the terms of s. 58, see p. 717, letter C, post.

The appellant was at all material times a Shops Act inspector, appointed by East Suffolk County Council, and was duly authorised to institute proceedings on behalf of the county council for offences against the Shops Act, 1950. The respondent was the owner of an Austin motor van which was equipped as a mobile shop and was stocked with a variety of goods, including groceries and ice cream, for sale by retail by the respondent to the public. On Sunday, Nov. 10, 1957, in the course of his trade or business, the respondent drove the van slowly along Peterhouse Crescent, which was part of his normal Sunday round with the van, advertising its presence by musical chimes and stopping the van at frequent intervals, and at 4.30 p.m., he stopped the van in the roadway outside No. 106, Peterhouse Crescent and, there, sold to a customer who was standing in the roadway, a packet of tea. The respondent said that he did not think that the provisions of the Shops Act applied to mobile vans.

For the appellant it was contended that the portion of Peterhouse Crescent on which the respondent's van was standing at the time when he sold the tea was a "place" within the meaning of s. 58 of the Shops Act, 1950; that the respondent was carrying on a retail trade or business at that place and that the respondent was therefore guilty of the offence charged in the information. For the respondent it was contended that the portion of Peterhouse Crescent occupied by the stationary van was not a place within s. 58; that the sale was effected in the van, not in the roadway, and that the van was not a place within s. 58; that the van was mobile and at no time occupied any identifiable place within the meaning of s. 58 and that the respondent was, therefore, not guilty of the offence charged. The justices were referred to *Eldorado Ice Cream Co., Ltd. v. Clark* (1) ([1938] 1 All E.R. 330) and were of the opinion, having regard to that decision, that a place within the meaning of s. 58 of the Act of 1950 must be premises akin to a shop, while the offence alleged here was that retail trade or business was carried on on an undefined portion of the public highway which place was not closed for the serving of customers on a Sunday; in view of the decision cited, it was not alleged that the mobile van, while stationary, was a place within s. 58. On the facts found, the justices were therefore of opinion that the charge contained in the information could not be sustained.

The question for the court was whether or not a sale was effected at a place where the respondent was carrying on a retail trade or business within the meaning of s. 58 of the Act of 1950.

L. K. E. Boreham and *M. Dyer* for the appellant.

C. J. Crespi for the respondent.

LORD GODDARD, C.J., having referred to the Case Stated and the information preferred against the respondent, continued: The information, stating it shortly, charges the respondent with having sold a packet of tea on a Sunday contrary to s. 47 and s. 58 of the Shops Act, 1950. The matter came before a lay bench of justices at Woodbridge; I pay tribute to the care that they gave to the case, and I have come to the conclusion that their decision was right. [His LORDSHIP then stated the decision of the justices, as set out in the Case Stated, and continued:] The sale took place from one of the large mobile lorries or vans which nowadays are becoming common about the country, called mobile shops, and I have no doubt that as the Shops Act, 1950, was intended to prohibit and regulate Sunday trading, it might be a very good thing from the public point of view, though it is not for us to express opinions on matters of policy, if these mobile vans came within the Act. It certainly seems, if they do not, that there is unfair competition. The shopkeeper has to close his shop, but the owner of a mobile van can go round and sell from his van. However, we have to see whether on the construction of the Act of 1950 and the cases which are binding on this court an offence has been committed.

The various Shops Acts are consolidated in the Shops Act, 1950, and that is the Act to which we have to pay attention, though one case, *Eldorado Ice Cream*

A *Co., Ltd. v. Clark* (1) ([1938] 1 All E.R. 330), on which the justices relied, was decided under one of the earlier Acts* which is consolidated with and reproduced in the Act of 1950. Section 47 of the Act of 1950 provides:

“Every shop shall, save as otherwise provided by this Part of this Act, be closed for the serving of customers on Sunday.”

B Section 74, which is the definition section, says: “‘shop’ includes any premises where any retail trade or business is carried on”. That is not a precise definition; it includes any premises where any retail trade or business is carried on and does not therefore exclude other matters. Section 58 provides:

C “The foregoing provisions of [Part IV]† of this Act except [sections to which I need not refer] shall extend to any place where any retail trade or business is carried on as if that place were a shop, and as if in relation to any such place the person by whom the retail trade or business is carried on were the occupier of a shop.”

Both with regard to the definition of shop in s. 74 (1) and with regard to s. 58 I cannot hold that a retail trade or business is carried on in a mobile shop. D At a mobile shop no doubt retail sales are made, but that is different from saying that a retail trade or business is carried on there. A man carries on business from an address. I do not think that the words in those sections apply to a mobile van of this sort. I do not for my part think it necessary to go into a long account of the Shops Acts or the Scottish cases, because *Eldorado Ice Cream Co., Ltd. v. Clark* (1), to which the justices refer, which is a decision of this court, is binding on us. Whether, if the case was *res integra*, we might come to a different decision I need not inquire. *Eldorado Ice Cream Co., Ltd. v. Clark* (1) E was a case where a box tricycle, from which ice cream is commonly sold now, was attacked as a retail shop, and there is no difference between a mobile van and a tricycle. The distinction sought to be drawn here is that, though the court held in *Eldorado Ice Cream Co., Ltd. v. Clark* (1) that the tricycle could not be a shop within the definition or extension section‡ in the Act of 1936, that case F left open the question whether a place, that is to say, the actual piece of ground on which the tricycle stands, could be a shop. That is why, as counsel for the appellant in his very well-sustained argument told us, the information in this case charged the respondent with selling from a place, which was the piece of ground in front of a house in the street. It seems to me that that is not a place G where the respondent had set up a place of business or had established himself as, for example, people establish themselves nowadays at the side of a road on Sundays by putting out a table and selling flowers or fruit. It was simply the place where he stopped, and it seems to me that it would be fanciful to distinguish this case from *Eldorado Ice Cream Co., Ltd. v. Clark* (1) on the ground that that case was dealing with a charge which alleged that a man sold from a tricycle and in this case it is said he sold from a place, namely, where the tricycle H or van stopped. We must try to construe these matters in a way which the public can understand. *Eldorado Ice Cream Co., Ltd. v. Clark* (1) seems clearly to decide that a moving vehicle such as a tricycle is not within the provisions of this Act. It would be wholly artificial to hold that although tricycles are not within the Act of 1950 the place at which a tricycle comes to a stand is within the Act. So long as *Eldorado Ice Cream Co., Ltd. v. Clark* (1) stands we I are bound by it. That we hold that these mobile shops are not within the Shops Act, 1950, is a matter which no doubt the appropriate government department which has to deal with these matters may take into account. This decision

* The Shops (Sunday Trading Restriction) Act, 1936.

† Part IV of the Act of 1950, which includes s. 47, relates to Sunday trading.

‡ *Viz.*, s. 13 of the Shops (Sunday Trading Restriction) Act, 1936, which provided: “Subject as hereinafter provided, the provisions of this Act shall extend to any place where any retail trade or business is carried on as if that place were a shop . . .”

is in consequence of that which took place in 1938. Although the Shops Act, 1950, was a consolidating Act there could always have been an amending section to alter the effect of the decision in *Eldorado Ice Cream Co., Ltd. v. Clark* (1), but it has not been altered. A

For these reasons, I am of opinion that the justices were quite right in holding that they were constrained by *Eldorado Ice Cream Co., Ltd. v. Clark* (1) to hold that an offence had not been committed. Therefore this appeal fails and must be dismissed. B

SLADE, J.: I agree that this appeal fails because this court is bound by the decision of the Divisional Court in *Eldorado Ice Cream Co., Ltd. v. Clark* (1) ([1938] 1 All E.R. 330). I respectfully agree with my Lord that it would be too fanciful to draw a distinction between a box tricycle and the land on which the box tricycle stood at the time the retail sale was effected, and of course the same applies in this case to a motor van. Had the matter been *res integra*, I am bound to say that I should have come to a different conclusion. Section 47 of the Shops Act, 1950, says: C

“Every shop shall, save as otherwise provided by this Part of this Act, be closed for the serving of customers on Sunday.” D

A shop is defined by s. 74 (1) as including any premises where any retail trade or business is carried on. In a sense, therefore, the expression “shop” may be said to be linked to the word “premises”. Then one has s. 58 of the Act of 1950, the rubric of which is: “Extension of foregoing provisions of Part 4 to retail trading elsewhere than in shops”, which means elsewhere than in shops as defined by s. 74 (1). Section 58 says that the provisions shall extend to any place where any retail trade or business is carried on. The intention of that Act, as of the Act of 1936, which was the Act considered in *Eldorado Ice Cream Co., Ltd. v. Clark* (1), was to prohibit Sunday trading by retail save for the exceptions provided for in the Act; and I would have given the word “place” in the extension provisions of the Act of 1950 the widest possible interpretation. I am fortified in taking that view by the decision of the High Court of Justiciary in Scotland in 1949 in *Nixon v. Capaldi* (2) (1949 S.C. (J.) 155). That was a decision under s. 9 of the Shops Act, 1912, and it is true that s. 9 of the Act of 1912 had no relation to Sunday trading but dealt with bringing the conditions of employment in shops into line with the conditions of employment in factories. There is in my view, however, no distinction so far as the wording is concerned, and the High Court of Justiciary came in that case to a decision on the meaning of the word “place” which cannot be reconciled with the meaning given to it in *Eldorado Ice Cream Co., Ltd. v. Clark* (1). I merely refer to *Coultairs Co-operative Society, Ltd. v. Glasgow Corpn.* (3) ([1957] S.L.T. 288), a decision of the Court of Session to which counsel for the appellant drew attention in his admirable argument, to say that I see nothing in it to conflict with the decision in *Nixon v. Capaldi* (2). E F G

I should again like to emphasise, as the Lord Chief Justice has done in this court on more than one occasion, the desirability of allowing within limits an appeal in a criminal cause or matter beyond this court, but at present as the law stands no further appeal lies. I agree that this appeal should be dismissed. H

DEVLIN, J.: I agree. Three attempts have now been made to bring mobile vans which act as shops within the purview of the Shops Acts which have been consolidated in the Shops Act, 1950. In the first place it has been suggested that a mobile van which is fitted up as a shop is in the popular sense of the word a shop and therefore quite capable of being brought within the Act, and that the definition in the Act is not comprehensive; it merely says that a shop includes premises, and there is no reason why mobile vans should not be treated as shops for the purposes of the Act. I confess to having a great deal I

- A of sympathy with that argument, but it has not been very fully explored and, I think, rightly so. It came before the Scottish court in *Cowlairs Co-operative Society, Ltd. v. Glasgow Corpn.* (3) ([1957] S.L.T. 288). That very argument was put up and was there rejected. It seems to me most desirable that, for the sake of uniformity of decisions under these statutes, we should follow wherever possible the decisions of the Scottish courts; and this decision excludes that
- B argument. The second way of bringing a mobile van within the Act is to suggest that the van itself or the tricycle, or whatever it may be, is a place where retail trade or business is carried on, because by virtue of s. 58 the Act is extended to any place where any retail trade or business is carried on as if that place were a shop. That failed in *Eldorado Ice Cream Co., Ltd. v. Clark* (1) ([1938] 1 All E.R. 330) and consequently it has not been suggested again here. The third way
- C of doing it is to say that the place for the purposes of s. 58 is not the van or tricycle but the ground on which the van or tricycle stands, and that way of bringing the thing within the Act has received the support of *Nixon v. Capaldi* (2) (1949 S.C. (J.) 155) the Scottish case to which SLADE, J., referred. I agree with counsel for the appellant that one can distinguish *Eldorado Ice Cream Co., Ltd. v. Clark* (1) on that ground because LORD HEWART, C.J., in *Eldorado Ice Cream*
- D *Co., Ltd. v. Clark* (1) ([1938] 1 All E.R. at p. 334) said specifically that that argument as to the meaning of the word "place" had not been brought before the court and he was not dealing with it. I agree, however, also with the Lord Chief Justice and SLADE, J., that to make such a distinction would be to introduce an almost fanciful reasoning, and would also mean that a great deal of the argument that commended itself to LORD HEWART, C.J., and on which he based
- E his judgment in *Eldorado Ice Cream Co., Ltd. v. Clark* (1) would be erroneous. Therefore, having to choose in that way between *Eldorado Ice Cream Co., Ltd. v. Clark* (1) and *Nixon v. Capaldi* (2) I should choose *Eldorado Ice Cream Co., Ltd. v. Clark* (1) and I should have the less hesitation in doing so because I should find difficulty in appreciating the basis of the decision in *Nixon v. Capaldi* (2) and much prefer the view that the ground on which the van or
- F tricycle stands is not a place within the meaning of s. 58. I can state my reasons for that quite briefly. The Shops Act, 1950, is extended by s. 58 to any place where the retail trade or business is carried on, but not to any place where the sale happens to be effected. Here the place is alleged to be an area in Peterhouse Crescent, Woodbridge, situate outside No. 106. Clearly it may well have been
- G a dozen or a score of similar places which could equally well be described as the place where a sale happened to be effected. Is that a place where any retail trade or business is carried on? Is each of them such a place? So to hold would be to strain the meaning of the Act in order to produce a result that is not in accordance with common sense. There are so many sections of the Act which make it clear that s. 58 has in mind a place where business is carried
- H on in the ordinary sense of the word and not where any trader happens to effect a sale in the course of his business, there being to my mind a clear distinction between the two. No better section could be introduced as illustrative of that than the very section under which this prosecution was brought. That is s. 47, which says:

- I "Every shop shall, save as otherwise provided by this Part of this Act, be closed for the serving of customers on Sunday."

That, to my mind, makes it quite plain that the place is something which is fixed, a place where business is carried on, and not a place where a casual sale happens to be effected. The ordinary man could not make sense of a requirement of the law that, in the words of this information, he should close a place being a part of Peterhouse Crescent outside the dwelling-house No. 106. It is very undesirable that this court should strain to give meanings to a section of the

Act which would be to produce a result incomprehensible to the traders who have to comply with it. The result is, as my Lord has said, that it must now be taken as definitely decided in these courts that a mobile van is not a shop within the meaning of the Shops Act, 1950, and if Parliament desires to make it so it must introduce new legislation for that purpose.

Appeal dismissed.

Solicitors: *Berrymans*, agents for *G. C. Lightfoot*, Ipswich (for the appellant); *Field, Roscoe & Co.*, agents for *Gotelee & Goldsmith*, Ipswich (for the respondent).

[Reported by WENDY SHOCKETT, Barrister-at-Law.]

PUBLIC TRUSTEE v. INLAND REVENUE COMMISSIONERS.

[COURT OF APPEAL (Lord Evershed, M.R., Romer and Ormerod, L.J.J.), June 25, 26, 1958.]

Estate Duty—Exemption—Interest as holder of an office—Share of income of residuary estate given to trustee for life while a trustee—Death of trustee—Passing under s. 1 and not under s. 2 (1) of the Finance Act, 1894—Whether capital of share exempted from liability to duty—Finance Act, 1894 (57 & 58 Vict. c. 30), s. 1, s. 2 (1) (b).

By his will a testator appointed A. to be one of his executors and trustees and directed that the income of his residuary estate be divided among a number of persons, of whom A. was one, in specified shares, and so that when one beneficiary died the total income was divided among the survivors or survivor. The income directed to be paid to A. was expressed to be given to him in respect of his acting as executor and trustee and by way of remuneration for his so doing. At the date of his death, A. was receiving $\frac{6}{99}$ of the income of the residuary estate, and estate duty was claimed on $\frac{6}{99}$ of the capital of the fund under the Finance Act, 1894, s. 1. It was not disputed that the relevant charging provision was s. 1 and not s. 2 (1) (b) of the Act of 1894, but the trustee contended that the claim was precluded by virtue of s. 2 (1) (b), which excluded "property the interest in which of the deceased . . . was only an interest as holder of an office" from property deemed by s. 2 (1) (b) to be included in property passing on the death of the deceased.

Held: since the relevant charging provision was s. 1 and not s. 2 (1) (b) of the Act of 1894, the dichotomy between s. 1 and s. 2 (1) of that Act precluded the application of the words of exemption quoted above, which related only to a claim arising under s. 2 (1) (b).

Earl Cowley v. Inland Revenue Comrs. ([1899] A.C. 198) applied.

Sanderson v. I.R. Comrs. ([1956] 1 All E.R. 14) considered.

Decision of DANCKWERTS, J. ([1958] 1 All E.R. 550) affirmed.

[As to interest in property as the holder of an office, see 15 HALSBURY'S LAWS (3rd Edn.) 38, para. 75; and for a case on the subject, see 21 DIGEST 46, 297.]

For the Finance Act, 1894, s. 1 and s. 2 (1), see 9 HALSBURY'S STATUTES (2nd Edn.) 348, 350.]

Cases referred to:

- (1) *Re Northcliffe, Arnholz v. Hudson*, [1929] 1 Ch. 327; 98 L.J.Ch. 65; 140 L.T. 300; Digest Supp.
- (2) *A.-G. v. Eyres*, [1909] 1 K.B. 723; 78 L.J.K.B. 384; 100 L.T. 396; 21 Digest 46, 297.
- (3) *Cowley (Earl) v. Inland Revenue Comrs.*, [1899] A.C. 198; 68 L.J.Q.B. 435; 80 L.T. 361; 63 J.P. 436; 21 Digest 7, 27.
- (4) *Sanderson v. I.R. Comrs.*, [1956] 1 All E.R. 14; [1956] A.C. 491; 36 Tax Cas. 239; 3rd Digest Supp.

- A (5) *A.-G. v. Dobree*, [1900] 1 Q.B. 442; 69 L.J.Q.B. 223; 81 L.T. 607; 64 J.P. 24; 21 Digest 17, 97.
- (6) *A.-G. v. Milne*, [1914] A.C. 765; 83 L.J.K.B. 1083; 111 L.T. 343; 21 Digest 46, 296.
- (7) *Re Norfolk (Duke), Public Trustee v. Inland Revenue Comrs.*, [1950] 1 All E.R. 664; [1950] Ch. 467; 2nd Digest Supp.

B **Appeal.**

This was an appeal by the plaintiff, the trustee of the will of Viscount Northcliffe, deceased, from an order of DANCKWERTS, J., made on Feb. 13, 1958, and reported [1958] 1 All E.R. 550. The trustee by his originating summons applied for the determination of the question whether on the death of the late Henry Preuss Arnholz, who was a trustee of the will of the deceased, estate duty became payable on a share of the testator's residuary estate corresponding to the share of the income to which the deceased trustee was entitled immediately before his death under cl. 6 of the testator's will as his trustee. DANCKWERTS, J., held that estate duty was exigible, because the liability to duty, which arose by virtue of the Finance Act, 1894, s. 1, was unaffected by the fact that the deceased trustee took his interest as the holder of an office.

D *John Pennycuik, Q.C.*, and *J. A. Wolfe* for the trustee.

Sir Lynn Ungood-Thomas, Q.C., and *E. Blanshard Stamp* for the Crown.

LORD EVERSHERD, M.R.: The originating summons in this case raised the question of the liability to estate duty under the Finance Act, 1894, of the estate of one Henry Preuss Arnholz, who died on Aug. 31, 1955, in respect of a share (of which at the date of his death he was in enjoyment) of the income of the estate of the late Lord Northcliffe.

For reasons which I hope will later sufficiently appear, it is not necessary that I should go at length into the facts or indeed into the arguments of this case, both of which are fully stated in the judgment under appeal of DANCKWERTS, J. Suffice it then to say that under Lord Northcliffe's will the income of the residuary estate was, for a period terminating as provided by the will, divided among a number of income beneficiaries, each taking a specified share or fraction, so that when any one income beneficiary died the total income was then divided among the survivors or survivor.

At the date of Mr. Arnholz's death his share amounted to three of the 49½ shares in which the income was then divisible; but the interest in the income which Mr. Arnholz enjoyed was expressed to be given to him by para. 26 of cl. 6 of Lord Northcliffe's will as being in respect of his acting as executor and trustee and by way of remuneration for his so doing, though the will also contained a reference to the fact that Mr. Arnholz was a very old friend of the testator. By an order of the court made in *Re Northcliffe, Arnholz v. Hudson* (1) ([1929] 1 Ch. 327) it was held that on the death of any income beneficiary, save at any rate the last, there was a "passing" within the terms of the Finance Act, 1894, s. 1, of a share of the corpus of the estate corresponding to the share of the income which at his death the dying income beneficiary had enjoyed.

The claim to duty in this case has been resisted by the Public Trustee as the present trustee of the testator's estate, in reliance on the last three lines of para. (b) of s. 2 (1) of the Finance Act, 1894. In order to make that statement intelligible, I will read the whole paragraph, which is introduced by the opening sentence of s. 2 (1):

"Property passing on the death of the deceased shall be deemed to include the property following, that is to say: . . . (b) Property in which the deceased or any other person had an interest ceasing on the death of the deceased, to the extent to which a benefit accrues or arises by the cesser of such interest; but exclusive of property the interest in which of the deceased or other person was only an interest as holder of an office . . ."

Accordingly, it has been the contention of the trustee, following an earlier decision in *A.-G. v. Eyres* (2) ([1909] 1 K.B. 723) that the interest which Mr. Arnholz had as an income beneficiary was only an interest as the holder of an office, viz., the office of executor and trustee; but since the exemption appears, as I have said, in the second half of para. (b) of s. 2 (1), and since, as I have also observed, it has been held and is conceded that there was here a passing of a proportionate share of the corpus under s. 1, it will be apparent that the contest has raised the question of the application (and indeed, under the argument on behalf of the trustee, the validity today) of the celebrated dichotomy between s. 1 and s. 2 (1) of the Finance Act, 1894, which is enshrined in the well-known speech of LORD MACNAGHTEN in *Earl Cowley v. Inland Revenue Comrs.* (3) ([1899] A.C. 198).

Counsel for the trustee has also contended that even though the dichotomy has the consequence, if valid, that the Crown cannot charge under the terms of s. 2 (1) (b) but must direct their attention exclusively to s. 1 of the Act, none the less the exempting words, introduced after a semi-colon by the words "but exclusive of property", amount to an exemption which is not limited by the scope of para. (b), but is of general application and corresponds accordingly to the exemptions which s. 2 (2) and s. 2 (3) of the Act of 1894 confer; and I understand that counsel finds some peg in the semi-colon to which he seeks to attach that argument. I confess that on this last matter I have not been at all persuaded that those words of exemption in para. (b) can be interpreted save as a qualification of the earlier language of para. (b) itself; and if that is right, then counsel is faced, as he concedes, with the formidable difficulty that if the dictum of LORD MACNAGHTEN must be treated as binding on us today, then he cannot rely on something which is exclusive to para. (b) of s. 2 (1) of the Act, since the charge admittedly is made under s. 1.

On the other side counsel for the Crown has intimated, though he has not developed, an argument, that on the facts of this case Mr. Arnholz could not be said to have enjoyed his interest as holder of an office within the meaning of para. (b) of s. 2 (1), so that no question at all arises on that paragraph. In the circumstances I do not find it necessary to say anything on that argument save to record the fact that DANCKWERTS, J., rejected it.

However, counsel for the Crown also contended that even if today the dichotomy to which I have referred cannot be as rigid as might have previously been supposed, still if the subject is to rely on those exempting words in para. (b), he must say that his interest is one which is properly described and brought into charge by virtue of the enlarging effect of para. (b) as distinct from being something which has come into charge by virtue of s. 1 of the Act. Again in the circumstances I do not find it necessary to say anything on that point either.

Counsel for the trustee concedes that until a very recent case, *Sanderson v. I.R. Comrs.* (4) ([1956] 1 All E.R. 14), he would have been in very great difficulty in prevailing on this court to say that we could now treat LORD MACNAGHTEN's dictum as not excluding him from any reference to s. 2 (1) (b) of the Act. In *Sanderson v. I.R. Comrs.* (4), however, LORD RADCLIFFE, in the course of his speech, indicated that this dictum should, to use his own words, be resigned "to the list of the many minor mysteries of the law". Counsel for the trustee says that we, having so resigned it, can treat the matter as *res integra*, and in so doing should decide the matter in his favour.

It cannot, I think, be disputed that the argument of counsel for the trustee has formidable and attractive points in its support. For example, he relied on the language of para. (a) of s. 2 (1), which I will read, again prefacing it by the introductory words:

"Property passing on the death of the deceased shall be deemed to include

- A the property following, that is to say:—(a) Property of which the deceased was at the time of his death competent to dispose.”

It is certainly a forceful contention to observe that property of which the deceased was at the time of his death competent to dispose, according to the ordinary use of the language, would include the testator's own free estate no less than property over which he had but a general power of appointing. So it is counsel's contention that notwithstanding LORD MACNAGHTEN's dictum, s. 2 (1) cannot be regarded as dealing with property which is exclusive of property strictly within the first section; and that view is undoubtedly reflected in the speech of LORD RADCLIFFE (see especially [1956] 1 All E.R. at p. 19). I add further that LORD RADCLIFFE notices language used by a very learned judge, CHANNELL, J., in *A.-G. v. Dobree* (5) ([1900] 1 Q.B. 442) and also the differing views expressed by the House in a later case, *A.-G. v. Milne* (6) ([1914] A.C. 765). Notwithstanding the weight of those arguments, I feel myself compelled to the view that in this court, as before DANCKWERTS, J., we cannot do other than treat LORD MACNAGHTEN's dictum as still applicable.

- C I think that it will suffice by way of supporting that conclusion, if I refer to the language of JENKINS, L.J., in *Re Duke of Norfolk, Public Trustee v. Inland Revenue Comrs.* (7) ([1950] 1 All E.R. 664). The point was undoubtedly a different one, but no less clearly this court in its judgment and in particular the judgments of myself and of JENKINS, L.J., treated this dictum as one which this court must accept. Thus JENKINS, L.J., said (*ibid.*, at p. 673):

- E “It is clearly not open to this court to depart from the construction placed on s. 1 and s. 2 over fifty years ago by the House of Lords in *Earl Cowley v. Inland Revenue Comrs.* (3).”

The learned lord justice then proceeded to cite the whole of the passage from LORD MACNAGHTEN's speech, and without repeating it here, I have it in mind that the language includes the statement that one should read s. 1 as though it had been headed: “With regard to property passing on death, be it enacted as follows”, and that you should read s. 2 as though it had been headed: “And with regard to property not passing on death, be it enacted as follows”. If that view is binding, it must be conclusive in this case, for counsel's reliance on the terms of s. 2 (1) (b) becomes prefaced by the opening words “With regard to property not passing on death”; and *ex concessis* the property with which we are concerned did pass on the death. In *Sanderson v. I.R. Comrs.* (4) LORD RADCLIFFE's intimation of a contrary, or much modified, view was his own; it is, of course, plainly none the worse for that, but the four other members of the House did not share (or if they did, they did not express their adherence to) LORD RADCLIFFE's opinion. On well recognised principles, therefore, I do not think that it would be right for us, after so long a time during which LORD MACNAGHTEN's speech has been hallowed by those who practise in this branch of the law, to treat the matter as now thrown open again by LORD RADCLIFFE's observations.

- H It may well be that this case has disclosed, perhaps for the first time, an anomaly which a strict application of the dichotomy has hitherto concealed, and there may be other anomalies—one being in relation to a corporation sole—which, if the views of the Crown which have been indicated in argument are right, may add some emphasis to the view that the matter is one which ought properly to be considered by, and as I think resolved only by, the House of Lords itself. The cases which have been cited were referred to by DANCKWERTS, J., and I do not think, as I said at the beginning of this judgment, that it will in the circumstances serve any useful purpose, or be of any use to the House (if this matter goes to the House) for me to repeat the citations or repeat the summary of the case as DANCKWERTS, J., carefully and with accuracy expressed it. Thinking, as I do, that we must still regard ourselves as bound by the view hitherto prevailing of the effect of LORD MACNAGHTEN's speech in *Earl Cowley*

v. *Inland Revenue Comrs.* (3), in my judgment we can do no other than dismiss the appeal. A

ROMER, L.J.: I agree. The submission to us of counsel for the Public Trustee as to the inter-relation of s. 1 and s. 2 of the Finance Act, 1894, is, as he indeed concedes, plainly at variance with the opinion that LORD MACNAGHTEN expressed on the subject in *Earl Cowley v. Inland Revenue Comrs.* (3) ([1899] A.C. 198), and it is for that reason that it seems quite clear to me that this court cannot accept it, whatever views we might have formed on the matter if we had been able to approach it de novo. As LORD EVERSHED, M.R., has pointed out, in *Re Duke of Norfolk* (7) ([1950] 1 All E.R. 664), this court said quite explicitly that LORD MACNAGHTEN's opinion in the *Cowley* case (3) was binding on this court, and it seems to me, therefore, that the only question is whether anything that has happened since justifies us in expressing a different view now and saying that the matter is open to review by us. The only material thing which could possibly be relied on is the speech of LORD RADCLIFFE in *Sanderson v. I.R. Comrs.* (4) ([1956] 1 All E.R. 14). Notwithstanding the great weight which must, of course, be attributed to LORD RADCLIFFE's opinion it was not, at all events expressly, adopted by the other law Lords; and it seems to me impossible to say that his speech amounts in itself to a justification for departing from the view which this court expressed in *Re Duke of Norfolk* (7). In those circumstances, therefore, the matter cannot be considered by us today, because we are just as bound now, as we were in 1950, by the views of LORD MACNAGHTEN. B
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I desire to express no opinion, because it is not necessary to do so, on the submission which counsel for the Crown made that the Crown was entitled to succeed in this case, even apart from the question of LORD MACNAGHTEN's views. On the pure question of construction arising under s. 2 (1) (b), which the learned judge described as follows ([1958] 1 All E.R. at p. 556): E

"The question still remains whether the excluding provision which is contained in s. 2 (1) (b) is capable of application to the case of property which passes within the unextended or natural meaning of s. 1 of the Act." F

I entirely agree with the conclusion at which he arrived, and in which he expressed himself as follows (*ibid.*):

"It seems to me that grammatically the second or excluding portion of this provision must refer to the preceding or including part of the provision." G

I entirely accept that view of the matter, and I have nothing further to say on that point or on any of the other matters which have been discussed.

ORMEROD, L.J.: I agree that this appeal should be dismissed, and I have nothing to add.

Appeal dismissed. Leave to appeal to the House of Lords granted.

Solicitors: *Russell & Arnholz* (for the trustee); *Solicitor of Inland Revenue.*
[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

A

PRICE v. HUMPHRIES.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Devlin and Ashworth, JJ.), July 7, 1958.]

National Insurance—Offence—Institution of proceedings by or with the consent of the Minister or by an inspector or other officer authorised in that behalf—

B *Whether prosecution have to prove authorisation—National Insurance Act, 1946 (9 & 10 Geo. 6 c. 67), s. 53 (1).*

The respondent was charged with certain offences against the National Insurance Act, 1946. By s. 53 (1) of that Act proceedings for an offence under the Act were not to be instituted except by or with the consent of the Minister of Pensions and National Insurance or by an inspector or other officer authorised in that behalf. At the trial the prosecution did not prove that this consent or authority had been given. After the prosecution's case was closed, the respondent submitted that there was no case to answer as the prosecution had failed to prove the consent or authority, and that evidence of it could not then be admitted. The justices upheld the submission.

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Held: it was the duty of the clerk to the justices on application being made to him for issue of the summons to see that the requirements of s. 53 (1) of the National Insurance Act, 1946, had been observed and unless objection was taken by the accused before the prosecution closed their case the court should have acted on the presumption that this duty had been discharged; therefore, the case should go back to the justices for them to proceed with it.

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R. v. Waller ([1910] 1 K.B. 364) applied.

Per LORD GODDARD, C.J.: there is a distinction between an objection that goes to the merits of the case and one which goes only to procedure; if an objection goes to the merits the justices should be very careful about allowing the case to be re-opened where the prosecution have failed to prove something, but they should not allow objection to procedure where that has been held back until the last moment.

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R. v. Day ([1940] 1 All E.R. 402) distinguished.

Appeal allowed.

[For the National Insurance Act, 1946, s. 53, see 16 HALSBURY'S STATUTES (2nd Edn.) 735.]

Cases referred to:

- G (1) *R. v. Day*, [1940] 1 All E.R. 402; 162 L.T. 407; 104 J.P. 181; 2nd Digest Supp.
 (2) *R. v. Waller*, [1910] 1 K.B. 364; 79 L.J.K.B. 184; 102 L.T. 400; 74 J.P. 81; 14 Digest (Repl.) 580, 5803.
 (3) *R. v. Turner*, [1910] 1 K.B. 346; 79 L.J.K.B. 176; 102 L.T. 367; 74 J.P. 81; 14 Digest (Repl.) 581, 5804.
 H (4) *Middleton v. Rowlett*, [1954] 2 All E.R. 277; 118 J.P. 362; 3rd Digest Supp.

Case Stated.

This was a Case Stated by justices for the County of Worcester in respect of their adjudication as a magistrates' court sitting at Worcester on Feb. 11, 1958. On Jan. 13, 1958, the appellant, Edward Price, an officer of the Ministry of Pensions and National Insurance, preferred two informations against the respondent, Michael Humphries that (i) on or about Mar. 28, 1957, at Broadheath Common, Worcester, contrary to the National Insurance Act, 1946, s. 52 (1), for the purpose of obtaining sickness benefit for himself under the Act, he knowingly made a certain false representation, to wit, that, because of incapacity, he had not worked since the date of the last medical certificate furnished by him on or about Mar. 15, 1957, whereas, in fact, between Mar. 15 and 28, 1957, he worked for Mr. D. J. Bushnell, Shoulton Farm, Hallow, Worcester; (ii) on or about Oct. 14, 1957, at Broadheath Common, Worcester, contrary to s. 52 (1) of the Act of 1946, for the

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purpose of obtaining for himself sickness benefit under the Act, he knowingly made a false representation, to wit, that, because of incapacity, he had not worked since the date of the last medical certificate furnished by him on or about Oct. 7, 1957, whereas, in fact, between Oct. 7 and 14, 1957, he worked for Mr. D. J. Bushnell, Shoulton Farm, Hallow, Worcester.

The following facts were found. The respondent pleaded not guilty to the offences set out in the informations. After evidence had been given as to the facts of the case, the respondent, by his solicitor, asked whether the case for the prosecution was closed, and, on receiving an affirmative answer, submitted that there was no case to answer.

It was contended on behalf of the respondent that the prosecution had failed to prove that the proceedings were instituted by or with the consent of the Minister of Pensions and National Insurance or by an inspector or other officer authorised in that behalf, as required by s. 53 (1) of the Act of 1946, and, the case for the prosecution having been closed, evidence of the consent or authority could not be admitted. It was contended on behalf of the appellant that proof of such authority to prosecute was unnecessary except when required by the court, and it was stated that it was available for production, if required.

The justices dismissed the informations, being of the opinion that the objection was good in law, it being clear from the decision in *R. v. Day* (1) ([1940] 1 All E.R. 402), that, after the close of the case for the prosecution, no further evidence should be allowed to be adduced by the prosecution unless it was evidence on any matter which arose ex improviso, or the necessity for which no human ingenuity could have foreseen; the authorisation of the proceedings was not such a matter. The appellant now appealed.

Rodger Winn for the appellant.

The respondent did not appear and was not represented.

DEVLIN, J.: There are many statutes which provide that a prosecution is not to be instituted except with the authority or consent of some particular officer, such as the Director of Public Prosecutions or some other officer who has to consider the matter before the prosecution is brought. This Case Stated raises a question of how, and to what extent, the prosecution is required to prove the existence of such authority and consent as part of its case. It is a prosecution brought under the National Insurance Act, 1946, which provides, by s. 53 (1):

“Proceedings for an offence under this Act shall not be instituted except by or with the consent of the Minister or by an inspector or other officer authorised in that behalf by special or general directions of the Minister.”

In the proceedings before the Worcestershire justices, the prosecution proved, or sought to prove, the substance of its case, and, after evidence had been given on the facts of the case, the respondent, by his solicitor, asked whether the case for the prosecution was closed, and, on receiving an affirmative answer, he submitted that there was no case to answer. His grounds were that the prosecution had failed to prove that the proceedings were instituted by or with the consent of the Minister of Pensions and National Insurance, that is, failed to comply with the sub-section which I have just read. He further contended that, the case for the prosecution having been closed, evidence of the consent or authority could not be admitted. The appellant contended that proof of such authority to prosecute was unnecessary except when required by the court, and he stated that it was available for production if required.

The justices, having had cited to them *R. v. Day* (1) ([1940] 1 All E.R. 402), came to the conclusion that the objection was good in law and that they ought not to allow the prosecution case to be re-opened because it was not evidence on any matter which arose, and, following the dictum laid down in that case, ex improviso or the necessity for which no human ingenuity could have foreseen, accordingly dismissed the informations.

A The first thing to observe about s. 53 is that the authority or consent for which it provides is authority or consent that has to be given for the institution of the proceedings: "Proceedings for an offence under this Act shall not be instituted except by or with the consent of the Minister". Proceedings in summary jurisdiction of this sort are instituted by the laying of an information and the issue of a summons, and, when the summons is issued, that is the institution of the
B proceedings. The point, therefore, at which the consent or authority must be proved is at that point before the summons is instituted, and it is the duty of the clerk to the justices if application is made to him, as it generally is, for the laying of the information or the issue of the summons, to see that the requirements of s. 53 are complied with, otherwise the summons will be a bad one. Accordingly, when the matter comes on before the court the point that has to be determined,
C if it is necessary to determine it, is whether the summons be good or bad, whether the proceedings were instituted with or without authority. The usual practice is for the prosecution to produce the formal document about which, as I said, the clerk and, indeed, the justice, who issued the summons ought first to satisfy himself to show that the summons was properly issued.

The question that we have to determine is: What is the position if he fails to do so, as he did in this case? I think that the position in law has been dealt with, and the law has been fully laid down in *R. v. Waller* (2) ([1910] 1 K.B. 364). That was a case, it is true, of an indictment and of the consent of the Director of Public Prosecutions being necessary to that indictment, and the court dealt with it in this way: LORD ALVERSTONE, C.J., said this (*ibid.*, at p. 366):

E "In *R. v. Turner* (3) ([1910] 1 K.B. 346) we considered the degree of evidence necessary to prove the consent in cases in which proof had to be given. The point which has now been taken is whether *prima facie*, and in the absence of objection by the prisoner, any evidence of that consent need be given at all at the trial. No doubt the giving of the consent is a condition which must be satisfied in fact, and unless it has in fact been given the
F indictment ought not to be allowed to go before the grand jury. But how far or under what circumstances that fact need be proved at the trial is a different matter. Under the Vexatious Indictments Act an indictment charging offences, in respect of which neither the prosecutor has been bound over to prosecute nor the person accused has been committed or bound over to appear and defend, cannot go before the grand jury without the consent of a judge or one of the law officers. But it is the duty of the clerk of assize to satisfy
G himself before the bill is presented to the grand jury that all the necessary steps preliminary to indictment have been taken, and, unless objection be taken by the prisoner that there was no consent in fact, it is to be presumed that the clerk of assize has discharged his duty in that respect."

H I think *mutatis mutandis* that that reasoning applies exactly to this case. It is the duty of the clerk to the justices, or whoever issues the summons, to see that it is not issued unless the consent or the authority is produced, and there is a presumption which, indeed, is merely a facet of the wider *maxim omnia praesumuntur rite et solenniter esse acta* that the clerk has discharged his duty in that respect. Accordingly, *prima facie*, the position was that the summons had been properly issued and there was no need for the prosecution to take any
I further step unless objection was taken. If objection were taken then they must be in a position to prove it and the nature of that proof in the case of the consent of the Director of Public Prosecutions was laid down in *R. v. Turner* (3), and we are not concerned with it here. Accordingly, I think that the justices were wrong in dismissing the information.

I should like to say a word about the position of the justices, whether or not they should allow a case to be re-opened, because it may well be that they found it a rather confusing one. The authority on which they acted lays it down that,

if the matter is one of substance, the prosecution ought not to be allowed to re-open its case. On the other hand, there are authorities which show that, if the matter is one of technicality, such as the proof of a statutory rule or order, or something of that sort, then the justices should allow the prosecution case to be re-opened. In my judgment, in matters of this sort where what is in issue is simply the question whether proceedings are properly authorised, no question really arises about re-opening the prosecution case at all. I think that the application of the principle in *R. v. Waller* (2) to the circumstances of this case is this, that, if the prosecution is allowed without objection to close its case, then the prosecution has done all that is necessary and the summons is presumed to be a good one and properly authorised. If the defence wants to challenge that and take objection, they should take their objection before the prosecution case is closed, and, having taken their objection, the burden will pass to the prosecution to produce what evidence they have which shows that the proceedings were duly authorised.

For these reasons, I think that the decision of the justices was wrong, the appeal should be allowed, and that the case should go back to the justices in order that they may proceed with the hearing of it.

LORD GODDARD, C.J.: I agree in the result, but I desire to say that the fact that we are differing from the justices does not mean any reflection on them, because I can well understand that, when justices have a case such as *R. v. Day* (1) ([1940] 1 All E.R. 402) cited and there is no answer by the prosecution citing some other authority, the justices may think they are bound by *R. v. Day* (1). I think that possibly they might have been in greater difficulties if *Middleton v. Rowlett* (4) ([1954] 2 All E.R. 277) had been cited to them; it would still more have led them to believe that they could not allow the further evidence to be given. When the sort of case arises such as we have here today, I think that justices would do well to bear this in mind: There is a distinction between an objection which goes to the merits and one which goes only to procedure. If it goes to the merits and the prosecution have failed to prove something on which the guilt or innocence of the defendant depends, then justices must be very careful about allowing cases to be re-opened and must consider the doctrine laid down in *R. v. Day* (1). If it is only a matter which goes to procedure, as this does, and as it does in a large number of cases where the Director of Public Prosecution's consent or anybody else's consent is required to the prosecution, then I do not think that they ought to allow an objection which has been, so to speak, kept up the sleeve till the last minute, as where the prosecution are induced to say that they have closed their case, and it is objected that they have not proved consent to the proceedings having been instituted. If the difference between an objection which goes to the merits and one which only goes to procedure is borne in mind, many of the difficulties will be cleared up.

ASHWORTH, J.: I agree with both the judgments which have been given.

Appeal allowed.

Solicitor: *Solicitor, Ministry of Pensions and National Insurance.*

[Reported by G. A. KIDNER, ESQ., Barrister-at-Law.]

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NOTE.

PIOTROWSKA v. PIOTROWSKI.

[COURT OF APPEAL (Hodson and Morris, L.JJ., and Vaisey, J.), June 23, 1958.]

B *Divorce—Appeal—Fresh evidence—Perjury—Witness' confession that relevant evidence accepted at trial was perjured—R.S.C., Ord. 58, r. 10.*

[As to motions for a new trial on the ground of perjury, see 12 HALSBURY'S LAWS (3rd Edn.) 425, para. 951, note (p); and for a case on the subject, see 27 DIGEST (Repl.) 601, 5615.]

C Case referred to:

(1) *Worsley v. Worsley & Worsley*, (1904), 20 T.L.R. 171; 27 Digest (Repl.) 601, 5615.

Appeal.

This was an appeal by a wife against an order of LORD MERRIMAN, P., sitting at Sheffield, made on Nov. 30, 1956, dismissing her defended petition for divorce on the grounds of her husband's adultery with one Jessie Smith, the woman named in the petition. The facts appear in the judgment.

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R. V. Cusack for the appellant wife, the petitioner.

The respondent husband and the woman named did not appear and were not represented.

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HODSON, L.J., stated the facts set out above and continued: The parties themselves are Poles. At the end of a very careful hearing LORD MERRIMAN, P., acquitted the respondent husband and the woman named of adultery. The application to this court is for a re-hearing and the ground of the application is simply this, that the crux of the case, as it was presented to the learned President, and as he found, was whether or not the parting which took place between the parties on Mar. 7, 1955, followed on an accusation by the wife against her husband and this woman that the latter was pregnant by the husband, followed by an admission that that was so. This allegation by the wife was absolutely denied at the trial; in support of the denial the mother of the woman named, who lived in the same house (both the woman named and the mother being lodgers there), gave evidence that her daughter was not at that time pregnant; she had been pregnant before, because she had a child, but at that time she was not pregnant. The learned President accepted the evidence of the woman and the mother, and incidentally that of the husband, although he had not previously been disposed to accept the evidence of the husband as against that of the wife. He found the wife to be an apparently credible witness, but in the puzzling situation in which he found himself, due to the way in which the case was presented to him, he acquitted the parties charged with adultery. Since then the husband himself, the woman named and her mother have all admitted their perjury in these divorce proceedings in that matter and have suffered the penalty of the law for it. That is really all that I need say.

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There should be a new hearing under the powers conferred on this court by R.S.C., Ord. 58, r. 10. Reference has been made by counsel to *Worsley v. Worsley & Worsley* (1) ((1904), 20 T.L.R. 171), where a somewhat similar situation occurred. In that case the trial had been by a judge and jury; and, after a witness who had given evidence had confessed that it was false, the Court of Appeal ordered a new trial. I have in my own recollection a case in which a similar course was taken where the hearing was before a judge alone.

[His LORDSHIP commented on the way in which this case had been presented to the trial judge, and continued:] I repeat that the situation in which the learned President found himself was such that the conclusion which he reached,

as I understand his judgment, was almost inevitable, but on the information which we now have I think that there must be a new hearing. A

MORRIS, L.J.: I entirely agree.

VAISEY, J.: I also agree.

Appeal allowed; order of court below set aside; order that petition be re-heard. B

Solicitors: *Peake & Co.*, agents for *Lapage Norris Sons & Saleby*, Stroud (for the appellant wife, the petitioner).

[Reported by HENRY SUMMERFIELD, Esq., Barrister-at-Law.]

RIGDEN v. WHITSTABLE URBAN DISTRICT COUNCIL.

[CHANCERY DIVISION (Danckwerts, J.), June 27, 1958.]

Town and Country Planning—Enforcement notice—Validity of notice—Application by originating summons for declaration that notice invalid—Town and Country Planning Act, 1947 (10 & 11 Geo. 6 c. 51), s. 23—R.S.C., Ord. 54A, r. 1, r. 1A. D

An application under R.S.C., Ord. 54A, by originating summons for a declaration that an enforcement notice served under the Town and Country Planning Act, 1947, s. 23 (1), is invalid because it fails to comply with the provisions of s. 23 cannot be entertained by the High Court, because in such a case the plaintiff is not within r. 1 or r. 1A of R.S.C., Ord. 54A. E

[**Editorial Note.** Apart from the right of appeal against an enforcement notice, conferred by s. 23 (4) of the Town and Country Planning Act, 1947, which, as the law stands at the time of the present decision, is not available for determining whether the development alleged in the notice was development within s. 12 (2) at all (see *Eastbourne Corpn. v. Forte's Ice Cream Parlour (1955) Ltd.*, ante p. 276 at pp. 281, 282), the validity of an enforcement notice has so far been successfully impugned in at any rate two ways. The first is by way of defence to a prosecution under s. 23 (4) for use of land in contravention of the notice (*Mead v. Plumtree*, [1952] 2 All E.R. 723). The second is by an action for a declaration (*Francis v. Yiewsley and West Drayton Urban District Council*, [1957] 3 All E.R. 529). F

For s. 23 of the Town and Country Planning Act, 1947, see 25 HALSBURY'S STATUTES (2nd Edn.) 524-526.] G

Case referred to:

- (1) *Mead v. Plumtree*, [1952] 2 All E.R. 723; [1953] 1 Q.B. 32; 116 J.P. 589; H
3rd Digest Supp.

Adjourned Summons.

The plaintiff, George Rigden, applied by originating summons for a declaration that an enforcement notice dated Oct. 31, 1957, in respect of land at Whitstable in the County of Kent, purporting to be made by the Whitstable Urban District Council under powers delegated to them by the Kent County Council (with the consent of the Minister of Housing and Local Government) and purporting to be made under the Town and Country Planning Act, 1947, failed to comply with the provisions of s. 23 of the Act and was accordingly null and void and of no effect whatever. The relevant part of the enforcement notice appears in the judgment. I

F. H. B. W. Layfield for the plaintiff, the owner and occupier.

Denys B. Buckley for the defendants, the urban district council.

A **DANCKWERTS, J.:** This is an application by Mr. George Rigden against the Whitstable Urban District Council by originating summons under the provisions of R.S.C., Ord. 54A. The defendants, the Whitstable Urban District Council, are the planning authority for the relevant district by virtue of the Kent County Council having delegated their power; and the plaintiff is the owner of property known as "Limberlost", Church Lane, Seasalter, Whitstable, in the B County of Kent, on which apparently he has been keeping caravans, using the land as a winter caravan park and a summer caravan camping site. The Whitstable council has objected to this, and the question which is raised by this summons is in regard to an enforcement notice served by the Whitstable council under the provisions of the Town and Country Planning Act, 1947.

C The powers of the planning authority (the council) are conferred by s. 12 (1) of the Act of 1947, which requires permission to be obtained, in effect, for any development of land which is carried out after the appointed day, which is July 1, 1948. Development is defined in s. 12 (2) as follows:

D "...except where the context otherwise requires, the expression 'development' means the carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of any material change in the use of any buildings or other land."

It is with regard to the use of the land that the objection has been raised.

E The provisions for an enforcement notice are contained in s. 23 and s. 24 of the Act. Section 23 (1) allows the planning authority to serve an enforcement notice within four years of the development being carried out, and s. 23 (2) and s. 23 (3) contain provisions as to the form of such a notice. Section 23 (2) provides:

F "Any notice served under this section (hereinafter called an 'enforcement notice') shall specify the development which is alleged to have been carried out without the grant of such permission as aforesaid or, as the case may be, the matters in respect of which it is alleged that any such conditions as aforesaid have not been complied with, and may require such steps as may be specified in the notice to be taken within such period as may be so specified for restoring the land to its condition before the development took place, or for securing compliance with the conditions, as the case may be; and in particular any such notice may, for the purpose aforesaid, require the demolition or alteration of any buildings or works, the discontinuance of any use of land, or the carrying out on land of any building or other operations."

G Section 23 (3) provides:

"Subject to the provisions of the next following sub-section, an enforcement notice shall take effect at the expiration of such period (not being less than twenty-eight days after the service thereof) as may be specified therein . . ."

H The proviso to s. 23 (3) causes a suspension of the effective notice when there is an appeal pending the final determination of the appeal. Section 23 (4) provides for an appeal to a court of summary jurisdiction for the petty sessional division or place within which the land to which the notice relates is situated, and then states what the court may do on such an appeal. Section 23 (5) provides for a further appeal to a court of quarter sessions.

I The notice in the present case was dated Sept. 27, 1957, and required the plaintiff "to take the following steps for the aforesaid purpose", viz., for restoring the aforementioned land to the condition (as agricultural land) in which it was before the development took place,

"on or before Nov. 7, 1957, namely the discontinuance of the use of the land as a caravan park and caravan camp by the removal from the land of all caravans in excess of two in number such number to include one caravan stationed within the curtilage of the dwelling-house."

Then there is a statement: "This notice will take effect on Oct. 31, 1957".

It is contended that that notice is bad because it takes no account of the fact that the period within which the notice would take effect might be suspended if there were an appeal against the notice, and in that event the period within which the land was required to be restored by the notice would have expired before the period within which the notice takes effect had come to an end. The object of this application is to obtain a declaration from the court that that notice fails to comply with the provisions of s. 23 of the Act and is accordingly null and void and of no effect whatever. It is claimed that the validity of the notice cannot be decided by the court of summary jurisdiction, or the court of quarter sessions on an appeal against the notice (see *Mead v. Plumtree* (1), [1952] 2 All E.R. 723, per LORD GODDARD, C.J., at pp. 725, 726); and so it is contended that the present application is a convenient and appropriate method of obtaining a decision on the validity of the notice. The owner of the land naturally wants to know his position in relation to s. 23 of the Act.

R.S.C., Ord. 54A, r. 1, provides:

"In any Division of the High Court, any person claiming to be interested under a deed, will, or other written instrument, may apply by originating summons for the determination of any question of construction arising under the instrument, and for a declaration of the rights of the persons interested."

Rule 1A provides:

"In any Division of the High Court any person claiming any legal or equitable right in a case where the determination of the question whether he is entitled to the right depends upon a question of construction of a statute, may apply by originating summons for the determination of such question of construction, and for a declaration as to the right claimed."

I have come, with some reluctance, to the conclusion that the plaintiff cannot bring himself within the terms of either of those rules. It is perfectly true that he is interested in the question of the validity of the notice, and it may be true that the question of the validity of the notice depends on the proper construction of the statute, but this is a very restricted jurisdiction conferred by R.S.C., Ord. 54A, and if the application does not fall within the terms of the rules, I have no power, whatever I would like to do, to consider it. I do not think that the plaintiff can be said to be a person "interested under a deed, will, or other written instrument" within the meaning of r. 1. He cannot really be interested under a notice; he is merely interested in trying to show that the notice is invalid and does not comply with the Act. Again, with regard to r. 1A, he is not "claiming any legal or equitable right", which depends on a question of the construction of the statute. There might be a question depending on the true interpretation of s. 12 of the Act and the exercise by the planning authority of its powers conferred by the Act; but a claim to a legal or equitable right depending on the construction of a statute cannot be said to be raised by a question as to the validity of an enforcement notice served by the planning authority for the purpose of securing compliance with its order because of the failure of the landowner to obtain the necessary permission. It does not seem to me that the plaintiff is claiming any legal or equitable right which depends on the notice, and therefore I have most reluctantly come to the conclusion that I am not in a position to entertain this application, and it must be dismissed.

Summons dismissed.

Solicitors: *Balderston, Warren & Co.*, agents for *Wild & Son*, Whitstable, Kent (for the plaintiff); *Sharpe, Pritchard & Co.*, agents for *R. H. Kealy*, Whitstable, Kent (for the defendants).

[Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.]

A CITY & WESTMINSTER PROPERTIES (1934), LTD. v. MUDD.

[CHANCERY DIVISION (Harman, J.), May 5, 6, June 3, 4, 5, July 2, 1958.]

Landlord and Tenant—Lease—Covenant against use except as business premises—Construction of lease—Reference to drafts—Consideration of history and of conduct of parties after the grant—Consideration of nature of demised premises.

Landlord and Tenant—Lease—Forfeiture—Breach of covenant—Waiver—Promise by landlord before execution of lease that tenant could continue to live on premises—Enforceability of landlord's promise.

Rectification—Absence of common intention to include words in lease.

C In 1941 the landlords let premises comprising a shop and small back room on the ground floor and a basement to the tenant under an oral tenancy for three years. The tenant was engaged in civil defence duties and was permitted to sleep on the premises. He fitted up a basement room as a sitting room. On Apr. 5, 1944, a lease was granted to the tenant by deed whereby the landlords let "the shop on the ground floor and the basement floor all as now in his occupation" for three years from Lady Day, 1944.

D The tenant was described as an antique dealer, and he covenanted "not to use or permit the use of the said premises except as the shop of the [tenant] for his business as hereinbefore described" and not to do or suffer to be done anything which might render the premises liable to be assessed as a dwelling-house. The tenant continued, however, to sleep on the premises, and he also fitted up a room in the basement as a dining room.

E In January, 1947, the tenant asked for a new lease. The draft lease which he was offered contained a covenant "to use the demised premises as and for showrooms, workrooms and offices only" and not to use the premises for any of a large number of specified trades and not to permit "the demised premises or any part thereof to be used as a place for lodging dwelling or sleeping". The tenant's solicitors deleted the covenant against use for lodging, dwelling or sleeping, and added a note on the draft that the tenant had been residing at the premises for some years and had spent a large sum of money on decorations. The landlords were advised that to permit the tenant to reside on the premises might cause the Rent Restrictions Acts to apply, and they objected to the deletion. A representative of the landlords orally informed the tenant that the landlords would not object to his residing on the premises if he would sign the lease in its original form.

G The lease (for a term of fourteen years) was signed in due course, but the words expressly excluding lodging, dwelling or sleeping were not included, and the tenant continued to live on the premises. The lease contained a provision for re-entry on breach of covenant. In May, 1956, the tenant applied for a new lease. On a visit to the premises by the managing director of the landlords the tenant informed him that he was living on the premises. The landlords claimed that the lease was forfeited and that they were entitled to possession.

H

I **Held:** (i) in construing the lease it was not permissible to consider the history of the matter, or the fact that the tenant had been living on the premises to the knowledge of the landlords, or that express words of prohibition of user as a dwelling had appeared in the draft lease and did not appear in the lease as executed (see p. 739, letter G, post); but it was proper to take into consideration the nature of the property (see p. 740, letter D, post).

Caffin v. Aldridge ([1895] 2 Q.B. 648) and *Inglis v. Buttery* ((1878), 3 App. Cas. 552) considered.

Dictum of JENKINS, L.J., in *Levermore v. Jobey* ([1956] 2 All E.R. at p. 364) applied.

Levermore v. Jobey (ante) and *R. v. Brighton & Area Rent Tribunal, Ex p. Slaughter* ([1954] 1 All E.R. 423) distinguished on the facts.

(ii) in view of the nature of the premises, and having regard to the exclusion of a large number of trades from the permitted user, user of the premises as a dwelling-house was clearly a breach of the covenant to use the demised premises "for showrooms, workrooms and offices only".

(iii) the tenant was not entitled to have the lease rectified by the inclusion of an express permission to reside on the premises, for there was no common intention to insert such a provision in the lease.

(iv) although the landlords knew that the tenant was sleeping on the premises and acceptance of rent with that knowledge waived past breaches of covenant, yet there had been no release of their rights as regards continuing or future breaches of the tenant's covenant to use the premises as "showrooms, workrooms and offices only" (see p. 742, letter H, post).

Re Lower Onibury Farm, Onibury, Shropshire ([1955] 2 All E.R. 409) and *Wolfe v. Hogan* ([1949] 1 All E.R. 570) applied.

(v) nevertheless the landlords' claim to forfeit the lease and assume possession failed because the tenant had executed the lease in reliance on a promise made to him by the landlords at the time not to enforce against him personally the covenant to use the demised premises for business purposes only, and thus an enforceable contract had been constituted from which the landlords could not resile (see p. 742, letter I, to p. 743, letter A, post).

Dictum of SIMONDS, J., in *Re William Porter & Co., Ltd.* ([1937] 2 All E.R. at p. 363) applied.

[As to the construction of covenants the breach of which may lead to forfeiture, see 23 HALSBURY'S LAWS (3rd Edn.) 667, 668, para. 1392; and as to the general rules of interpretation of deeds, see 11 HALSBURY'S LAWS (3rd Edn.) 381 et seq.]

As to the principle that construction of a document is not controlled by previous negotiations, see 11 HALSBURY'S LAWS (3rd Edn.) 399, para. 648; and as to the admission of evidence of surrounding circumstances to assist interpretation, see *ibid.*, p. 406, para. 658.

As to covenants in leases concerning user, see 23 HALSBURY'S LAWS (3rd Edn.) 622, para. 1322; and as to waiver of breach of covenants that are continuing breaches, see *ibid.*, p. 673, para. 1398.

As to promissory estoppel, see 15 HALSBURY'S LAWS (3rd Edn.) 175, para. 344; and as to waiver of contractual rights based on fresh contract or estoppel, see also 8 HALSBURY'S LAWS (3rd Edn.) 175, para. 299.]

Cases referred to:

- (1) *Caffin v. Aldridge*, [1895] 2 Q.B. 648; 65 L.J.Q.B. 85; 73 L.T. 426; 41 Digest 342, 1930.
- (2) *Inglis v. Buttery*, (1878), 3 App. Cas. 552; 7 Digest 334, 17.
- (3) *Levermore v. Jobey*, [1956] 2 All E.R. 362; 3rd Digest Supp.
- (4) *R. v. Brighton & Area Rent Tribunal, Ex p. Slaughter*, [1954] 1 All E.R. 423; [1954] 1 Q.B. 446; 118 J.P. 231; 3rd Digest Supp.
- (5) *Gibson v. Doeg*, (1857), 2 H. & N. 615; 27 L.J.Ex. 37; 30 L.T.O.S. 156; 21 J.P. 808; 157 E.R. 253; *affd.* Ex.Ch., (1862), 7 L.T. 71; 31 Digest (Repl.) 555, 6749.
- (6) *Gibbon v. Payne*, (1907), 22 T.L.R. 54; *affd.* C.A., 23 T.L.R. 250; 31 Digest (Repl.) 370, 5014.
- (7) *Hepworth v. Pickles*, [1900] 1 Ch. 108; 69 L.J.Ch. 55; 81 L.T. 818; 31 Digest (Repl.) 187, 3194.
- (8) *Re Lower Onibury Farm, Onibury, Shropshire, Lloyds Bank, Ltd. v. Jones*, [1955] 2 All E.R. 409; [1955] 2 Q.B. 298; 3rd Digest Supp.
- (9) *Wolfe v. Hogan*, [1949] 1 All E.R. 570; [1949] 2 K.B. 194; 31 Digest (Repl.) 640, 7477.

- A (10) *Central London Property Trust, Ltd. v. High Trees House, Ltd.* (1946), [1956] 1 All E.R. 256n.; [1947] K.B. 130; [1947] L.J.R. 77; 175 L.T. 332; 3rd Digest Supp.
- (11) *Re Porter (William) & Co., Ltd.*, [1937] 2 All E.R. 361; Digest Supp.
- (12) *Cairncross v. Lorimer*, (1860), 3 L.T. 130; 7 Jur.N.S. 149; 21 Digest 328, 1227.

B Action.

The plaintiffs, by their amended statement of claim, claimed possession of the ground floor shop and basement of No. 4, New Cavendish Street, St. Marylebone, demised by them to the defendant for a term of fourteen years, for breach of a covenant contained in cl. 2 (9) of the lease to use the demised premises for business purposes only. By his amended defence and counterclaim, the tenant (i) denied that he was in breach of covenant by residing on the premises, (ii) alternatively contended that the landlords were not entitled to enforce the covenant against the tenant so as to prohibit such user and/or were estopped from alleging that the tenant was in breach of covenant by reason of promises made by the landlords to the tenant during the negotiations leading up to the lease, and (iii) alternatively contended that the landlords had released and/or waived the prohibition by acquiescence in the user by the tenant and accepting rent from the tenant without raising any objection to such user. By his amended counterclaim the tenant claimed rectification of cl. 2 (9) of the lease by inserting the words "provided that nothing herein shall prohibit the said Dixon Horace Mudd from personally residing in the demised premises", and alternatively relief from forfeiture under s. 146 of the Law of Property Act, 1925.

E *J. Bradburn* for the landlords.

D. A. M. Kemp and *A. P. Graham-Dixon* for the tenant.

Cur. adv. vult.

July 2. HARMAN, J., read the following judgment: This is a landlords' action for forfeiture of a lease on the ground of the breach by the defendant, the tenant, of a covenant which is said to forbid him to reside as he has been doing on the demised property, a ground floor shop and basement known as No. 4, New Cavendish Street, W.I. The defences are first that, on the true construction of the lease, residence on the property is no breach of covenant; secondly that if the tenant be wrong on construction the landlords, by reason of the promises made to him before he signed the lease, are disentitled from relying on their rights; thirdly that the landlords' acquiescence in the breach has been such that a release of the covenant must be assumed and that the landlords have waived its observance. The tenant counterclaims for rectification of the lease by the insertion of a proviso expressly allowing him personally to reside on the property, or alternatively for relief against forfeiture under the Law of Property Act, 1925, s. 146. The demised property consists of a ground floor and basement forming part of a block of residential flats having four storeys above the ground floor which consists of four shops described as lock-up shops: the basements go with the shops.

Before dealing with the issues, it will be convenient to state here the circumstances, some of which are said to be relevant on all the issues and others on some of them. The tenant began his connexion with the property in 1941, when he took over the shop and basement for a term of three years. No written agreement was produced covering this period, during which it is admitted that he was allowed to sleep in the ground floor back room behind the shop. This was a wartime arrangement. The tenant was engaged in civil defence activities and it was thought a useful protection against incendiaries that he should be on the property at night. No inference, in my judgment, ought to arise from this. During this period the tenant fitted up a room in the basement in an elaborate style as a sitting room.

On Apr. 5, 1944, a lease was granted by the landlords to the tenant by a document under seal whereby the landlords let "the shop on the ground floor and the basement floor all as now in his occupation" of No. 4, New Cavendish Street for a term of three years from Lady Day, 1944, at a rent of £170 payable monthly. There were covenants by the lessee, who was described in the lease as an antique dealer "not to use or permit the use of the said premises except as the shop of the lessee for his business as hereinbefore described"; also "not to do or suffer to be done anything . . . which may render the said premises . . . liable . . . to be assessed as a dwelling-house". The tenant continued to carry on his business of an antique dealer in the ground floor shop and to sleep in an office behind the shop where he had a divan bed covered in the day with a velvet counterpane. During the term of this lease the tenant fitted up another room in the basement as a dining room. Both the basement rooms had an appearance consistent with being showrooms for antique furniture, but the tenant alleges that in fact this furniture was not for sale and that he did not take customers down to the basement. He says that he used these rooms to live in and to entertain his friends. He had an electric cooker in the front area of the basement and a wash basin with an Ascot water heater in a lavatory at the back. He says that he made no secret of the fact that he was living on the premises and that the landlords, particularly through their property manager, one Jones, were well aware of the fact. In my judgment, the landlords were aware that the tenant from time to time slept on the ground floor, but I was not satisfied on the evidence that they knew that the property was his principal or only residence or that he used the basement rooms as his home.

In January, 1947, the tenant asked for a new lease and was offered a further lease for seven years from Lady Day, 1947. Negotiations proceeded in a dilatory fashion. A draft lease was sent to the tenant in May, 1947. He continued to occupy the property as before and seems to have taken no step in the matter during the summer beyond agreeing the repairing terms and the new rent. In August, 1947, Mr. Jones telephoned to the tenant, who gave some explanation of the delay and instructed his present solicitors, who on Oct. 17, 1947, returned the draft revised in red ink. By this document as it then stood, the landlords were expressed to demise to the tenant the ground floor shop and basement for the term of fourteen years from Lady Day, 1947, at an annual rent rising to £325 in the last seven years of the term, payable quarterly on the usual quarter days, together with fire insurance premiums. The lessee's covenants included covenants to repair and paint and a clause in the following terms (cl. 2 (9)):

"To use the demised premises as and for showrooms, workrooms and offices only and not to use exercise or carry on or permit or suffer to be used exercised or carried on in or upon the said premises or any part thereof the trades or businesses of [then follows a long list of prohibited trades and businesses] . . . and not to permit or suffer the demised premises or any part thereof to be used as a place for lodging dwelling or sleeping."

There was a proviso for re-entry by the landlords on breach of any of the lessee's covenants. At the time when the red ink revisions were made, the tenant's solicitors did not know that he had been residing on the property and intended to continue so to do. On Oct. 23, 1947, the landlords' solicitors returned the draft with various amendments in yellow ink not here relevant. The draft in this condition was submitted by the tenant's solicitors to him, when he pointed out to them the words at the end of cl. 2 (9) which I have read, and took objection to them on the ground that he was in fact residing on the premises and intended so to continue. On Oct. 29, 1947, they returned the draft with the words at the end of cl. 2 (9) struck out and a side-note in green ink in these terms:

"The lessee has in fact been residing at the premises for some years and has spent a large sum of money on decorations."

The covering letter was in these terms:

- A "We have your letter returning draft lease revised, and our client accepts your revisions [in yellow ink]. We are informed by our client that he has been living at the premises for some considerable time and has spent a large sum of money on decorating the rooms he occupies. Our client lives entirely alone and he points out that unless he resides at the premises he cannot obtain any burglary insurance of his very valuable stock of antiques. We
- B have seen the premises the lessee occupies for his own use and they are most expensively decorated and furnished and we consider, therefore, that your clients are not in any way prejudiced by our client's user. We have, therefore, amended cl. 2 (9) in green ink and shall be glad to know that your clients will accept this. If so, perhaps you will let us have engrossment for execution."
- C On this the landlords' solicitors consulted their clients and advised them that permission to the tenant to reside on the premises might bring the shop and basement within the Rent Restrictions Acts. Accordingly, on Nov. 28 the landlords' solicitors wrote this letter to the tenant's solicitors:
- D "With reference to your letter of the 29th of last month and the enclosure mentioned as accompanying it, we have now received our clients' instructions that notwithstanding such user to which these premises may have been put in the past, they must insist upon the retention of the restriction in cl. 2 (9) which you have deleted in green ink. On hearing from you that this is agreed, we will proceed to engross the lease and counterpart. We cannot agree with your contention that our clients are in no way prejudiced by the premises
- E being used for residential purposes; such user would probably be construed as bringing the letting within the provisions of the Rent Restrictions Acts."

The draft was not returned to the landlords' solicitors, but the tenant's solicitors replied as follows on Dec. 1:

- F "We have your letter of the 28th of last month and note what you say, but our client will, of course, require an assurance that upon completion of the lease, your clients will take no steps to prevent his using the premises for residential purposes. As the primary letting is for business use, we do not think the letting would be brought within the provisions of the Rent Restrictions Acts, but our client cannot run the risk of being stopped from residing on the premises while he is the lessee."
- G There follows a gap in the correspondence until Dec. 31, 1947. During this interval, according to the tenant, he telephoned to Mr. Jones and told him he would not sign the lease with a clause about not sleeping there. He adds that he asked Mr. Jones to have a clause inserted stating expressly that he could sleep there, but that Mr. Jones replied that this was impossible because it was against the terms of the head-lease. This was in fact untrue, but it is clear
- H that Mr. Jones believed his own statement. According to the tenant Mr. Jones added that the landlords would make no objection to his continuing to reside there if he would sign the lease. Mr. Jones, who has left the employment of the landlords and was only called at an adjourned hearing, stated that he had no recollection of this conversation. He admitted in cross-examination that the landlords must have known that the tenant was living on the premises and
- I said that the landlords' object was to avoid the mischief of the Rent Restrictions Acts. He added that on paper his attitude was "business premises only", but that he was less emphatic when dealing with the tenant personally. On Dec. 31, 1947, the tenant's solicitors wrote to the landlords' solicitors as follows:

"We have now taken our client's instructions on your letter to us of Nov. 28 and we understand that he himself has spoken to your clients with reference to this. Our client is now willing to complete the lease and we shall be glad to receive the counterpart for execution."

In due course, the lease and counterpart were exchanged and bear date Feb. 10, 1948. Clause 2 (9) omits the words at the end expressly excluding lodging, dwelling or sleeping. Mr. Byford, the landlords' solicitor, stated that he read the letter of Dec. 31, 1947, as meaning that the tenant had given way, but that the words at the end of cl. 2 (9) were omitted by inadvertence in his office. Doubt is thrown on this statement by a Mr. Turner, then the tenant's solicitor, who deposed to a conversation on the telephone with Mr. Byford. This is said to have been held just after the Christmas holiday and to have been to the effect that the tenant had spoken to his landlords and was "quite happy he would not be disturbed" and had nothing to worry about. He says that Mr. Byford said that the landlords' main concern was that neighbouring tenants might complain and that it was agreed that the words struck out in green be left out and that the less said about living on the premises the better. Mr. Byford denied all recollection of this conversation and says that he took the letter of Dec. 31, 1947, to mean that the tenant had given way. If so, his explanation that the words were omitted inadvertently is a singularly weak one, whereas if there had been such a conversation the omission is explained. I accept Mr. Turner's evidence on this point.

After the execution of this lease the tenant carried on business as before and continued to live on the property. In the spring of 1950 war damage repairs were done by the landlords and in connexion with these Mr. Jones and one Northover came down and inspected the basement, and a little later one Kingscote, a director of the landlords, also came down and inspected damage done. According to the tenant, he made it clear to them that he was living on the premises. Mr. Jones for his part said that this was far from clear to him, though he recognised that the tenant was sleeping there from time to time. So things went on till June, 1953, when the tenant applied for leave to instal a bath in the basement. This was promptly refused in a letter of June 18, 1953, in these terms:

"We understand from our surveyors who called upon you yesterday that you are contemplating installing a bath in the basement at these premises but we regret that we are unable to agree to this matter proceeding. These premises are let solely for business purposes, as clearly defined in the lease under which they are held dated Feb. 10, 1948, and any use of the premises for residential purposes can in no way be allowed. Our head-lease expressly excludes the use for living accommodation, the premises are scheduled for business purposes and shop only and any alteration in such use seriously prejudices our position with our ground landlords. We shall be glad, therefore, to hear from you that any proposals that you have in mind in this direction will not be proceeded with."

Mr. Jones was responsible for this and it repeats the misstatement that the head-lease excludes use for living purposes. In May, 1956, the tenant applied to the landlords for a further twenty-one years' lease of the property and in connexion with this there were considerable negotiations in the course of which one Nixon, then the managing director of the landlords, interviewed the tenant on the property on Oct. 1, 1956. This witness said that he had visited the property with Mr. Jones in 1950, but in this he was mistaken. In the course of the interview Mr. Nixon noticed signs of residence on the property and asked the tenant if he was living there, to which the tenant replied he was and why should not he. High words ensued and as a result a letter was written by Mr. Nixon on the landlords' behalf which contained the following passage:

"It was noticed that you are using the premises for residential purposes, which is not in accordance with the terms of your lease as this particularly specifies that the premises are to be used for business purposes. We therefore request that you cease to live in the premises forthwith and

A give your assurance that they will not be used for this purpose at any time in the future. This was made perfectly clear in our letter to you of June 18, 1953."

That is the letter about the bath. As a result, a notice was served and the present proceedings were begun.

B The statement of claim as drawn alleged as a breach that the tenant was residing on the premises, but omitted to allege the proviso for re-entry; it was thus necessary for the landlords to amend, which I allowed them to do. The tenant denied residence on the premises, but admitted that he was sleeping there and always had done in order to guard the valuable stock of his business which he did not insure. He also alleged a release or waiver by the landlords by reason of their knowledge prior to and during the currency of the lease of his said user, i.e., sleeping with the object of protecting the stock, and relied on acquiescence. When the action came on, the tenant desired in aid of his plea on the construction of the lease to rely on the landlords' state of knowledge at the time when it was made. He also wished to rely on the doctrine of promissory estoppel, and I adjourned the case to enable the pleadings to be amended. At the adjourned hearing, the tenant added the facts which he alleged amounted to estoppel and also claimed rectification by the insertion of these words in the covenant as to user:

"provided that nothing herein shall prohibit the said Dixon Horace Mudd from personally residing in the demised premises."

The tenant, however, omitted to add a prayer to his counterclaim to that effect.

E The landlords, by their reply, denied the plea of rectification, alleging that the intention was to complete with the omitted words at the end of cl. 2 (9) expressly prohibiting residence. The landlords also pleaded that if the landlords had allowed the tenant to reside on the premises, this was only a licence on their part which they could recall at will; and on these issues the case was fought. The tenant in the witness-box claimed the right not merely to sleep on the premises for the protection of his stock, but to use them as his residence.

F The first question to be answered is that of construction. The words on which the landlords rely are those at the beginning of cl. 2 (9), "to use the demised premises as and for showrooms workrooms and offices only", and it is argued that the plain meaning of these words is that no other use is to be made of the premises. It is said that this interpretation is affirmed by the rest of the clause which further cuts down the user by prohibiting a large number of trades or businesses. In my judgment, on the question of construction it is not permissible to look into the past history of the matter, nor to rely on the fact that the tenant had been living on the premises to the knowledge of the landlords, nor even that he intended to continue to do so; nor, in my judgment, can the fact be called in aid that express words of prohibition as to residence had appeared in the draft and did not appear in the lease as executed.

H In commercial cases where printed forms are used, attention has been paid to words struck out. This method of construction had, I believe, the great authority of SCRUTTON, L.J. There is an instance of it in *Caffin v. Aldridge* (1) ([1895] 2 Q.B. 648 at p. 650). That was a commercial cause (in which SCRUTTON, L.J., appeared when at the Bar) where the court had to construe the word "cargo", and they could see on the face of the document that before the word "cargo" there had been the words "full and complete" and these had been struck through. LORD ESHER, M.R., said this (*ibid.*, at p. 650):

"In order to see what it meant, one must look at the rest of the document.

We find that the words 'full and complete', which were originally in the printed form, had been struck out."

LOPES, L.J., also said (*ibid.*):

"The words 'full and complete' were erased; and that could only, I

think, have been done for the purpose of showing that such was not the intention." A

KAY, L.J., did not allude to that matter. Whether this is legitimate, I take leave to doubt: e.g., *Inglis v. Buttery* (2) ((1878), 3 App. Cas. 552), again a commercial case, but the House of Lords held that neither letters of the parties before the contract was signed nor deleted words in the contract could be considered for the purpose of interpreting the intention of the parties. LORD HATHERLEY said (*ibid.*, at p. 558): B

"Nor can I think, and I believe your Lordships will concur with me in this opinion, that it is legitimate to look at those words which appear upon the face of the agreement with a line drawn through them, and which are expressly, by the intention of all the parties to the agreement, deleted, that is to say, done away with, and wholly abolished. It is not legitimate to read them and to use them as bearing upon the meaning of that which has become the real contract between the parties, namely, the final arrangement of the document which we must now proceed to construe." C

At any rate, in my judgment, that method of construction must be confined to commercial cases where the words struck out appear on the face of the signed document and cannot be extended to looking at words which appear in a draft. All these matters which I have mentioned are not, in my judgment, surrounding circumstances which can be called in aid to construe the language used. On the other hand, the nature of the property (i.e., whether it was obviously a dwelling-house or adopted to be used as such) is a matter to be taken into consideration. This is shown by the recent case of *Levermore v. Jobey* (3) ([1956] 2 All E.R. 362). JENKINS, L.J., as is indicated at the end of the headnote, says this (*ibid.*, at p. 364): D E

"The first thing to be done, therefore, in the present case is to look at the terms of the lease . . . For the purpose of construing the lease . . . it is permissible for the court, and indeed obligatory on the court, to pay regard to the surrounding circumstances with reference to which the lease was entered into, and in particular to look at the nature of the subject-matter of the letting." F

My attention was called not only to this case but to another in which covenants not unlike those before me have recently been construed by the court. The earlier case is *R. v. Brighton & Area Rent Tribunal, Ex p. Slaughter* (4) ([1954] 1 All E.R. 423). That was a case under the Rent Restrictions Acts, the question being whether a shop with a self-contained flat over it ought to be classed as a dwelling-house. The covenant in question was that the tenant would not permit the premises to be used otherwise than for the business of a greengrocer, and it was held that so long as he carried on a greengrocer's business there he was not in breach of covenant, though he lived on the property. LORD GODDARD, C.J., in a reserved judgment, after quoting the covenant, said (*ibid.*, at p. 425): G H

"The rule with regard to the construction of a covenant is conveniently stated in FOA'S LANDLORD AND TENANT (7th Edn.), p. 111, and, as we think, the passage accurately states the law, we will quote it instead of setting out the various cases which deal with this point: 'A covenant, like any other contract, is to be construed according to the intent of the parties as expressed by their own words, and by regard to the whole of the instrument, and the surrounding circumstances of the case, it being also a rule that if the words be doubtful, that construction is to be taken which is most strong against the covenantor'. Bearing that in mind, it is, in our opinion, impossible to construe this covenant so as to prohibit the tenant from living on the premises. Provided that the tenant carries on a greengrocer's business it would, in our opinion, be impossible, and, indeed, absurd, to say that he I

A was in breach of his covenant because he lived on the premises. So to hold would mean that the whole of the upper part was sterilized, at least to the extent that the rooms could be used only as a store or for some such purpose, and not for that which they were designed although the tenant is under covenant to preserve and not to alter them."

B LORD GODDARD, C.J., relied largely, as will be seen, on the fact that to hold that residence was a breach would be in effect to sterilize a large part of the property and prevent it from being used for the purposes for which it was designed. To the like effect is *Levermore v. Jobey* (3), already cited, where the question was similar to that in the case above cited. Here again, the covenant was construed, having regard to the nature of the demised property, not to prevent user by residence.

C These cases turned on the particular words used and the surrounding circumstances; and both are here different. If the demised property consists in part of trade premises and in part of living quarters, it is natural to give the covenant a meaning which confines its operation to the trade portion and does not make the rest of the property unusable. This shop and basement are not, on the face of it, suitable for a dwelling-house. They constitute in effect one of four lock-up shops. They are adapted for shopkeeping. Consequently, when I find a covenant to use for showrooms, workrooms and offices only, coupled with a restriction covering a wide area of trades, it appears to me that this clearly means that the property is to be used for trade purposes only and then only for certain trades, and that to use the property as a dwelling-house is a clear breach of covenant. On this point, therefore, I am of opinion that the landlords succeed.

E I must next deal with the issue of rectification. The tenant sought to have inserted a proviso expressly allowing him to reside on the premises. Now, according to his evidence, which I accept on this point, this was the very request which he made to Mr. Jones on the telephone in December, 1947, and which Mr. Jones categorically refused, being under the impression this would be a breach of the covenants of the head-lease. The tenant argued that both sides did in fact intend that the tenant should be allowed to reside; but even if that be so, there was clearly no common intention to insert such a provision in the lease, for the very clear reason that the landlords wished to avoid the mischief of the Rent Restrictions Acts. The plea of rectification therefore fails.

G The next issue is that of waiver. Now, residence contrary to the covenants of the lease is a continuing breach and therefore prima facie it is only waived by the acceptance of rent down to the date of that acceptance and there is a new breach immediately thereafter which is not waived. My attention was called to a number of cases which show that acts of waiver may be so continuous that the court is driven to the conclusion that there has been a new agreement or letting or a licence or a release of the covenant. The cases cited on this subject show acquiescence continuing for a very long period of years. For instance, in *Gibson v. Doeg* (5) ((1857), 2 H. & N. 615), the period was twenty years, in *Gibbon v. Payne* (6) ((1907), 22 T.L.R. 54) it was forty years, and in *Hepworth v. Pickles* (7) ([1900] 1 Ch. 108) twenty-four years. In the more recent case of *Re Lower Onibury Farm, Onibury, Shropshire, Lloyds Bank, Ltd. v. Jones* (8) ([1955] 2 All E.R. 409) SINGLETON, L.J., points out that no particular period such as twenty years is required. MORRIS, L.J., says (*ibid.*, at p. 426):

I "The learned judge in his judgment held that the conduct of the landlords in standing by from May 23, 1934, until Jan. 31, 1951, without protest at [the respondent's] non-residence on the holding constituted waiver, or release of, or acquiescence in, [the respondent's] breach of cl. 15, and that the landlords were now estopped from alleging that [the respondent] had committed a breach of cl. 15. On the admitted facts I cannot see that any implication arises that the landlords agreed that they would never again insist on full performance of cl. 15. It may well be that if they accepted rent with

knowledge they waived breaches of covenant from time to time, but I can see no reason why they should be prevented from demanding proper compliance as from the date they required it. There may be conduct from which can be implied the waiver or abandonment of a right. I do not think that the landlords so conducted themselves that they could not assert that cl. 15 should be honoured. There was no reason why after the death of Mrs. Minnie Bach they should not say that, though they had not been insisting on the full and strict compliance with the covenant in cl. 15 in the past, they proposed to require compliance for the future. The present case differs on its facts from such cases as *Gibson v. Doeg* (5) and *Hepworth v. Pickles* (7). It could not here be said that a judge or jury could infer from the landlords' conduct and the admitted facts that the landlords had given some form of irrevocable licence, or some form of release, which had the effect that the covenant in cl. 15 could not in the future be regarded as effective and subsisting."

Again, in *Wolfe v. Hogan* (9) ([1949] 1 All E.R. 570) I find this in the head-note (in [1949] 2 K.B. 194):

"The mere acceptance of rent by the landlord from the tenant, after he had knowledge of the change of user by the tenant, though it continues for some time, does not, by itself, constitute such acceptance by the landlord of the changed position as to show that the house has been let as a separate dwelling."

DENNING, L.J., after dealing with the facts, said ([1949] 1 All E.R. at p. 575):

"A house or a part of a house originally let for business purposes does not become let for dwelling purposes unless it can be inferred from the acceptance of rent or otherwise that the landlord has affirmatively consented to the change of user. Let me illustrate that from the common law doctrine as to waiver of forfeiture. A breach of covenant not to use premises in a particular way is a continuing breach. Any acceptance of rent by the landlord after knowledge only waives the breaches up to the time of the acceptance of rent. It does not waive the continuance of the breach thereafter and, notwithstanding his previous acceptance of rent, the landlord can still proceed for forfeiture on that account. Indeed, in the case of a continuing breach the acceptance of rent after knowledge is only a bar to a claim for forfeiture if it goes on for so long or is accepted in such circumstances that it can be inferred that the landlord has not merely waived the breach but has also affirmatively consented to the tenant continuing to use the premises as he has done . . ."

I cannot think that anything proved here amounts to a release by the landlord of his rights. He knew, indeed, that the tenant was using the property to sleep in, but I do not think that he knew more than that. At that he was willing to wink, but I am unable to find a release of the covenant or an agreement for a new letting. In my judgment, therefore, the plea of waiver fails.

There remains the so-called question of estoppel. This, in my judgment, is a misnomer and the present case does not raise the controversial issue of *Central London Property Trust, Ltd. v. High Trees House, Ltd.* (1946) (10) ([1956] 1 All E.R. 256n.). This is not a case of a representation made after contractual relations existed between the parties to the effect that one party to the contract would not rely on his rights. If the tenant's evidence is to be accepted, as I hold that it is, it is a case of a promise made to him before the execution of the lease that if he would execute it in the form put before him, the landlords would not seek to enforce against him personally the covenant about using the property as a shop only. The tenant says that it was in reliance on this promise that he executed the lease and entered on the onerous obligations contained in it. He says, moreover, that but for the promise made he would not have executed

A the lease, but would have moved to other premises available to him at the time. If these be the facts, there was a clear contract acted on by the tenant to his detriment and from which the landlords cannot be allowed to resile. The case is truly analogous to *Re William Porter & Co., Ltd.* (11) ([1937] 2 All E.R. 361). This is a decision of SIMONDS, J. He said (*ibid.*, at p. 363):

B "I come to the final point, the point which has given me difficulty in this case, and it is this. [Then he states some of the facts, which were very different from the facts here, but he goes on in this way:] It was an act intended to induce the company to take a certain course of action, to carry on its business, to enter into transactions and to incur obligations which, but for that resolution, it might not have done. It appears to me
C that there is some direct evidence here, and, in my judgment, I am entitled to apply the rule, stated nowhere better than in the old case of *Cairncross v. Lorimer* (12) ((1860), 3 L.T. 130). This was a Scottish appeal to the House of Lords, where LORD CAMPBELL, L.C., said, after some observations which are not material to the present case (*ibid.*, at p. 130): 'The doctrine will apply which is to be found, I believe, in the laws of all civilised nations, that if a man, either by words or by conduct, has intimated that he consents
D to an act which has been done, and that he will offer no opposition to it, although it could not have been lawfully done without his consent, and he thereby induces others to do that from which they otherwise might have abstained, he cannot question the legality of the act he had so sanctioned, to the prejudice of those who have so given faith to his words, or to the fair inference to be drawn from his conduct'. Also, a little further on (*ibid.*,
E at p. 131): 'I am of opinion that, generally speaking, if a party having an interest to prevent an act being done, has full notice of its having been done, and acquiesces in it, so as to induce a reasonable belief that he consents to it, and the position of others is altered by their giving credit to his sincerity, he has no more right to challenge the act, to their prejudice, than he would have had if it had been done by his previous licence'."

F In my judgment, the tenant's evidence is to be accepted on this point. No alternative explanation of his change of mind between the beginning and the end of December, 1947, is available, and I think that he was a witness of truth. His evidence was uncontradicted, for Mr. Jones remembered nothing about it.

G The plea that this was a mere licence retractable at the landlords' will does not bear examination. The promise was that so long as the tenant personally was tenant, so long would the landlords forbear to exercise the rights which they would have as to residence if he signed the lease. He did sign the lease on this promise and is therefore entitled to rely on it so long as he is personally in occupation of the shop.

H The result is that on this point the defence succeeds; and I propose to dismiss the action. I may add that if I had been of a different opinion, I should certainly have allowed the tenant relief against forfeiture under the Law of Property Act, 1925, but that, of course, would have been on the footing that he ceased to reside or to sleep on the premises, which would have been a different result. I propose, therefore, to dismiss the counterclaim, the burden of which was rectification, a plea which failed.

Action and counterclaim dismissed.

Solicitors: *Forbes & Son* (for the landlords); *Groos, Guest, Lowden & Hazell* (for the tenant).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

NELSON v. NELSON AND SLINGER.

[COURT OF APPEAL (Romer and Ormerod, L.JJ.), June 6, 30, 1958.]

Divorce—Practice—Amendment—Petition for dissolution of marriage on ground of desertion—Answer charging cruelty—Amending petition to charge cruelty—Facts relating to charge of cruelty known to petitioner at date of filing petition—R.S.C., Ord. 28, r. 1—Matrimonial Causes Rules, 1957 (S.I. 1957 No. 619), r. 15 (1), r. 82.

There is now no special practice in the Divorce Division prohibiting an amendment to a petition by adding a charge of cruelty which could have been made when the petition was filed, though it is obviously desirable, where a petition for dissolution of marriage is based on alleged cruelty, that all known charges of cruelty should be included in the petition rather than that they should be added subsequently by amendment (see p. 747, letter I, and p. 748, letter F, post).

In March, 1957, the husband filed a petition for the dissolution of marriage on the ground of the wife's constructive desertion. The wife in her answer denied the desertion and charged the husband with desertion, adultery and cruelty and cross-prayed for a divorce on those grounds. The husband, who in the expectation that the case would be undefended had been advised to rely on desertion only, now asked leave to amend his petition by charging cruelty against the wife.

Held: the court would allow the amendment notwithstanding that the facts were within the husband's knowledge when the petition was filed, because (a) to allow the amendment would not cause to the wife any injustice that could not be compensated by costs, (b) the husband had satisfactorily explained why he had not charged cruelty originally in the petition, (c) if the amendment were not allowed the husband might have difficulty in relying on suggestions of cruelty on the wife's part when questions of ancillary relief were being determined, and (d) the proper way to allege such charges was in the petition rather than by way of reply.

Observations of BRAMWELL, L.J., in *Tildesley v. Harper* ((1878), 10 Ch.D. at p. 396) and of BRETT, M.R., in *Clarapede & Co. v. Commercial Union Association* ((1883), 32 W.R. at p. 263) applied.

Jayne v. Jayne & Prothero ((1869), 21 L.T. 401) and *Austin v. Austin* ((1871), 41 L.J.P. & M. 8) distinguished.

Appeal allowed.

[As to amendments of charges in petition, see 12 HALSBURY'S LAWS (3rd Edn.) 320, para. 645, note (t); and for cases on the subject, see 27 DIGEST (Repl.) 453, 454, 3857-3871.]

Cases referred to:

- (1) *Jayne v. Jayne & Prothero*, (1869), 21 L.T. 401; 27 Digest (Repl.) 455, 3877.
- (2) *Austin v. Austin*, (1871), 41 L.J.P. & M. 8; 25 L.T. 856; 27 Digest (Repl.) 454, 3861.
- (3) *Rowley v. Rowley*, (1859), 1 Sw. & Tr. 487; 29 L.J.P.M. & A. 15; 34 L.T.O.S. 61; 23 J.P. 744; 27 Digest (Repl.) 453, 3859.
- (4) *Brittain v. Brittain & Camp*, (1859), Sea. & Sm. 83; 23 J.P. 455; 27 Digest (Repl.) 481, 4196.
- (5) *Gillett v. Gillett*, [1952] 1 All E.R. 1399; 3rd Digest Supp.
- (6) *Tildesley v. Harper*, (1878), 10 Ch.D. 393; 48 L.J.Ch. 495; 39 L.T. 552; Digest (Pleading) 47, 386.
- (7) *Clarapede & Co. v. Commercial Union Association*, (1883), 32 W.R. 151; *revsd.* C.A., 32 W.R. 262; Digest (Practice) 105, 905.
- (8) *Duchesne v. Duchesne*, [1950] 2 All E.R. 784; [1951] P. 101; 27 Digest (Repl.) 615, 5760.

A Interlocutory Appeal.

This was an appeal by the husband petitioner against the decision of His Honour JUDGE ROBSON, Q.C., sitting as a divorce commissioner at Leicester, dated Mar. 21, 1958, whereby he dismissed the husband's appeal from a decision of the district registrar dated Feb. 28, 1958, refusing to grant him leave to amend the petition. The facts are fully stated in the judgment of ROMER, L.J.

B *E. F. Jowitt* for the husband.

M. V. Argyle for the wife.

ROMER, L.J.: The parties were married in 1922 and they ceased to live together in December, 1952, thirty years later. On Mar. 21, 1957, the husband filed a petition for the dissolution of the marriage, founding himself exclusively on alleged constructive desertion by the wife. We were told that the husband thought it improbable in the circumstances that the wife would defend the petition but, in fact, on July 31, 1957, the wife put in an answer denying the charge of desertion brought against her by her husband and making charges against him of desertion, adultery and cruelty; and she added a cross-prayer for dissolution of the marriage on those grounds. No reply to that has yet been filed, but, in February, 1958, the husband applied for leave to amend his petition by introducing charges of cruelty against the wife. As required by the Matrimonial Causes Rules, 1957, r. 15 (1), that application was supported by an affidavit sworn by the husband of which I need read only para. 1. He says:

E "That although I disclosed various acts of cruelty by my wife against me to my solicitor before my petition was presented I was advised by counsel to rely only on desertion in presenting my petition at that time as allegations of cruelty would only add to the cost of the divorce proceedings if the petition were undefended. Counsel further advised me that if my wife defended the petition I should seek leave to amend my petition by making allegations of cruelty against her."

F The amendments which he sought to make are conveniently set out in the notice of appeal before this court, and I need only say that they are detailed and elaborate and charge various acts of cruelty starting from the time of about the fifth year after the date of the marriage.

G That application for leave to amend was contested by the wife and refused by the registrar, who said that the husband could raise the charges of cruelty, if he thought proper to do so, in his reply. The husband then appealed from the registrar to the learned commissioner; he dealt with the matter on Mar. 21, 1958, and dismissed the appeal. We have a note of his reasons which are to this effect:

H "If there had been no authority to guide me I should have been inclined to allow this husband's application to amend his petition. But I consider that I am bound by the decisions in *Jayne v. Jayne & Prothero* (1) ((1869), 21 L.T. 401) and *Austin v. Austin* (2) ((1871), 41 L.J.P. & M. 8). *Jayne v. Jayne & Prothero* (1) appears to have been an application particularly without merit and might be distinguishable, but I can see no way of distinguishing *Austin v. Austin* (2). It was urged on me that the application in *Austin v. Austin* (2) was made at a later stage in the case than in this one and that it was an application to add cruelty to cruelty and not, as in this case, cruelty to desertion. In my judgment, those are not differences which should affect my reading of that decision. *Rowley v. Rowley* (3) ((1859), 1 Sw. & Tr. 487) was cited to me. It appears to be a decision in direct opposition to *Austin v. Austin* (2) but it may have turned on special facts not clear in the report. *Austin v. Austin* (2) was decided twelve years later and apparently has not been overruled in over eighty years. In my judgment I am bound by it rather than by *Rowley v. Rowley* (3). *Brittain v.*

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Brittain & Camp (4) ((1859), 23 J.P. 455) was also cited to me. The headnote in the report is to the same effect as *Rowley v. Rowley* (3) but I can find nothing in the report of the case to support the headnote. In *Gillett v. Gillett* (5) ([1952] 1 All E.R. 1399), an amendment to the petition was allowed but it was not one which gave the petitioner a new ground on which to obtain a decree, and the case does not appear to me to be of any assistance to this petitioner. I therefore dismiss the application.”

Before considering the grounds on which the learned commissioner dismissed the application, it is convenient to note the powers which the court has of allowing amendments to pleadings in ordinary litigation. Those powers derive from s. 43 of the Supreme Court of Judicature (Consolidation) Act, 1925*, and are embodied in R.S.C., Ord. 28, r. 1 and r. 12. I think that it is only necessary for the present purpose to refer to R.S.C., Ord. 28, r. 1, which is in the following terms:

“The court or a judge may, at any stage of the proceedings, allow either party to alter or amend his indorsement or pleadings, in such manner and on such terms as may be just and all such amendments shall be made as may be necessary for the purpose of determining the real question in controversy between the parties.”

Then in the ANNUAL PRACTICE (1958 Edn., Vol. 1, at p. 622) there is a note to this rule headed “*General Principles when leave to amend should be given.*” A citation is made from *Tildesley v. Harper* (6) ((1878), 10 Ch.D. 393), in which BRAMWELL, L.J., said (*ibid.*, at p. 396):

“My practice has always been to give leave to amend unless I have been satisfied that the party applying was acting mala fide, or that, by his blunder, he had done some injury to his opponent which could not be compensated for by costs or otherwise.”

There is another citation from the judgment of SIR BALLIOL BRETT, M.R., in *Clarapede & Co. v. Commercial Union Association* (7) ((1883), 32 W.R. 262), where he says (*ibid.*, at p. 263):

“... however negligent or careless may have been the first omission, and, however late the proposed amendment, the amendment should be allowed if it can be made without injustice to the other side. There is no injustice if the other side can be compensated by costs.”

By virtue of r. 82 of the Matrimonial Causes Rules, 1957, the Rules of the Supreme Court are, generally speaking, made applicable to matrimonial causes, and the rules relating to amendment, which I have mentioned, apply accordingly to matrimonial causes.

Against that background, the question arises whether, notwithstanding the application of the ordinary rules governing the amendment of pleadings, there is some special rule of practice in the Divorce Division which, as the learned commissioner thought, presents an obstacle in the way of such amendments as the husband in this case seeks to introduce, namely, the introduction by amendment after the service of the petition of a different and distinct ground on which a prayer for dissolution can be founded, such ground having been known to the petitioner when his original petition was served.

In *RAYDEN ON DIVORCE* (7th Edn.) at p. 283 the practice as to amendment is stated as follows:

“When, after a petition has been filed, it is desired to add further charges, the method to be adopted varies according to three circumstances: (i) If all the acts to be added occurred before the date of the petition, the method is by amendment, though amendments should, in general, refer to acts as regards which evidence has been obtained only since the petition was filed,

- A particularly if the further charges are of cruelty; but a petitioner was allowed to amend his petition to allege certain acts of adultery against his wife, all of which had been admittedly condoned, on the ground that this was a matter of which the court should be informed as it might be relevant, not only to the general issues involved, but also to the questions of maintenance and custody."
- B Among the authorities cited in support of the proposition that the amendment should, in general, refer to acts as regards which evidence has been obtained only since the petition was filed, particularly if the charges are charges of cruelty, are *Jayne v. Jayne & Prothero* (1) and *Austin v. Austin* (2) to which the learned commissioner referred. They are both short cases, and in order of date *Jayne v. Jayne* (1) comes first, in 1869. The report is so short that I will read it in full:

C "This was a husband's suit for dissolution on the ground of his wife's adultery with the co-respondent. The respondent and co-respondent had both pleaded a simple denial, and after the pleadings had been completed and issue joined, *Dr. Tristram*, on behalf of the co-respondent, moved for leave to add to his answer a charge of cruelty against the husband.

D *G. Browne*, for the petitioner, contra. LORD PENZANCE, J.O.: The court is willing at all times to allow a wife to plead, though she may have allowed the time to go by. But here both parties have filed their answers, and cruelty is not a thing which ought to be allowed to be pleaded at the last moment. I shall certainly not allow the co-respondent to plead cruelty at this stage."

- E The report of *Austin v. Austin* (2) (41 L.J.P. & M. 8) reads as follows:

"This was a suit by a wife for judicial separation on the ground of cruelty. The respondent in January, 1871, had filed his answer, traversing the charge, and the case had been set down for trial in Trinity term, when the trial was postponed at the application of the wife. It was now in the list for trial. *Inderwick* moved for leave to amend the petition by adding two fresh charges of cruelty. *Searle*, contra: The amendment ought not to be allowed. The petitioner must have known at the commencement of the suit of the alleged acts of cruelty now sought to be charged. LORD PENZANCE: It would open the door to a bad practice if I were to allow these charges of cruelty to be added. Cruelty must be within the wife's knowledge at the commencement of the suit, and she ought in her petition to state once for all what complaint she has in this respect against her husband. The motion must be rejected."

It will be noticed that both in *Jayne v. Jayne* (1) and in *Austin v. Austin* (2) the applications for leave to amend were made almost at the last moment. In point of fact, some years previous to those cases, in 1859, in *Rowley v. Rowley* (3) the Judge Ordinary, SIR CRESSWELL CRESSWELL had allowed an application by a wife petitioner to add a charge of cruelty to charges of adultery and desertion. The judge came to the conclusion (1 Sw. & Tr. at p. 489) that she had assigned reasonable grounds for the delay in charging cruelty. I do not think it necessary to refer to that case beyond stating what I have just said.

H That being the position, when the matter came before this court a month or so ago, the court felt some hesitation, notwithstanding the apparent applicability of the ordinary rules of amendment as prescribed by the Rules of the Supreme Court, in making an order which might be in conflict with some established or settled practice of the Divorce Division, and, consequently, the appeal was adjourned so that we might make inquiries into the matter. During the adjournment, we have approached the highest authority on the matter and as a result we are now satisfied that, whatever may have been the position in the past, there is now no rule of procedure which is a fixed obstacle to our granting the husband leave to amend in the way in which he seeks to do by his notice of

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appeal. The registrar before whom the matter came suggested that the husband should introduce the charges of cruelty which he desired to raise in his reply. That would not make them an issue in the cause, and on the hearing of the petition the husband would not be allowed to rely on cruelty as a ground for seeking divorce. Any such reply would be a departure from the original proceeding and it would obviously be an inconvenient way of introducing the matter, and, presumably, if it were introduced in that way, the wife would apply for leave to file a reply. Then there is this further consideration. If the husband is precluded from introducing by amendment these charges of cruelty, it may well be—and I have in mind the decision of PEARCE, J., in *Duchesne v. Duchesne* (8) ([1950] 2 All E.R. 784)—that he would be in great difficulty in relying on any suggestion of cruelty on the wife's part in any ancillary proceedings that might take place in those proceedings for divorce.

Bearing all these considerations in mind, and, in particular, bearing in mind that the obstacle that the learned commissioner thought might prevent the amendment does not, in fact, exist, it would seem that, as long as we are not in any way overruling the discretion of the commissioner, we are at liberty to do whatever we think is just and proper. If we do allow this amendment, it is plain that we shall not be overruling, in any way, the learned commissioner's discretion, because he made it quite clear in his notes of judgment, which I have read, that had he regarded himself as being at liberty to allow the application, he would have done so. It has not been suggested by counsel for the wife, who very fairly presented the wife's case before us, that if the amendments are allowed she will be subjected to any injustice or meet any difficulty which cannot adequately be compensated for by costs. Accordingly, as it is clearly desirable that all the issues as between this husband and wife should be before the court when the petition is heard, and as the husband has acted quite obviously in a bona fide manner in this case, and only refrained from introducing these charges of cruelty in his original petition for reasons which have been satisfactorily explained, I, for my part, think that he should be allowed to amend his petition in the way in which he desires to amend it.

This is not a case of adding additional charges of cruelty to similar charges already made, as in *Austin v. Austin* (2). It is obviously desirable that in such a case all the charges of cruelty which are known to the petitioner should be introduced in the original petition. Even if he failed to introduce them all, it appears to me that this court would have jurisdiction to allow an amendment by adding further charges of cruelty if it were right and proper so to do in the interests of justice. In any event, as I say, this is not a case of adding to charges of cruelty already made, but it is a case of adding an additional ground for dissolution of the marriage. Having regard to the practice as we have now ascertained it to be, I can see no objection to the amendments being allowed, and inasmuch as we are not in any way overruling the discretion of the commissioner in making the order which the husband asked us to make, I would allow this appeal. Without expressing any view whatever as to the merits of the allegations of cruelty which the husband desires to raise, I think that he should at least have the opportunity of introducing them in the petition and presenting them as part of his case when this petition comes on for hearing. I would accordingly allow the appeal.

ORMEROD, L.J.: I agree that this appeal should be allowed. Had it not been for *Austin v. Austin* (2) ((1871), 41 L.J.P. & M. 8) I would have said that this was essentially the type of case which was within the discretion of the learned commissioner, and he has made it clear that he would have allowed the appeal from the registrar, and permitted the proposed amendments, had he not considered himself bound by the decision in that case. The only hesitation that there has been on the part of this court has been caused by the question whether a practice of some seventy years would be disturbed by allowing the

A appeal. That appears not to be so, and in the circumstances, I agree, for the reasons which have been fully expressed by ROMER, L.J., that the appeal should be allowed. I am satisfied that the question of allowing the amendments is one for the learned commissioner, and none the less so because the facts which are sought to be alleged in the additional grounds to be added to the petition are facts which were within the knowledge of the husband at the time when the

B petition was originally filed. That may or may not be, in the circumstances of any particular case, a ground for disallowing an amendment, but it is, I think, essentially a matter for the discretion of the judge.

Appeal allowed.

Solicitors: *Gibson & Weldon*, agents for *Straw & Pearce*, Loughborough (for the husband); *P. A. Cook*, Nottingham (for the wife).

[*Reported by F. GUTTMAN, Esq., Barrister-at-Law.*]

Re GILLINGHAM BUS DISASTER FUND. BOWMAN AND OTHERS v. OFFICIAL SOLICITOR AND OTHERS.

[COURT OF APPEAL (Lord Evershed, M.R., Romer and Ormerod, L.J.J.), June 3, 4, July 2, 1958.]

Charity—Imperfect trust provision—Donations for two specific objects and then to “worthy causes” in memory of certain persons—Specific objects achieved—Whether trusts of surplus were validated—Whether donations were dispositions creating more than one interest in the same property—Charitable Trusts (Validation) Act, 1954 (2 & 3 Eliz. 2 c. 58), s. 1 (2), s. 2 (3).

In December, 1951, a motor vehicle ran into a column of cadets, who were marching along a road in Gillingham, killing some of them and injuring others. The mayors of Gillingham, Rochester and Chatham decided to open a memorial fund, and the town clerk of Gillingham wrote a letter to a daily newspaper referring to that decision and stating that the fund was “to be devoted, among other things, to defraying the funeral expenses, caring for the boys who may be disabled, and then to such worthy cause or causes in memory of the boys who lost their lives, as the mayors may determine”. Money was contributed to the fund anonymously by means of street collections, and also, but to a smaller extent, by substantial gifts from known persons. After so much of the fund as was required to discharge the primary objects (i.e., the defraying of general expenses and the caring for disabled boys) had been spent for the benefit of the victims of the accident, application was made to the court to determine (among other questions) whether the trusts affecting the fund were valid charitable trusts under the Charitable Trusts (Validation) Act, 1954*, or otherwise. It was admitted that the primary objects of the fund were not charitable, but it was contended that the words “such worthy . . . causes . . . as the mayors may determine” constituted an “imperfect trust provision” within s. 1 (1) which was validated by s. 1 (2) in relation to gifts to the appeal fund.

Held (ORMEROD, L.J., dissenting): the Charitable Trusts (Validation) Act, 1954, did not apply for the following reasons—

(i) the Charitable Trusts (Validation) Act, 1954, did not validate an “imperfect trust provision” relating to the appeal fund unless the contributions to the fund were dispositions to which the Act applied, viz., in the present case, dispositions “creating more than one interest in the same property” within s. 2 (3), and

* The terms of s. 1 (1), (2), (3) and of s. 2 (3) are printed at p. 751, letters H and I, and p. 756, letter I, post.

(ii) though a contribution to the fund was a disposition, no interest (or, per ROMER, L.J., no separate interest) in favour of each of the worthy causes was created by the disposition, for (per LORD EVERSHED, M.R.) the act of the donor alone did not create an interest in his gift in favour of the worthy causes, but such an interest would be "created" only by the joint effect of the disposition and of the letter of appeal or exercise of discretion by the mayors; and therefore a contribution to the fund was not within s. 2 (3) of the Act of 1954 (see p. 754, letters B to D, and p. 755, letters G to I, post).

Decision of HARMAN, J. ([1958] 1 All E.R. 37) affirmed.

[For the Charitable Trusts (Validation) Act, 1954, s. 1 and s. 2, see 34 HALSBURY'S STATUTES (2nd Edn.) 68, 69.]

Appeal.

This was an appeal by the Attorney-General from an order of HARMAN, J., dated Nov. 7, 1957, and reported [1958] 1 All E.R. 37, on an originating summons taken out by the trustees of the Gillingham Bus Disaster Fund.

In December, 1951, a motor omnibus ran into a column of Royal Marine cadets who were marching along a road in Gillingham, Kent. Twenty-four cadets were killed and a further number injured. The mayors of Gillingham, Rochester and Chatham determined to open a memorial fund. A statement was made to the Press, and the town clerk of Gillingham wrote a letter to the editor of the "Daily Telegraph" which was published in that paper on Dec. 13, 1951. As a result of their appeal to the public, subscriptions amounting to nearly £9,000 were received. A part of this was money contributed in substantial sums by known persons, but the greater part was contributed anonymously as a result of street collections, and so forth. Some £2,000 was spent for the benefit of the victims of the accident. As compensation to the injured had been paid by the bus company, an originating summons, dated July 26, 1956, was taken out for the determination of, among others, the following questions: (i) whether the trusts affecting the fund were valid charitable trusts under the Charitable Trusts (Validation) Act, 1954, or otherwise; and (ii) as to any surplus of the fund over and above what was required for the purposes of funeral expenses and caring for boys disabled in the disaster, whether the same (a) was applicable cy-près for some charitable purpose or purposes; or (b) was repayable to the donors who contributed to the fund in the proportions of their gifts; or (c) went to the Crown as bona vacantia, or that it might be determined how otherwise the same ought to be applied.

In his judgment delivered on Nov. 7, and reported [1958] 1 All E.R. at p. 38, HARMAN, J., held that the Charitable Trusts (Validation) Act, 1954, did not apply to the trusts affecting the fund, and that, therefore, the surplus in the hands of the trustees ought not to be devoted to charitable purposes under a cy-près scheme. In his further judgment dated Nov. 27, 1957, and reported [1958] 1 All E.R. at p. 41, HARMAN, J., held that the fund was held on a resulting trust in favour of the donors and that no part of the fund was bona vacantia. There was no appeal by the Crown on this point.

Denys B. Buckley and *N. C. H. Browne-Wilkinson* for the Attorney-General.
J. V. Nesbitt for the trustees (the plaintiffs).

E. W. Griffith for the Official Solicitor on behalf of the donors.

Cur. adv. vult.

July 2. The following judgments were read.

LORD EVERSHED, M.R.: The question raised on this appeal relates to an unexpended balance of over £7,000 in the hands of the three plaintiffs, who were the respective mayors of Gillingham, Rochester and Chatham at the time of the distressing accident to which the title of the proceedings alludes. Shortly after that accident and moved, very naturally, by the shock which it had

A occasioned, the three mayors made an appeal for funds to the public. For the purposes of the arguments in this court the letter published in the "Daily Telegraph" on Dec. 13, 1951, may be taken as stating, exhaustively, the terms and purposes on and for which all moneys subscribed would be held and applied. The letter was as follows:

B "Sir, the mayors of Gillingham, Rochester and Chatham have decided to promote a Royal Marine Cadet Corps Memorial Fund to be devoted, among other things, to defraying the funeral expenses, caring for the boys who may be disabled, and then to such worthy cause or causes in memory of the boys who lost their lives, as the mayors may determine. This tragedy has been a shock to the whole country, and in view of the widespread messages of sympathy which have been received, their worships feel sure that many persons would wish to be associated with the fund, and that all concerned would wish it to be really worthy of its objects."

C Then it ended with a statement of the address to which donations should be sent. As the letter clearly indicates, it was contemplated that a substantial part, if not the whole, of the moneys subscribed would go in paying the funeral expenses of the boys killed and in providing compensation in one way or another for the injured. In the event, however, compensation for the injured was fully provided by the acceptance, on the part of the proprietors of the bus which did the damage, of common law liability for negligence: and so the three mayors have found themselves with the unexpended balance above mentioned, and the only remaining purposes available to them, according to the terms of the appeal, are those stated in the words "such worthy cause or causes in memory of the boys who lost their lives, as the mayors may determine."

E There is no doubt that such trusts would altogether fail for uncertainty unless the terms of the Charitable Trusts (Validation) Act, 1954, can save them by limiting the trusts to charitable purposes. HARMAN, J., held that the case was outside the purview of that Act, and (since he rejected the claim of the Crown to the fund as bona vacantia) that the moneys must be returned to the donors if and to the extent that they could be found. The claim of the Crown to bona vacantia has not been pursued. The question, therefore, on this appeal is whether the learned judge's conclusions in other respects were correct.

F It will be noticed that the terms of the Act* distinguish between (i) an "imperfect trust provision" which, to the extent and subject to the qualifications stated in the Act, is thereby validated, (ii) the "instrument" in which the imperfect trust provision is contained, and (iii) the "disposition" or "covenant" to which the Act is expressed to apply and in relation to which (alone) the validation takes effect. This threefold division of subject adds somewhat, on the face of it, to the complexity of the Act's provisions: but its justification appears to be that, whereas it is assumed that the imperfect trust

H * Section 1 (1), (2) and (3) of the Charitable Trusts (Validation) Act, 1954, reads:

"(1) In this Act, 'imperfect trust provision' means any provision declaring the objects for which property is to be held or applied, and so describing those objects that, consistently with the terms of the provision, the property could be used exclusively for charitable purposes, but could nevertheless be used for purposes which are not charitable.

I "(2) Subject to the following provisions of this Act, any imperfect trust provision contained in an instrument taking effect before Dec. 16, 1952, shall have, and be deemed to have had, effect in relation to any disposition or covenant to which this Act applies—(a) as respects the period before the commencement of this Act, as if the whole of the declared objects were charitable; and (b) as respects the period after that commencement as if the provision had required the property to be held or applied for the declared objects in so far only as they authorise use for charitable purposes.

"(3) A document inviting gifts of property to be held or applied for objects declared by the document shall be treated for the purposes of this section as an instrument taking effect when it is first issued."

The relevant terms of s. 2 (1) are printed at p. 752, letter B, post, and the terms of s. 2 (3) are printed at p. 756, letter I, post.

provision will be contained in (though normally it will only form part of) an instrument (see, for example, s. 1 (2)), the property (the beneficial enjoyment of which is, after all, the important thing to be dealt with) may be "disposed of" otherwise than by the instrument alone which contains the imperfect trust provision. A published appeal for contributions for some public cause will not by itself "dispose of" any property. The property to be held for the purposes of the appeal will be provided by contributors in response to the appeal. So, by s. 2 (1), the Act is expressed to apply to "any disposition of property to be held or applied for objects declared by an imperfect trust provision", subject to the qualification at the end of the sub-section. A B

The argument of counsel for the Attorney-General in the present appeal has applied these statutory provisions to the facts before us, as follows. The relevant "instrument" is the statement of the objects of the appeal made by the three mayors and published in the "Daily Telegraph" on Dec. 13, 1951. HARMAN, J., observed truly ([1958] 1 All E.R. at p. 39) that emotion is a bad foundation for such activity. One reason is that the appeal, if it expressed sincere emotional concern, manifested also a lack of the care and precision in formulation which are properly appropriate to instruments of this kind. It was suggested by counsel for the Official Solicitor on behalf of the donors that such was the looseness of its terms that the instrument conferred on the three mayors an absolute discretion to apply the moneys subscribed to any of the expressed objects, to the exclusion of the rest. On this view, counsel for the Attorney-General contended that all the terms of the instrument would form a single "imperfect trust provision" within the terms of s. 1 (1) of the Act, since it would be competent for the mayors, consistently with the terms of the instrument so construed, to apply the whole fund to some charitable purpose by way of memorial to the boys killed and injured in the accident. But counsel for the Attorney-General—in my view rightly—did not accept this extreme view of the effect of the instrument, which disregards entirely the significance of the words "and then" before the final phrase "to such worthy cause or causes", etc. According to counsel, the effect and meaning of the instrument is to impose an obligation on the three mayors to apply the funds contributed first in payment of funeral expenses and provision of care for the disabled (nothing significant being, according to the argument, contributed by the words "among other things"), and, *subject thereto*, to apply the rest of the funds "to such worthy cause or causes", etc. Counsel conceded that the prior obligation (for funeral expenses and care of the disabled) was wholly non-charitable; but he claimed that the residual obligation in favour of "worthy causes" was an "imperfect trust provision" within the meaning of the Act, since "worthy causes" must necessarily include charitable purposes, and since, therefore, the mayors could "consistently with the terms of the provision" apply the whole residue to some charitable purpose or purposes. Counsel conceded that, even if he were right so far, it would not suffice for the success of his argument; for the validating provisions of s. 1 (2) apply only "in relation to any disposition . . . to which this Act applies". He had, therefore, further to show that the property now remaining in the hands of the mayors had been the subject of a disposition or dispositions to be held or applied for objects declared by "the imperfect trust provision". In other words, assuming that the various sums contributed, whether through the medium of collecting boxes at football matches and the like, or otherwise, were "dispositions of property", the donors had provided them "to be held or applied", that is, "for the purpose of being held or applied", for the objects declared by the imperfect trust provision (namely, for "worthy causes"), and for no other purposes. To achieve this result, counsel invoked the terms of s. 2 (3) of the Act, which reads: C D E F G H I

"A disposition in settlement or other disposition creating more than

- A one interest in the same property shall be treated for the purposes of this Act as a separate disposition in relation to each of the interests created."

B HARMAN, J., rejected both the essential steps in the argument of counsel for the Attorney-General. He held that the phrase "to such worthy cause or causes . . ." was of so vague and general a character that it fell altogether outside the purview of the Act and could not, therefore, constitute an "imperfect trust provision" within s. 1 (1) any more than could (say) a provision that trust property was to be applied for such purposes as the trustees should in their absolute discretion think fit. HARMAN, J., also rejected counsel's claim to invoke s. 2 (3) of the Act; and it is this latter contention which should logically be first considered, since, unless counsel can rely on s. 2 (3), there is no "disposition of property" in relation to which the alleged imperfect trust provision can take effect, and his case breaks down in limine. The first question for determination is, therefore (paraphrasing and applying s. 2 (3)), whether the contributors to this appeal, who must for this purpose be taken to have contributed on the terms of that appeal as published, thereby created a distinct interest in the property which they contributed, namely, an interest in favour of the "worthy cause or causes" selected by the three mayors. On this question, HARMAN, J., said ([1958] 1 All E.R. at p. 40):

- E "He [the Attorney-General] argued that the instrument which, be it observed, has now changed its name from being a 'provision' to being a 'disposition', creates three interests in the same property (the property being the subscriptions), namely, funeral expenses, care, and other worthy causes, and that, therefore, each must be taken separately, and, so taking them, worthy causes might be charitable and thus satisfy s. 1 (1) . . ."

Later on, in dealing with other points, the learned judge said (*ibid.*):

- F "In my judgment, s. 2 (3) cannot be called in aid, as has been claimed, for I do not think that the letter to the newspaper 'creates more than one interest in the same property'. In fact, the letter created no interest in any property at all. It was merely an appeal which had the result of producing property in the hands of the three mayors. When they received it they were bound to devote it to the memory of the boys, first by the two specified non-charitable activities, and then by using the balance for worthy objects. The first two purposes and the worthy objects cannot be described, in my judgment, as different interests in the same property."

- G Counsel for the Attorney-General challenged the learned judge's reasoning, in the passages cited, on the ground that he had looked rather to the terms and character of the "instrument", or of the (alleged) "imperfect trust provision" which the instrument contained, than to the "dispositions" consisting of the several contributions made in answer to, and on the terms of, the appeal.
- H There is, perhaps, with respect to the learned judge, some force in the criticism. I have earlier observed* that a distinction seems to be made in the Act between the instrument, the imperfect trust provision contained therein, and the disposition in relation to which alone (so far as concerns the present case) any validation by the Act of the alleged imperfect trust provision can, according to the terms of the Act, take effect. What counsel, therefore, has to show—
- I as he concedes—is that the "dispositions", consisting of the donors' contributions, were effective to create separate and distinct interests in the subject-matter of their contributions in favour of the "worthy causes" selected by the three mayors. I have myself come in the end to the same conclusion on this matter as HARMAN, J. I am prepared to agree with counsel for the Attorney-General that the creation of a distinct interest is not negatived by the mere circumstance that the extent of that interest is not quantified and may not at the

* See p. 751, letter G, ante.

present time be capable of quantification. In the simple case where a man transfers certain property to trustees and directs such trustees, out of such property, to discharge certain obligations, and subject thereto to hold any balance in favour of A, he will, I apprehend, have created a distinct interest in A; and none the less so, though the amount of the prior obligations is uncertain, and, therefore, the amount of the balance uncertain also. The present case, however, is by no means so simple. The vital words in s. 2 (3) of the Act are, in my judgment, "creating" and "created". No doubt, a contributor must be taken to have transferred the property in his gift to the three mayors with the intention of its being held and applied by them for the purposes stated in their published appeal; but it does not, in my judgment, follow that the contributor thereby, and by his own act alone, "created" an interest in the subject-matter of his gift in favour of the worthy objects. It is, no doubt, tempting to try to seek an escape from a consequence which will leave the balance of the fund contributed virtually incapable of useful application—but the duty of the court must be to interpret the Parliamentary language, and I cannot for my part give to the precise word "create" so loose and benevolent a construction as counsel's argument requires. If an interest in favour of worthy causes can be said to have been "created" at all, it must have been by the joint effect of the disposition and of the instrument or the exercise by the three mayors of their wide and ill-defined powers under the instrument; and not by the disposition alone.

In the simple example which I gave above, the "instrument" containing the directions to the trustees and the "disposition" of the property to be applied by the trustees were contemporaneous; and, notwithstanding the distinction generally drawn in the Act between the "instrument" (or the imperfect trust provision) and the "disposition", I cannot think that the distinction was very clearly in the draftsman's mind when framing s. 2 (3) of the Act. Suppose that under the trust instrument there was a power of revocation and re-appointment and that, shortly after a donor had handed a sum of money to the trustees of the instrument by way of addition to the trust funds, the power was exercised: it would be extremely difficult, as I conceive, to hold on any sensible use of language that the donor had "created" separate interests in favour of the objects of the re-appointment. However that may be, and whatever may be the proper significance of the words "other dispositions" in s. 2 (3) of the Act, I do not think in the present case that the contributors can fairly be said to have by their dispositions created separate or distinct interests in favour of the "worthy causes" mentioned in the relevant instrument.

If this view be thought somewhat strict and narrow, it has at least some support in common sense. I take it that by the word "interest" in the subsection is meant a legal or equitable interest of a proprietary character, recognisable as such. The learned judge thought that no sensible effect could be given to the three words "among other things". But, *prima facie*, some effect ought to be given to all the language in the instrument; and, if so, then the intended effect of the words may be said to have been to permit the three mayors to apply the subscribed funds for any purposes which seemed good to them, being purposes of the same kind as, and in addition to, the instances of funeral expenses and care for the disabled, as prior obligations *before* coming to the residual obligations introduced by the words "and then". The application of a large part of the moneys actually spent in providing memorial gravestones for the boys who were killed may, indeed, well be justified as an instance of such "other things". If this view is right, then the effect of the residual phrase, "and then to such worthy cause or causes . . ." may well be said to be so remote and uncertain as to be disqualified as a proprietary interest of any recognisable kind. And I add that the result of giving such a meaning to the words "among other things" is not to make the prior obligation itself an imperfect trust provision; for it would not appear that there is any sufficient ground for saying that (on

A this view) the three mayors could, consistently with the terms of the instrument, apply the moneys exclusively for charitable purposes.

I therefore conclude, with HARMAN, J., that the contention of the Attorney-General fails on this ground. It is, accordingly, unnecessary for me to express a view of my own on the second question, whether the phrase "to such worthy cause or causes . . ." is itself capable of constituting an imperfect trust provision.

B I feel, as did the learned judge, considerable difficulty that a formula so vague and wide as "for such purposes as the trustees think fit" could have been within the contemplation of the Act merely because such a formula would, on the face of it, allow the exclusive selection of charitable purposes. But the phrase in the present case is "to such worthy . . ." and I feel also the force of the argument of counsel for the Attorney-General that such a phrase has within it at least the notion of charitable objects or objects analogous thereto, and that the sense of the phrase would not be materially different if it had read "to such charitable or other worthy causes . . .". In the circumstances, therefore, I prefer to express no view of my own on this part of the Attorney-General's case. I would dismiss the appeal.

D ROMER, L.J.: Two main questions were argued on this appeal. The first question is whether the last of the objects which were stated in the letter to the "Daily Telegraph", dated Dec. 13, 1951, namely, "such worthy cause or causes in memory of the boys who lost their lives, as the mayors may determine", constituted an "imperfect trust provision" for the purposes of the Charitable Trusts (Validation) Act, 1954; and secondly, on the assumption that it did, whether the contributions by the public in response to the letter constituted dispositions to which the Act applies, within the meaning of s. 2 (1) thereof.

E Taking the second of these points first, it is clear that it only permits of an affirmative answer if the provisions of s. 2 (3) of the said Act are applicable to the contributions. Counsel for the Attorney-General contended that they were. He conceded that neither of the first two objects set forth in the letter (namely, the defraying of the funeral expenses or caring for the boys who might be disabled) was charitable, but contended that each contribution created more than one interest in the money contributed and that the surplus now in the hands of the trustees represents a collection of separate interests created in relation to the third, or residual, object. I find myself unable to accept this view of the matter. Before s. 2 (3) can apply at all to the present case it is necessary to establish

G (i) a "disposition" (ii) which creates more than one interest (iii) in the subject-matter of the disposition. It is, I think, clear that each contribution, whether it was of 1s. or of £100, was a "disposition"; and the only question, therefore, is whether it has been shown that the various donors created more than one "interest" in their contributions. I am quite prepared to assume that the contributors knew, or may be taken to have known, of the letter to the "Daily

H Telegraph" and accordingly that their gifts would be devoted (subject to the rather nebulous reference to "among other things") to the two objects first specified and, subject thereto, to the "worthy causes" therein mentioned. It appears, however, to be almost impossible, from a practical or common-sense point of view, to attribute to the donors an intention to create separate interests in their gifts in favour of the three objects respectively. It seems to me that the intention of a donor in writing a cheque or putting a coin in a collecting box, and the legal effect of his so doing, was to vest in the trustees a legal interest in the subject-matter of his contribution coupled with an obligation, enforceable in equity, to apply the gift in accordance with the provisions of the appeal. Subject to this, no interests, in my judgment, were "created" by the various donors in the contributions which they made. I recognise, of course, the desirability of applying the surplus of the fund which is now in question to charitable purposes *cy-près*; but for my part I cannot arrive at this result by holding that every person who put a coin in a collecting box created three interests

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(which must, of course, mean legal or equitable interests) in the coin, the third being subject to the first two. I would be disposed to agree with counsel for the Attorney-General that it is no fatal objection that the donor was unable to quantify the interests if he did in fact create them; but, in my judgment, no separate interests were created at all. A

I accordingly agree with the learned judge on this point, and it therefore becomes unnecessary to consider whether a gift for "worthy causes", in the context of the "Daily Telegraph" letter, could properly be regarded as a disposition in favour of "an imperfect trust provision". The learned judge held that it could not and there appear to be powerful considerations which support his view. It may be that an "imperfect trust provision" under s. 1 (1) of the Act is confined to cases where, among the declared objects for which property is to be held or applied, one, at least, is charitable; and that, accordingly, while a gift to "charitable or benevolent" objects would be within the Act, a gift to "philanthropic or benevolent" objects would not. It is not necessary, however, to express any concluded opinion on the point and I refrain from doing so. I agree that the appeal should be dismissed. B
C

ORMEROD, L.J.: I have had the opportunity of reading the judgments which have been delivered by my brothers and regret that I have felt compelled to reach a different conclusion. D

The instrument setting out the trusts which are sought to be validated is a letter from the town clerk of Gillingham published in the "Daily Telegraph" on Dec. 13, 1951. The material part of the letter is the first paragraph:

"The mayors of Gillingham, Rochester and Chatham have decided to promote a Royal Marine Cadet Corps Memorial Fund to be devoted, among other things, to defraying the funeral expenses, caring for the boys who may be disabled, and then to such worthy cause or causes in memory of the boys who lost their lives, as the mayors may determine." E

The language of the letter is not altogether clear, but the intention appears to be that the money collected should be devoted, first, to defraying the funeral expenses of the boys who were killed and caring for those who were disabled, and then that any money left after satisfying these objects should be used for such worthy cause or causes in memory of the boys as the mayors should determine. The precise meaning of the letter is made more difficult to determine by the use of the words "among other things"; but these words would not appear to give the trustees of the fund a wider discretion to dispose of the money than can be derived from the words "to such worthy cause or causes", etc. F
G

In order that the provisions set out in the letter may be declared an "imperfect trust provision" within s. 1 (1) of the Charitable Trusts (Validation) Act, 1954, the objects of the provision must be so described that, consistently with the terms of the provision, the property could be used exclusively for charitable purposes. Counsel for the Attorney-General agreed that this fund could not be so used exclusively as neither the defraying of funeral expenses nor caring for the injured boys could be treated as charitable objects. Section 2 (1) provides that the Act applies to any disposition of property to be held or applied for objects declared by an imperfect trust provision. Section 2 (3) reads: H

"A disposition in settlement or other disposition creating more than one interest in the same property shall be treated for the purposes of this Act as a separate disposition in relation to each of the interests created." I

In the circumstances of this case, therefore, s. 1 cannot apply unless the fund consists of dispositions "creating more than one interest in the same property", and whether this is so becomes the first question for consideration. The same considerations apply, in my judgment, whether the contributions to be considered consist of substantial sums paid by cheque by individual donors, or of small coins

A put in collection boxes at football matches and on other similar occasions. The large contributors may take more care to ascertain how the money is to be applied, but all the contributors must, in my view, be taken to have given their contributions to be held and applied for the objects set out in the letter. It would seem to follow that each contributor has made a disposition of property to be so held and applied. The difficult question is whether in these circumstances each contributor has made a disposition "creating more than one interest in the same property". Counsel for the Official Solicitor on behalf of the donors argued, in the first place, that this could not be so, as the trusts were discretionary throughout, and the trustees could use the whole of the fund for any of the objects set out in the letter as they thought fit. I do not accept this construction of the town clerk's letter, but, if it is the right one, there is no need to consider whether s. 2 (3) applies, for, as counsel for the Attorney-General pointed out, if the trustees have an absolute discretion, there is nothing to prevent them from applying the fund exclusively for charitable purposes and the only remaining question would be whether the letter contained an "imperfect trust provision" as defined by s. 1 (1).

It was further argued by counsel on behalf of the donors that such a disposition as has been discussed could not be regarded as creating more than one interest in the same property since it could not be said at any time until the first two objects of the trust had been satisfied that there would be any sum left to be devoted to the "worthy cause or causes". It is, of course, true that the sum available, if any, could not be ascertained until the funeral expenses had been defrayed and the necessary provision made for the disabled boys. Had the circumstances of the accident been such as to throw no liability on the driver of the bus or his employers, the whole of the fund might well have been absorbed in fulfilling the two objects. It happened that the bus company acknowledged their liability to compensate the disabled boys and a substantial surplus is, in consequence, available for other purposes. It would seem, on what I regard as the right construction to be put on the letter, that the representatives of the boys who were killed and injured could have enforced the performance of the first two objects for their benefit if the trustees had failed in their duty, and, if the objects declared by the letter for absorbing the balance, if any, had been charitable objects, I can see no reason why the trustees could not have been compelled to devote any surplus from the fund to the furtherance of such objects. This appears to be an interest in the property which has been created by the person making the disposition, none the less because the amount which would be available could not be ascertained at the time when the disposition was made and in spite of the fact that no part of the fund might ever be available. Section 2 (3) begins with the words "A disposition in settlement or other disposition". It is not difficult to envisage the different interests in the same property which may be created where a disposition is made by way of settlement. It is more difficult to conceive a disposition other than in settlement which creates more than one interest in the property if interests of the kind here being considered cannot be taken into account. If there is a right to ensure that, after satisfying certain specified objects, the portion of a fund remaining shall be applied for other purposes, then, in my view, this must be an interest, even though it may be contingent on the existence of a fund for disposal. The learned judge, in dealing with this part of the case, said ([1958] 1 All E.R. at p. 40):

"... I do not think that the letter to the newspaper 'creates more than one interest in the same property.' In fact, the letter created no interest in any property at all."

With this I agree. At the time of the publication of the letter there was no property in which an interest could be created. In my judgment, it was the contribution to the fund on the understanding that it would be dealt with in the terms of the letter which constituted a disposition of property creating

interests in those terms, and the actual "creating" of the interests was done in each case by the person making the contribution. A

If s. 2 (3) applies, and in my judgment it does, the question then arises whether the terms of the letter contain an "imperfect trust provision" within the meaning of s. 1. Section 1 (1) reads:

"In this Act, 'imperfect trust provision' means any provision declaring the objects for which property is to be held or applied, and so describing those objects that, consistently with the terms of the provision, the property could be used exclusively for charitable purposes, but could nevertheless be used for purposes which are not charitable." B

Looking at the objects for which the property was to be held or applied, it appears that, at least on the face of it, the objects, although they could be used for purposes which are not charitable, could be used exclusively for charitable purposes consistently with the terms of the provision. If this be so, then it would seem that the provision is within the terms of the section. The learned judge referred to the long title of the Act which reads: C

"An Act to validate under the law of England and Wales, and restrict to charitable objects, certain instruments taking effect before Dec. 16, 1952, and providing for property to be held or applied for objects partly but not exclusively charitable, and to enable corresponding provision to be made by the Parliament of Northern Ireland." D

He expressed the view ([1958] 1 All E.R. at p. 40) that, as the long title shows, the Act was E

"intended to cure dispositions whereby part of the trust fund is devoted to charitable purposes and part to purposes not charitable, or not wholly charitable, so long as the whole of the money could be devoted to charity..."

It may well be that such an intention on the part of the legislature can be inferred from the long title. On the other hand, the section appears to be in unambiguous terms, and it is not the rule to invoke the assistance of the long title in the interpretation of a statute except in the case of an ambiguity. It would have been an easy matter for the legislature to have defined an imperfect trust provision as one where part of the fund was devoted to charitable purposes, but that was not done. The language of the section, in my judgment, is clear, and I can see no reason why the provision in this case does not come within it. I would allow the appeal. F

Appeal dismissed. Leave to appeal to the House of Lords granted.

Solicitors: *Treasury Solicitor; Sharpe, Pritchard & Co.*, agents for *Town clerk, Gillingham* (for the trustees); *Official Solicitor*.

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.] G

A
 NEWTON AND OTHERS v. COMMISSIONER OF TAXATION
 OF THE COMMONWEALTH OF AUSTRALIA.

[PRIVY COUNCIL (Viscount Simonds, Lord Tucker, Lord Keith of Avonholm, Lord Somervell of Harrow and Lord Denning), May 5, 6, 7, 8, 12, July 7, 1958.]

B
Privy Council—Australia—Income tax—Avoidance—“Arrangement” having the purpose or effect of “avoiding liability”—Transactions which may be disregarded by commissioner—Sale by shareholders of shares having rights to special dividend—Commonwealth Income Tax and Social Services Contribution Assessment Act, 1936-1951, Division 7, s. 260 (c).

C
 A private limited company, dealing in motor cars, amended its articles of association so as to attach special dividend rights to eighty thousand ordinary shares of £1 each, entitling the holders to a dividend of about £5 15s. per share. Before receipt of the special dividend, the holders sold the shares for £460,000 (the amount of the special dividend) to P. Ltd.,
 D
 a private limited company which dealt in stocks and shares. P. Ltd. received the special dividend amounting to about £460,000. It applied to the motor car company for four hundred thousand five per cent. preference shares of £1 each (newly issued) and paid £400,000 for them. On the next day P. Ltd. sold the preference shares for £400,000 to the shareholders from whom P. Ltd. had bought the ordinary shares. P. Ltd. sold the
 E
 eighty thousand ordinary shares (on which after payment of the special dividend a fixed dividend of five per cent. only was payable in future) to a subsidiary company for £80,000. All the cheques relating to these transactions were banked simultaneously, and the result was that of the special dividend of £460,000 the original holders of the eighty thousand
 F
 ordinary shares had received £60,000 in cash (which constituted capital not liable to tax) and re-invested £400,000 in the motor car company. P. Ltd. had made a loss on the purchase and resale of the ordinary shares which it was entitled to set off against the special dividend of £460,000 received by it, leaving it with tax payable on only £80,000. If the £460,000 had been distributed to the original shareholders, tax would have been
 G
 payable on the whole amount at 15s. in the pound, but after the conclusion of these transactions, if they were effective for tax purposes, tax was exigible only on the £80,000 profit made by P. Ltd. Two other private limited companies dealing in motor cars carried out similar transactions with P. Ltd., and the final result was that (a) the motor car companies received new
 H
 capital of £1,185,631, of which they were greatly in need; (b) the original shareholders received in return for the sale of shares a capital payment of £1,661,722, of which they retained £476,091 in cash, but they received nothing liable to tax; (c) the motor companies had distributed a dividend of £1,764,136 (to P. Ltd.), which was sufficient to avoid the application of Division 7 of the Commonwealth Income Tax and Social Services Contribution Assessment Act, 1936-1951, under which undistributed profits retained beyond a certain period became liable to tax as if they had been
 I
 distributed; and (d) P. Ltd. made a profit on its share dealings, receiving 161,213 £1 shares, and £102,414 in cash on which it was liable to pay tax. Section 260* of the Act provided that a contract, agreement or arrangement “so far as it has . . . the purpose or effect of in any way, directly or indirectly—(c) . . . avoiding any . . . liability imposed on any person by this

* This section is printed at p. 762, letters H and I, post.

Act" should be absolutely void as against the commissioner, without prejudice to such validity as it might have for any other purpose.

Held: for the reasons stated in (i) and (ii) below the transactions were void as against the commissioner to the extent stated in (iii) below—

(i) the word "arrangement" in s. 260 was apt to describe something less than a binding contract, but to bring an arrangement within s. 260 the overt acts by which it was implemented must show that the purpose was to escape tax, and if they were explicable as ordinary business or family dealings the arrangement was not within s. 260.

(ii) on the facts, so viewed, notwithstanding that tax avoidance was not the sole purpose of the arrangement, there was an arrangement within s. 260 in the present case, which "arrangement" comprehended all the transactions by which it was carried into effect; consequently the commissioner could disregard for tax purposes all steps taken in pursuance of the arrangement in so far as they would otherwise enable liability to tax to be avoided, but he could not ignore transactions that did nothing towards avoiding tax, as, e.g., the taking up of the preference shares.

(iii) thus the shareholders' transfer of the special dividends on the ordinary shares to P. Ltd. could be ignored for tax purposes, and, as the amount of those dividends (£1,764,136) could be traced to the shareholders (viz., £1,661,722, as the cash price of the shares and £102,414 as the remuneration allowed to P. Ltd. by those shareholders) the amount of the special dividends (£1,764,136) was taxable.

Bell v. Federal Comr. of Taxation ((1953), 87 C.L.R. 548) approved.
Appeal dismissed.

[**Editorial Note.** Two aspects of the reasoning in the present case may have particular relevance under English income tax legislation. The first is the meaning given to the word "arrangement" which is a word that is used also in s. 403 of the Income Tax Act, 1952; see 20 HALSBURY'S LAWS (3rd Edn.) 573, para. 1117, text and note (t). The second is that under the English income tax legislation there is also an express exemption, from the provisions to meet tax avoidance by the transfer of assets abroad, if the taxpayer shows that the purpose of avoiding tax was not a purpose of the transfer or associated operations (Income Tax Act, 1952, s. 412 (3)); see 20 HALSBURY'S LAWS (3rd Edn.) 591, para. 1160, text and note (e). The transactions in the present case were genuine transactions, but one purpose was to avoid tax.

For the Income Tax Act, 1952, s. 403 and s. 412 (3), see 31 HALSBURY'S STATUTES (2nd Edn.) 380, 390, 391.]

Cases referred to:

- (1) *Clarke v. Federal Comr. of Taxation*, (1931), 48 C.L.R. 56.
- (2) *De Romero v. Read*, (1932), 48 C.L.R. 649.
- (3) *W. P. Keighery Pty., Ltd. v. Comr. of Taxation*, (1958), Argus L.R. 97.
- (4) *Deputy Federal Comr. of Taxation v. Purcell*, (1921), 29 C.L.R. 464; 28 Digest 95, k.
- (5) *Jaques v. Federal Comr. of Taxation*, (1924), 34 C.L.R. 328; 31 Argus L.R. 61; Digest Supp.
- (6) *Bell v. Federal Comr. of Taxation*, (1953), 87 C.L.R. 548.

Appeal.

Appeal by special leave by Lauri Joseph Newton, Lionel Newton, Francie Una Christian, Henry James Lane, and Frederick Ernest Bunny, executors of the estate of Robert Nathan, deceased, and Stella Maud Adeline Lane and Leonard Alfred Fenton, from a decision of the Full Court of the High Court of

A Australia (DIXON, C.J., McTIERNAN, WILLIAMS, FULLAGAR and TAYLOR, JJ.), dated May 31, 1957, allowing an appeal by the respondent, the Commissioner of Taxation of the Commonwealth of Australia, from a judgment of KITTO, J., dated Aug. 15, 1956. The facts appear in the judgment of the Board.

Sir Garfield Barwick, Q.C., R. M. Eggleston, Q.C., J. A. Nimmo, Q.C. (all of the Australian Bar), and *R. A. Gatehouse* for the taxpayers, the appellants.

B *J. B. Tait, Q.C., Douglas I. Menzies, Q.C., and K. A. Aickin* (all of the Australian Bar) for the commissioner, the respondent.

LORD DENNING: The question in this case is: What was the assessable income of the appellants for the years which ended on June 30, 1950, and June 30, 1951? In particular, did it include certain sums declared by three companies as special dividends amounting in all to £1,764,136? The matter has given rise to considerable difference of opinion in the High Court of Australia. KITTO, J., who heard the case at first instance, decided that those sums did not form part of the assessable income of the appellants. But the Full Court, by a majority, consisting of DIXON, C.J., McTIERNAN, J., WILLIAMS, J., and FULLAGAR, J. (with TAYLOR, J., dissenting), held that they did form part of the assessable income of the appellants, and that they must pay tax on it and also a penalty. Very large sums of money are involved. In these days, when rates of tax are high, it is natural enough for a man to seek so to order his affairs that the tax attaching under the appropriate Acts is less than it otherwise would be. In England there is no general provision against it, but special provisions have been enacted so as to counter particular devices and to deal with particular situations. In Australia there is a general provision which is said to cover "tax avoidance", and it comes now before their Lordships for the first time. But before setting out the section, their Lordships think it better to summarise the facts which give rise to the question.

F In the autumn of 1949 the position was this: Three private companies (which dealt in motor cars) had made large profits and were still making them. Under Australian law, these profits would ordinarily be liable to a heavy tax. If they were distributed to the shareholders as dividends in cash or as bonus shares, the shareholders—being wealthy persons—would be liable to pay tax at the rate of 15s. in the pound. If the profits were not distributed to the shareholders by Dec. 31, 1949, but kept in the coffers of the company, the company would be liable—under Division 7 of the Commonwealth Income Tax and Social Services Contribution Assessment Act, 1936-1951—to pay the tax which the shareholders would have paid, that is, at 15s. in the pound.

G In December, 1949—before the last day—several transactions took place. For simplicity, their Lordships will consider what happened in the case of one of the private motor companies only; but all three carried out similar transactions. The company amended its articles of association so as to give special dividend rights to eighty thousand ordinary £1 shares, which entitled the holders of the shares to a dividend of £5 15s. 10d. on every £1 share. That comes to a total of nearly £460,000 as special dividend. After the payment of that dividend, those shares were to carry only a five per cent. fixed dividend. The original shareholders then sold these shares to a company called Pactolus, Ltd. (which was a private company controlled by a consulting accountant) at a price of nearly £460,000—roughly equal to the anticipated dividend. The Pactolus company paid to the original shareholders the price by cheque and, at about the same time, received from the motor company a cheque for the special dividend. The two cheques were for about the same amount—£460,000. The Pactolus company was only able to pay for the shares because of the special dividend it received on them.

The Pactolus company also applied to the motor company for four hundred thousand five per cent. preference £1 shares (freshly issued) and paid for them by a cheque in favour of the motor company for £400,000. On the next day the Pactolus company sold these four hundred thousand shares to the original shareholders (from whom they had bought the eighty thousand ordinary shares) at a price of £400,000. The original shareholders paid this sum, by cheque in favour of the Pactolus company, out of the £460,000 they had received for the eighty thousand ordinary shares. All the cheques in the above transaction were banked simultaneously, with the result that, by the end of December, 1949, the motor company had distributed £460,000 as special dividend. This had found its way back to the original shareholders who had received £460,000, of which they had reinvested £400,000 as capital in the company and kept £60,000 in cash. The Pactolus company had received eighty thousand shares on which it was thenceforward only entitled to a fixed dividend of five per cent. These were now worth £80,000, and the Pactolus company sold them to a subsidiary company for that sum in cash.

The Pactolus company was, of course, liable to pay tax on the special dividends it received; but it was a company dealing in stocks and shares and, as such, it was entitled to deduct losses on its deals from the dividends it received. On the purchase and resale of the shares it had made a loss. It had bought the shares for £460,000 and sold them for £80,000—a loss of £380,000. That loss could be set against the special dividend which it had received of £460,000, leaving it with a net profit of only £80,000 on which it had to pay tax.

So much for the one company. Taking the transactions of all three companies together, the result at the end of it all was that the motor companies distributed £1,764,136 as special dividends. Most of this found its way back to the original shareholders, who received £1,661,722 in cash, of which they had reinvested £1,185,631 as capital in the companies and kept £476,091 in cash. The Pactolus company had received 161,213 shares on which it was thenceforward entitled to a fixed dividend of five per cent. The Pactolus company had also retained £102,414 in cash.

It has not been disputed that all the transactions were genuine and not shams. They were all intended to have the effect they purported to have. If the commissioner is bound to accept them at their face value, then the shareholders have disposed of their shares for a capital payment of £1,661,722. They have derived no income and are not liable to tax thereon. If the transactions are to be questioned, it can only be by virtue of s. 260 of the Commonwealth Income Tax and Social Services Contribution Assessment Act, 1936-1951. It is in these terms:

“Every contract, agreement, or arrangement made or entered into, orally or in writing, whether before or after the commencement of this Act, shall so far as it has or purports to have the purpose or effect of in any way, directly or indirectly—(a) altering the incidence of any income tax; (b) relieving any person from liability to pay any income tax or make any return; (c) defeating, evading, or avoiding any duty or liability imposed on any person by this Act; or (d) preventing the operation of this Act in any respect, be absolutely void, as against the commissioner, or in regard to any proceeding under this Act, but without prejudice to such validity as it may have in any other respect or for any other purpose.”

The commissioner says that the section covers this case because there was, he says, an “arrangement” which had, or purported to have, “the purpose or effect” of “avoiding” a “liability imposed” on any person by the Act.

- A Counsel for the taxpayers submitted to their Lordships that the section had no application to this case. He put in the forefront of his argument two submissions which were not made to the High Court of Australia. First, counsel submitted that the section was of no effect at all. He referred to the history of the section and pointed out that, before 1936, the words "as against the commissioner" were not there. He said that in those days the section had only a social effect—an effect as between two or more subjects—not allowing one of them to put on to another the duty to make a return of tax or to bear it, and so forth. It had, he said, no fiscal effect—no effect, that is, as against the commissioner. Then, in 1936, by inserting the words "as against the commissioner", the section was deprived of any effect as between subjects; and, as it already had no effect as against the commissioner, it had thenceforward no effect at all.
- B The insertion of those words, he said, stultified the section. Their Lordships cannot accept this argument. They are quite clearly of opinion that, long before 1936, the section had a fiscal effect. Its principal effect was to avoid transactions as against the commissioner—as in cases such as *Clarke v. Federal Comr. of Taxation* (1) ((1931), 48 C.L.R. 56). But it had—as originally drafted—an unexpected effect in that, in *De Romero v. Read* (2) ((1932), 48 C.L.R. 649), it was held to avoid a transaction between subjects. It seems to their Lordships that the reason for the insertion of the words "as against the commissioner" was to do away with the decision in *De Romero v. Read* (2).
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- Next, counsel for the taxpayers submitted that, in s. 260 (c), the words "liability imposed on any person" meant a liability which had already accrued; and that "avoid" meant displace. He said that, in order that an arrangement should be avoided, it must be an arrangement which sought to displace a liability which had already come home to a taxpayer—in respect of income which had already been derived by him. Their Lordships cannot accept this submission. They are clearly of opinion that the word "avoid" is used in its ordinary sense—
- E in the sense in which a person is said to avoid something which is about to happen to him. He takes steps to get out of the way of it. It is this meaning of "avoid" which gives the clue to the meaning of "liability imposed". To "avoid a liability imposed" on you means to take steps to get out of the reach of a liability which is about to fall on you. If the submission of counsel were accepted, it would deprive the words of any effect; for no one can displace a liability to tax which has already accrued due, or in respect of income which has already been derived. Their Lordships notice that, although this point was not raised in the High Court, TAYLOR, J., did consider it, and they find themselves in agreement with what he said on it.
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- So much for counsel's new arguments. Their Lordships turn to consider the other points raised in the case. Their Lordships are of opinion that the word "arrangement" is apt to describe something less than a binding contract or agreement, something in the nature of an understanding between two or more persons—a plan arranged between them which may not be enforceable at law. But it must in this section comprehend, not only the initial plan, but also all the transactions by which it is carried into effect—all the transactions, that is, which have the effect of avoiding taxation, be they conveyances, transfers or anything else. It would be useless for the commissioner to avoid the arrangement and leave the transactions still standing. The word "purpose" means, not motive, but the effect which it is sought to achieve—the end in view. The word "effect" means the end accomplished or achieved. The whole set of words denotes concerted action to an end—the end of avoiding tax.
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But, said counsel for the taxpayers, if such a wide interpretation is given to the words, where is the section to stop? Does it enable the commissioner to

avoid all transactions by which a man seeks to escape a liability to tax which is about to fall on him? He gave numerous illustrations to show that the Parliament of Australia cannot have intended so sweeping a result. Take the case of a man who sells shares cum dividend—because he does not wish to pay the tax on the dividend when received; or of a private company which is turned into a non-private company in order to escape Division 7 tax; and so forth. Can the commissioner go behind those transactions?

The answer to the problem seems to their Lordships to lie in the opening words of the section. They show that the section is not concerned with the motives of individuals. It is not concerned with their desire to avoid tax, but only with the means which they employ to do it. It affects every "contract, agreement, or arrangement" (which their Lordships will henceforward refer to compendiously as "arrangement") which has the purpose or effect of avoiding tax. In applying the section you must, by the very words of it, look at the arrangement *itself* and see which is *its* effect—what *it* does—irrespective of the motives of the persons who made it. WILLIAMS, J., put it well when he said:

"The purpose of a contract, agreement or arrangement must be what *it* is intended to effect and that intention must be ascertained from its terms. Those terms may be oral or written or may have to be inferred from the circumstances but, when they have been ascertained, their purpose must be what they effect."

In order to bring the arrangement within the section, you must be able to predicate—by looking at the overt acts by which it was implemented—that it was implemented in that particular way so as to avoid tax. If you cannot so predicate, but have to acknowledge that the transactions are capable of explanation by reference to ordinary business or family dealing, without necessarily being labelled as a means to avoid tax, then the arrangement does not come within the section. Thus, no one, by looking at a transfer of shares cum dividend, can predicate that the transfer was made to avoid tax. Nor can anyone, by seeing a private company turned into a non-private company, predicate that it was done to avoid Division 7 tax: see *W. P. Keighery Pty., Ltd. v. Comr. of Taxation* (3) ((1958), Argus L.R. 97). Nor could anyone, on seeing a declaration of trust made by a father in favour of his wife and daughter, predicate that it was done to avoid tax: see *Deputy Federal Comr. of Taxation v. Purcell* (4) ((1921), 29 C.L.R. 464). But when one looks at the way the transactions were effected in *Jaques v. Federal Comr. of Taxation* (5) ((1924), 34 C.L.R. 328), *Clarke's case* (1), and *Bell v. Federal Comr. of Taxation* (6) ((1953), 87 C.L.R. 548)—the way cheques were exchanged for like amounts and so forth—there can be no doubt at all that the purpose and effect of that way of doing things was to avoid tax.

Applying these principles to the present case, the first question is—Was there an arrangement? The answer is "Yes". The whole complicated series of transactions must have been the result of a concerted plan; and the nature of the plan is to be ascertained by the overt acts done in pursuance of it.

Next, what was the purpose of the arrangement? It can clearly be seen to be threefold: (i) To increase the capital of the motor companies—and to do it by ploughing back over £1,000,000 of the profits into the businesses—and to do it in a way which would attract as little tax as possible. (ii) To enable the original shareholders to receive a large sum—nearly £500,000 in cash—without paying tax on it. (iii) To enable the Pactolus company to make a handsome profit in return for its part in the affair. (It is to be noticed that—in so far as it was the purpose of the transaction to let the motor companies escape from the

A additional tax under Division 7—this could have been effected by turning the motor companies into non-private companies.)

Finally, what was the effect of the arrangement? It was this: (i) The motor companies received new capital of £1,185,631—of which they were much in need for the conduct of their businesses. (ii) The original shareholders received a capital payment of £1,661,722 in return for the sale of shares, but had received no dividend on which they could be taxed. (iii) The motor companies distributed a dividend of £1,764,136 which was a sufficient distribution to enable them to avoid being liable to tax on undistributed profits under Division 7. (iv) The Pactolus company made a profit on its share dealings. It had received 161,213 £1 shares; and it had also £102,414 in cash on which it was liable to pay tax.

C It is clear from this analysis that the avoidance of tax was not the *sole* purpose or effect of the arrangement. The raising of new capital was an associated purpose. But, nevertheless, the section can still work if one of the purposes or effects was to avoid liability for tax. The section distinctly says “*so far as it has*” the purpose or effect. This seems to their Lordships to import that it need not be the sole purpose. Looking at the whole of this arrangement, their Lordships have no doubt that it was an arrangement which is caught by s. 260. The whole of the transactions show that there was concerted action to an end—and that one of the ends sought to be achieved was the avoidance of liability for tax.

This question then arises: What is the effect of s. 260 on that arrangement?

E It is quite clear that nothing is avoided as between the parties but only as against the commissioner. As against him the arrangement is “absolutely void” so far as it has the purpose or effect of avoiding tax. This is not a very precise use of the words “absolutely void”. Ordinarily, if a transaction is absolutely void, it is void as against all the world. In this case, what is meant is that the commissioner is entitled completely to disregard the arrangement—and the ensuing transactions—so far as they have the purpose or effect of avoiding tax. In the words of the courts of Australia, it is an “annihilating” provision—the commissioner can use the section so as to ignore the transactions which are caught by it. But the ignoring of the transactions—or the annihilation of them—does not itself create a liability to tax. In order to make the taxpayers liable, the commissioner must show that moneys have come into the hands of the taxpayers which the commissioner is entitled to treat as income derived by them. Their Lordships agree with the way in which FULLAGAR, J., put it in his judgment:

H “Section 260 alters nothing that was done between the parties. But for purposes of income tax, it entitles the commissioner to look at the end result and to ignore all the steps which were taken in pursuance of the avoided arrangement.”

I In this case, the commissioner must accept the arrangement in so far as it had the effect of creating special dividend rights in the original shareholders—for that did nothing to avoid tax; but he can ignore the arrangement in so far as the original shareholders transferred those dividend rights (with the shares) to the Pactolus company for money—for it was that transaction which gave the character of capital to the money received by the shareholders. When that transaction is ignored, it becomes apparent that special dividends were declared on shares which are to be deemed for this purpose to be still held by the original shareholders. Those dividends amount to £1,764,136 paid out by the company. If and so far as the commissioner can show that those special dividends reached the hands of the original shareholders, he is entitled to treat it as income derived by them from the shares. Now the commissioner can trace the sum of £1,661,722

in cash actually into the hands of the original shareholders. He is entitled, therefore, to treat it as income derived by them. He cannot trace the balance of £102,414 actually into their hands. It remained in the pocket of Pactolus, Ltd. It was ostensibly the profit of the Pactolus company on buying the shares. But when the transfer is ignored, that profit is seen to be nothing more nor less than remuneration which the original shareholders allowed the Pactolus company to retain for services rendered. The position is the same as if the shareholders had received it as part of the special dividend and then returned it to the Pactolus company as remuneration. The commissioner can, therefore, treat this £102,414 also as income derived by the shareholders.

The commissioner cannot avoid or ignore the taking up of four hundred thousand £1 preference shares; for that did nothing to avoid tax. Nor can he avoid or ignore the fact that the Pactolus company now holds 161,213 shares shorn of special dividend rights—because that does nothing to avoid tax. He can only avoid or ignore the transfer in so far as it transferred the special dividend rights.

In the course of the argument, counsel for the taxpayers submitted that *Bell's* case (6) was wrongly decided. In the opinion of their Lordships, it was rightly decided and the exposition of the law there given by the High Court of Australia is a valuable guide to the true understanding of the section.

Counsel for the taxpayers sought to raise before their Lordships a further point which was not raised below. The commissioner assessed the shareholders in the tax due on the moneys received by them—and, in addition, included a sum as a penalty under s. 226 (2) of the Act. This penalty amounts to over £600,000. Counsel sought to say that s. 226 (2) did not apply because the taxpayer could not properly be said to have “omitted” the income from his return—seeing that it was not income when he received it or when he made his return—but only has become so *ex post facto* when the commissioner decided to treat it so. Their Lordships were not disposed to allow counsel to raise this point as it had not been raised before and does not appear in the Case of the appellants—but, in any case, they think it is a bad point. In the events that have happened, the money has been determined to be assessable income. As such it ought to have been included—and has not. The taxpayer is, therefore, liable to the penalty.

Their Lordships will, therefore, humbly advise Her Majesty that this appeal should be dismissed. The appellants must pay the costs.

Appeal dismissed.

Solicitors: *A. F. & R. W. Tweedie* (for the taxpayers, the appellants); *Coward, Chance & Co.* (for the commissioner, the respondent).

[*Reported by G. A. KIDNER, ESQ., Barrister-at-Law.*]

A LYONS v. CENTRAL COMMERCIAL PROPERTIES, LTD.

[COURT OF APPEAL (MORRIS and ORMEROD, L.J.J., and HARMAN, J.), May 13, 14, 16, July 7, 1958.]

Landlord and Tenant—New tenancy—Business premises—Opposition by landlord—Breaches of covenant to repair—Negotiations for rebuilding premises—Discretion of court over refusal of grant of tenancy—Landlord and Tenant Act, 1954 (2 & 3 Eliz. 2 c. 56), s. 30 (1) (a), s. 31.

The tenant had carried on business for about twenty years as an outfitter on premises occupied by him under an underlease for a term ending three days before Lady Day, 1956. In 1954 negotiations started between the tenant, the landlords and L. Ltd., a well known firm of chain stores with a view to L. Ltd.'s acquiring a building lease of the premises and other land and demolishing the premises in question. Whilst the negotiations were in progress the tenant made a request under the Landlord and Tenant Act, 1954, s. 26, for a new tenancy. The landlords gave notice of opposition on the ground stated in s. 30 (1) (a), viz., that the tenant had failed to comply with his obligations to repair and "ought not to be granted a new tenancy" in view of the state of repair. In June, 1956, the tenant contracted to sell his interest in the premises (including any new tenancy thereof) to L. Ltd. but by agreement with L. Ltd. remained in occupation of the premises carrying on his business pending completion pursuant to two months' notice. In February, 1957, the negotiations between the landlords and L. Ltd. broke down. At the date of the hearing of the application for a new tenancy in December, 1957, there were serious breaches of the repairing covenants. The tenant (i.e., in fact L. Ltd.) was prepared to make these good in the event of a new tenancy being granted. The county court judge refused the grant of a new tenancy on the grounds that the new tenancy would be for the benefit of L. Ltd., not of the occupying tenant, and that the tenant was not the sort of tenant to whom the court should give relief. On appeal by the tenant,

Held: (i) (MORRIS, L.J., dissenting) in the circumstances the tenant's application was one that the Court of Appeal should determine and not refer back to the county court, and a new tenancy would be refused.

(ii) by virtue of the words "ought not to be granted" in s. 30 (1) (a) of the Landlord and Tenant Act, 1954, the court had a measure of discretion (per HARMAN, J., a narrow discretion) whether or not to refuse a new tenancy where breaches of repairing covenants had been established and the facts concerning the tenant's conduct had been found (see p. 773, letter C, p. 774, letter C, and p. 775, letter I, post).

(iii) the contract by the tenant for sale to L. Ltd. ought to be left out of account in determining the question whether a new tenancy should be refused (see p. 772, letter C, p. 774, letter F, and p. 776, letter E, post); but (per HARMAN, J.), in considering the terms of any tenancy to be granted and the exercise of the wider discretion conferred by s. 33 and s. 35, the fact that the application was really that of a purchaser, and not of an occupying tenant for whom the Act of 1954 was intended to provide, could be taken into consideration (see p. 776, letter F, post).

Appeal dismissed.

[As to the grounds of opposition to the grant of a new tenancy under Part 2 of the Landlord and Tenant Act, 1954, see 23 HALSBURY'S LAWS (3rd Edn.) 892, para. 1716.

As to the landlord's establishing to the satisfaction of the court grounds of opposition to the grant of a new tenancy, see 23 HALSBURY'S LAWS (3rd Edn.) 895, para. 1719, note (c).

For the Landlord and Tenant Act, 1954, s. 30 (1) (a), s. 31 (1), see 34 HALSBURY'S STATUTES (2nd Edn.) 414, 416.] A

Case referred to:

- (1) *Betty's Cafés, Ltd. v. Phillips Furnishing Stores, Ltd.*, [1957] 1 All E.R. 1; [1957] Ch. 67; 3rd Digest Supp.

Appeal.

This was an appeal by the tenant, David Lyons, from a decision of His Honour JUDGE ANDREW at Bow County Court on Feb. 10, 1958, dismissing his application for a new lease of business premises under the Landlord and Tenant Act, 1954.

H. Heathcote-Williams, Q.C., and *G. Newman* for the appellant, the tenant.

Maurice Lyell, Q.C., and *A. C. Goodall* for the respondents, the landlords.

Cur. adv. vult.

July 7. The following judgments were read.

MORRIS, L.J.: The landlords own the freehold of the premises known as 62, High Street, Walthamstow. Their predecessors in ownership granted a lease of the premises to Mrs. Hannah Lyons, the mother of the tenant, for a term of twenty-one years from Mar. 25, 1935. The rent was £250 a year. There were repairing covenants binding the lessee. The premises consisted in part of a shop; it was only to be used for the trade or business of a hosier and draper and general outfitter. The remaining parts of the premises were only to be used for such trade or business, or as a private residence. The premises were not to be assigned, nor was there to be underletting or parting with possession, without the previous consent in writing of the lessor, which consent was not to be withheld to an assignment or underletting of the premises to a respectable and responsible person.

The tenant became the underlessee of the premises; his underlease was for the term of his mother's lease less the last three days. The tenant was the owner of certain freehold land which lies to the rear of No. 62, High Street and which is also to the rear of the premises on either side of No. 62, High Street. In the autumn of 1954 certain tripartite negotiations commenced. They were between the tenant of the one part, the landlords of the second part and a company called Littlewoods Mail Order Stores, Ltd. (which company I will refer to as Littlewoods) of the third part. Littlewoods owned Nos. 58, 58A and 60, High Street. The lease of the premises had about eighteen months to run when the negotiations began. These proceeded on the lines that the tenant would assign his lease to Littlewoods, and would convey the freehold land at the back to them; that Littlewoods would then surrender the lease to the landlords, and that the landlords would then grant a new lease (for twenty-one years at £550 per annum) to Littlewoods. A new lease was drafted and a copy of the proposed new lease was before the court. The agreement of the landlords to this plan was marked by their giving written consent to the assignment of the head lease to the tenant; for during the negotiations it was realised that all that the tenant had was an underlease for the term of his mother's lease less the last three days.

Those negotiations did not result in any concluded agreement. That was not because of any unwillingness on the part of the landlords, but because the tenant in about March, 1955, became aware of his rights under the Landlord and Tenant Act, 1954. The negotiations at that stage were therefore halted. The landlords then instructed surveyors to inspect the demised premises, and in June, 1955, served a schedule of dilapidations on the tenant. The next step was that, under the provisions of s. 26 of the Landlord and Tenant Act, 1954, the tenant, on Aug. 30, 1955, made a written request for the grant of a new tenancy to commence on the expiry of the current lease, i.e., Mar. 25, 1956. By a notice given under the provisions of the same section, and dated Oct. 28,

- A** 1955, the landlords intimated that they would oppose an application to the court for the grant of a new tenancy, and stated their ground of opposition to be that the tenant had failed to comply with his obligation to repair and maintain the premises. By originating application dated Dec. 8, 1955, the tenant applied to the court for the grant of a new tenancy. The answer of the landlords was dated Dec. 15, 1955. By this time there had been a resumption of the tripartite
- B** negotiations. Accordingly the court was asked in January, 1956, to adjourn by consent the hearing of the application *sine die*.

- Negotiations had been resumed in November, 1955. Though the general plan still involved that Littlewoods should become the tenants of the landlords, there were certain important variations in the proposed arrangements. The tenant was to assign his lease of 62, High Street to Littlewoods, and to sell to them
- C** the freehold land at the back. Littlewoods were then to surrender the lease to the landlords and to convey the back land to them free of charge, and also to convey to them free of charge the adjoining freehold premises consisting of Nos. 58, 58A and 60, High Street which Littlewoods already owned. The landlords were then to grant a lease to Littlewoods of the whole site consisting of the site of Nos. 62, 60, 58 and 58A, High Street and the freehold land at the
- D** back: the letting was to be by a ninety-nine years' building lease at a rent of £1,000 a year. The scheme was, therefore, that Littlewoods, being given possession of the whole site, would demolish the existing buildings and erect one new building.

- Before the scheme could be agreed, it was recognised that it was for Littlewoods to come to terms with the tenant and to arrange for his departure. A
- E** contract of sale between Littlewoods as purchasers, and the tenant as vendor, was eventually agreed on June 27, 1956. Littlewoods were to purchase for £5,000. The property to be purchased was described as follows:

- "Firstly all that messuage shop and premises situate on the south side of High Street in the Parish of Walthamstow in the County of Essex and known as 62, High Street Walthamstow aforesaid as demised by a lease dated Apr. 15, 1935, and made between Hanway Estates, Ltd. of the one part and Hannah Lyons of the other part for the term of twenty-one years from Mar. 25, 1935, at the yearly rent of £250 and subject to the covenants and conditions on the part of the lessee therein contained And, secondly the freehold land at the back of 60/66 (even numbers) High Street Walthamstow in the County of Essex as registered at H.M. Land Registry with possessory title under Title No. EX 35275."
- F**
- G**

There were certain riders to the contract one of which included the words:

- "There is included in this sale any new lease or tenancy agreement granted to the vendor pursuant to the Landlord and Tenant Act, 1954, or otherwise in respect of the leasehold premises hereby agreed to be sold and all the rights of the vendor in respect of such leasehold premises confirmed by the said Act."
- H**

- The property was sold with vacant possession, and completion was to be on Aug. 14, 1956. Some delay took place and the tenant remained in possession.
- I** The delay was not occasioned by the tenant, but resulted because of negotiations to obtain a right of way over certain adjoining freehold land in order that there could be a side entrance to the new projected building so as to avoid loading and unloading taking place in the street. Because of the delay the tenant and Littlewoods arranged a variation of the terms of their contract of June 27, 1956. Completion was to be on the expiry of a two months' notice which either party was to be at liberty to give: the deposit, consisting of ten per cent. of the £5,000, was to be released to the tenant, and the tenant was to make a stated payment per month until completion.

So matters continued. By the beginning of February, 1957, the negotiations had reached a stage when a building agreement between Littlewoods and the landlords had been prepared. The landlords had signed their part and were ready to exchange; Littlewoods had not signed their part. Then for some reasons which have not been stated a telegram was sent on Littlewoods' instructions as follows:

"Informed today our clients still in state of negotiation. Compelled to state all offers (if any) to exchange documents withdrawn."

How the matter now stands between Littlewoods and the landlords as regards the wider plan is not clear. As regards No. 62, High Street all parties recognised that the claim of the tenant for a new lease had merely been postponed, though it had been expected that agreement would be reached between the landlords and Littlewoods on the lines which were being negotiated, in which event the tenant and his claim would disappear. After the negotiations broke down in February, 1957, the claim of the tenant remained, though because of the terms of the agreement of June 27, 1956, it existed for the benefit of Littlewoods.

The claim eventually came before the learned judge at the Bow County Court in December, 1957. The tenant gave evidence to the effect that he had established a profitable business which possessed a considerable goodwill, and that he proposed to continue to trade until such time as Littlewoods wished to take over. He expressed the hope that Littlewoods would defer giving the two months' notice which they were entitled to give to him. As the claim if successful will enure for the benefit of Littlewoods, it is not surprising to find that they were paying the costs of the application. As the only ground which the landlords had given for opposing a new lease was that the tenant had failed to comply with his obligation to repair, the issue before the learned judge depended in the main on a consideration of s. 30 (1) (a) of the Act. The words of that sub-section are as follows:

"The grounds on which a landlord may oppose an application under s. 24 (1) of this Act are such of the following grounds as may be stated in the landlord's notice under s. 25 of this Act or, as the case may be, under s. 26 (6) thereof, that is to say:—(a) where under the current tenancy the tenant has any obligations as respects the repair and maintenance of the holding, that the tenant ought not to be granted a new tenancy in view of the state of repair of the holding, being a state resulting from the tenant's failure to comply with the said obligations; (b) that the tenant ought not to be granted a new tenancy in view of his persistent delay in paying rent which has become due; (c) that the tenant ought not to be granted a new tenancy in view of other substantial breaches by him of his obligations under the current tenancy, or for any other reason connected with the tenant's use or management of the holding."

Section 29 (1) is in these terms:

"Subject to the provisions of this Act, on an application under s. 24 (1) of this Act for a new tenancy the court shall make an order for the grant of a tenancy comprising such property, at such rent and on such other terms, as are hereinafter provided."

Section 31 (1) reads:

"If the landlord opposes an application under s. 24 (1) of this Act on grounds on which he is entitled to oppose it in accordance with the last foregoing section and establishes any of those grounds to the satisfaction of the court, the court shall not make an order for the grant of a new tenancy."

- A The question in the present case was, therefore, whether the landlords could establish to the satisfaction of the learned judge that the tenant "ought not" to be granted a new tenancy in view of the state of repair of the holding being a state resulting from the tenant's failure to comply with his obligations as respects the repair and maintenance of the holding. It is clear from the facts of the present case that there was a considerable period, during the negotiations, when any question of disrepair of the holding was of no practical consequence at all. The plan was and the expectation was that the building would be demolished. When negotiations broke down and the application of the tenant came to be restored, then the issue as to disrepair revived. If the landlords and Littlewoods again renew negotiations, the state of the premises may again become of secondary importance to the landlords. After the negotiations had broken down the managing director of the landlords wrote a letter to the tenant which was dated July 8, 1957, and which was in the following terms:

- D "I expect that you are quite often in the West End and I am wondering if you would care to call here for a chat with me, in the near future, bringing your solicitor if you wish. There is a baffling and very unsatisfactory position in respect of No. 62, High Street and the adjoining property, acquired by Littlewoods Mail Order Stores. I am anxious to clear it all up without further delay and I believe that a chat with you would go a long way towards it, likewise that it could not be other than mutually beneficial. As I am quite often out, or otherwise engaged, could I trouble you to telephone me a day or two in advance, to fix a convenient time?"
- E The tenant gave evidence that after receipt of that letter he had an interview with the managing director of the landlords. The note of the evidence reads as follows:

- F "He asked me whether I was sure of my position with Littlewoods to complete a deal which had fallen through with the landlords. He asked me whether I would disclose my documents and I agreed to do so and authorised my solicitors to that effect. There was no suggestion that my application for a new tenancy was in danger."

- At the hearing before the learned judge much evidence was given in regard to the state of repair of the premises. The tenant expressed willingness to give an undertaking to carry out all the work for which he was liable under the lease.
- G The learned judge refused the application and in the course of his judgment he said:

- H "I have had the advantage of hearing Mr. McFarlane for the landlords and Mr. Jennings for the tenant. Both are well known surveyors and have great experience. Mr. McFarlane says the premises are very bad indeed and would cost £1,533 to put into conformity with the covenants in the lease. According to Mr. Jennings not nearly so serious and his figure was £530. Even Mr. Jennings has had to confess serious breaches, and it is perfectly plain that there are breaches of covenant both as to outside and inside and painting as well. He (Mr. Jennings) further said the tenant should have carried out painting in 1955. Even Mr. Lyons said: 'I have not bothered about covenants of my lease'. His learned counsel has undertaken on his behalf to do all repairs necessary in order to comply with the lease, and he contends that the landlords will not suffer. His counsel has stated that as long as negotiations were going on and the premises were certainly going to be altered, it was only natural that the tenant would spend as little as possible. I entirely agree, and I have to agree that if this were a case of a small man who would lose his livelihood, I would, despite the breaches, grant a new lease. The Act was passed to protect tenants. The facts do not fall within the usual framework, because of the name of Littlewoods appearing. I

have come to the conclusion that this action is brought not to secure the sitting tenant but to secure the premises for Littlewoods. The purpose of the Act was to secure the sitting tenant. There were severe breaches of covenant. Although the tenant had nearly a year to remedy the breaches he did not do so. The applicant is not the sort of person who is likely to be a tenant to whom I should give relief."

With every respect I think, as counsel for the tenant submitted, that there are certain difficulties in that reasoning. It seems to me that the learned judge was considerably influenced in reaching his conclusion by the circumstance that Littlewoods came prominently into the story, and that a new lease might enure for their benefit. If the tenant in the exercise of his statutory rights was in a position to obtain a new lease, his rights ought not to be defeated because of any contractual arrangements that he may have made with Littlewoods. No question as to the meaning or effect or enforceability of those arrangements arises for consideration in these proceedings. I consider, therefore, that the application should go back for re-hearing unless it can be said that the finding of the learned judge that there were serious breaches of covenant concludes the issue adversely to the tenant. The question arises whether any and if so what nature of discretion is given to the court by the words of s. 30 which have been quoted above.

Counsel for the landlords submitted in the first place that although the words "that the tenant ought not to be granted a new tenancy" denoted a discretion, the discretion given to the court was merely a discretion to determine the substantiality of a tenant's failure to repair and maintain. Counsel submitted that if the court in its discretion determined that a failure was serious or substantial, then the court was inevitably obliged to refuse to grant a new tenancy. I do not feel able to accept that submission. If that had been the intention of Parliament it would have been easy to enact that one ground of opposition should be that the tenant had been guilty of serious failure to repair. It is to be noted that s. 30 (1) (c) reads:

"that the tenant ought not to be granted a new tenancy in view of other substantial breaches by him of his obligations under the current tenancy, or for any other reason connected with the tenant's use or management of the holding."

This wording suggests that the discretion to be exercised (denoted by the words "ought not to") is a discretion which falls to be exercised after the time when "substantial" breaches are proved. Were it otherwise it would have sufficed to enact that a ground of opposition should be that the tenant had been guilty of other substantial breaches of his obligations. This approach is further suggested by a consideration of the wording of para. (b), namely:

"that the tenant ought not to be granted a new tenancy in view of his persistent delay in paying rent which has become due."

The words "ought not to be granted a new tenancy" are really given no meaning if the position is that a new tenancy must be refused as soon as it is shown that there has been persistent delay in paying rent. It would have been simple to enact, had it been so intended, that a ground of opposition should be that a tenant had been guilty of persistent delay in paying rent. I, therefore, consider that a measure of discretion is given to the court which may be exercised after it is shown that a tenant has failed to comply with obligations to repair and maintain, or has persistently delayed in paying rent which has become due, or has been guilty of other substantial breaches of his obligations under the current tenancy. It is to be noted that the discretion is one whereby a tenant may be deprived of that which under the Act he was in a position to receive. The discretion does not operate to give something, but to take away something.

- A** Counsel for the landlords alternatively submitted that the discretion vested in the court is limited so that a court must only consider such matters as may be explanatory of past defaults, or may be of an exculpatory nature in regard to past defaults, or may be indicative that in the future there will be good behaviour in regard to the honouring of obligations. Linked with this submission counsel urged that the judgment of the learned judge showed that he
- B** had found that there were "severe" breaches, but did not show that there were circumstances which palliated or mitigated the breaches. Counsel submitted therefore either that the judgment should be read as deciding that discretion should be exercised against the tenant, or that on the facts as found the only proper conclusion was that a new tenancy ought to be refused. Counsel for the landlords' analysis of the scope and function of the discretion which is to
- C** be exercised is very helpful. Where, however, Parliament has not precisely defined I would hesitate to adopt any particular formula as being all embracing or any formula which might be thought to be restrictive or definitive. I do not think that it is desirable to say more than that once a court has found the facts as regards the tenant's past performances and behaviour and any special circumstances which exist, then, while remembering that it is the future that is being
- D** considered, in that the issue is whether the tenant should be refused a new tenancy for the future, the court has to ask itself whether it would be unfair to the landlord, having regard to the tenant's past performances and behaviour, if the tenant were to enjoy the advantage which the Act gives to him.

- I find it impossible to resist the conclusion that the learned judge was much influenced by the circumstance "of the name of Littlewoods appearing".
- E** The question arises whether on a different approach there would inevitably be an exercise of discretion so as to refuse a new tenancy. Though the breaches were described as "severe", the learned judge said that if it had been a case of a small man who would lose his livelihood, he would have said, despite the breaches, that he would grant a new lease. Though the reference to the "small man" is not defended by learned counsel as denoting any justifiable test, the passage
- F** may indicate that the learned judge was not of opinion that, because of the state of disrepair, he would necessarily exercise a discretion against the tenant. So far as the recent period is concerned, there was a rather special history, and it must be an important feature of the story that the landlords were ready to make arrangements with Littlewoods, and were even in July, 1957, telling the tenant that the deal with Littlewoods might be completed. If the case had
- G** been dealt with on the footing that the tenant, who had carried on a successful business on the premises for about twenty years, was applying for a new lease for himself, then even though there was a state of disrepair I do not consider that the facts showed that the tenant would inevitably encounter an adverse exercise of discretion which would defeat this application.

- Had the matter rested with me, I would have thought that the appropriate
- H** course was to remit the case for further hearing before the learned judge, while expressing no view as to what should be the outcome. It might or might not be that after such further hearing the result would be the same. As my Lords are of the opinion that on the judgment of the learned judge the tenant ought not to be granted a new tenancy, and as on this view the result reached by the learned judge was correct, it follows that the appeal fails.

- I**
- ORMEROD, L.J.:** I agree. The tenant in the present case applied to the court for the grant of a new lease under the Landlord and Tenant Act, 1954. The landlords, in view of s. 30 (1) (a) of the Act, opposed the grant on the ground that the tenant had been guilty of a breach of his covenant to repair, and the learned county court judge has upheld the objection, and refused to make an order for a new lease. The question at issue in the appeal is whether the learned judge has taken into account extraneous matters in coming to his decision and it is necessary to consider what, if any, discretion is vested in the judge in dealing

with objections which fall within s. 30 (1) (a). The first three paragraphs of s. 30 (1) have already been read, and I do not propose to repeat them here. A

It is clear from the words of the section that there is a measure of discretion as regards the state of disrepair. The words are "ought not to be granted a new tenancy in view of the state of repair of the holding". Paragraphs (b) and (c) respectively refer to the "persistent delay" of the tenant in paying rent, and "other substantial breaches" by the tenant of his contractual obligations. These provisions seem to indicate that the neglect to repair to which the section refers should be substantial. The word "ought" in the section, in my judgment, implies that the discretion of the judge is not confined to the consideration of the state of repair. Without attempting to define the precise limits of that discretion, the judge, as I see it, may have regard to the conduct of the tenant in relation to his obligations, and the reasons for any breach of the covenant to repair which has arisen. For example, in the present case there were negotiations proceeding at one time for the sale of the premises to Littlewoods, which if successful would have resulted in the premises being demolished. It might well be regarded as unreasonable to expect the tenant to expend money on repairs during such negotiations. On the other hand, there would appear to be no reason for failing to carry out the repairs after the negotiations were terminated. The object of paras. (a), (b) and (c) of s. 30 (1), as I see it, is to enable the judge to refuse to grant a new lease to a tenant who has shown himself to be unsatisfactory in the performance of his obligations under the contract of tenancy. B C D

It is clear from his judgment that the judge considered the lack of repair to be serious, but he took into consideration the fact that the tenant had contracted to assign his interests in the premises to Littlewoods. He said: E

"I have come to the conclusion that this action is brought not to secure the sitting tenant but to secure the premises for Littlewoods."

It was argued that in spite of this passage in his judgment, the facts as found by him were such that there could be no proper exercise of his discretion other than to refuse to make an order for a new lease. The contract with Littlewoods had, in my view, no bearing on the case. The question was one to be tried between the landlords and the existing tenant, and it was his breaches and his conduct which were material. F

It remains to be decided whether the case should be sent back for reconsideration by the learned judge, or whether on the material before this court an order should be made. It is true that the judge said: G

"... if this were a case of a small man who would lose his livelihood, I would have said, despite the breaches, I would grant a new lease." H

It may be said that this is an indication that he might, if the case were sent back to him, exercise his discretion in favour of the tenant although it may very well be that in saying this the judge was regarding himself, as he indicated early in his judgment, as having an overall discretion similar to that given by the Rent Restrictions Acts. On the other hand, he found that there were severe breaches of covenant; that although the tenant had had nearly a year to remedy the breaches he did not do so, and his final observation was: I

"The applicant is not the sort of person who is likely to be a tenant to whom I should give relief."

In these circumstances, in my judgment, this court can and should deal with the application and confirm the judge's refusal to make an order for a new lease. I would dismiss the appeal.

A **HARMAN, J.:** I agree. The tenant admitted in the witness-box that he had an indemnity from Littlewoods for his costs, and it is evident that he has no financial interest in the appeal. He will get his £5,000 under his contract with Littlewoods whatever the result of the appeal; he is a mere trustee. It is clear, therefore, that in effect the appellant here is Littlewoods, using the name of the tenant, who still has such legal estate in the property as the Landlord and Tenant Act, 1954, gives him. The substantial ground of appeal is that the judge, in dismissing the application, took the last mentioned facts into account and was not entitled so to do, and thus mis-directed himself and came to a wrong conclusion.

C Section 31 of the Act of 1954 provides that if the landlord opposes an application for a new lease on one of the grounds set out in s. 30, and establishes any of those grounds to the satisfaction of the court, it "shall not make an order for the grant of a new tenancy". The court, therefore, has no discretion if any of these grounds be established to its satisfaction. The ground relevant here is that under s. 30 (1) (a), which has already been read by MORRIS, L.J. It is to be observed that the words "ought not to be granted" are common to paras. (a) (b) and (c), which depend alike on the conduct of the tenant in relation to the lease; the remaining paragraphs are concerned with the landlord. Now it was proved before the learned judge that very serious breaches of the repairing and decorating covenants were existing. These went back at least to 1955, and the tenant's surveyor admitted that a great deal of the work specified in the schedule served by the landlords in June, 1955, was within the repairing covenants and ought to have been performed by the tenant, and that he had so advised him. None the less, no effort was made by the tenant, and none has yet been made, to comply with his obligations, and he actually went so far in the witness-box as to say that he had never bothered about the covenants in his lease. The excuse put forward is that while negotiations were going on with Littlewoods, that is to say from the autumn of 1954 until March, 1955, and again from November, 1955, to February, 1957, there seemed no need to put into repair property which was likely to be demolished. The tenant and Littlewoods on his behalf offered to comply with all the covenants if a new lease were granted, and it was argued that in these circumstances a new lease ought to be granted.

G It appears to me that if the judge with these facts before him had decided to refuse the application, his decision would have been unimpeachable. In my judgment, paras. (a) (b) and (c) of s. 30 (1) must mean that where the tenant is proved during the currency of the former lease to have been a bad tenant, no new lease ought to be granted unless some exculpatory circumstances are enough to excuse the tenant's misdoings. The court must look at the position at the time when the application comes before it: *Betty's Cafés, Ltd. v. Phillips Furnishing Stores, Ltd.* (1) ([1957] 1 All E.R. 1 at p. 8 per BIRKETT, L.J.) and if the landlord then satisfies the court that there have been substantial breaches either of repairing covenants or in payment of rent, or any other obligations under the tenancy, the court ought to refuse any lease under s. 31 whatever promises may be made in the future. Of course, a landlord may have waived the breaches, as it is said was done here, or there may be a sufficient excuse as explained above.

I In my judgment, the discretion vested in the court under s. 30 (1) (a), (b) and (c) is narrow. It is limited to the question whether, having regard only to the grounds set out, a new tenancy "ought not" to be granted. This must mean, I think, whether having regard to the tenant's past conduct as a tenant it would be equitable to exclude the landlord from his property for a further term or to foist the tenant on him contrary to the contract. A wider discretion appears to be conferred on the court once it has decided to grant a new tenancy. Under

s. 33 the court, in considering duration, is to have regard to what is reasonable "in all the circumstances", while under s. 35 the terms of the tenancy, other than duration and rent, must be settled by the court having regard to the terms of the current tenancy "and to all relevant circumstances". A

It appears to me that on a fair reading of the learned judge's judgment he was under the impression that he had the wider discretion, and that, considering himself entitled to have regard to all relevant circumstances, he did take into account in arriving at his conclusion the fact that the tenant was not the true applicant but a mere trustee. This seems to me to be the only inference that can be drawn from the judge's statement that B

"if this were a case of a small man who would lose his livelihood, I would, despite the breaches, grant a new lease." C

It does not, however, follow from the fact that the judge misdirected himself in this respect that he came to a wrong conclusion. Treating the appellant as the tenant, and looking at him only as a tenant, the judge was, as I have said, in my view amply justified in refusing a new lease, and the fact that he would have granted one, if circumstances had been other than they were, does not seem to me to vitiate his conclusion. He did, as his judgment shows, take into account the breaches of the repairing covenants, and the conduct of the appellant in that connexion. D

The question for this court, then, is whether we ought to remit the matter to the county court judge for further consideration, leaving out of account the transaction of the tenant with Littlewoods, or whether we are in a position to come to a conclusion ourselves. For myself I think that we are. All the facts are before us. I cannot see how the court could reach any other conclusion but that having regard to the breaches of covenant, a new tenancy "ought not" to be granted to this tenant. I may be permitted to add perhaps that it seems to me regrettable that the legislature should not have seen fit to trust the judiciary with a full discretion in matters of this kind. The present case shows the absurdity, for this application is not really the tenant's application at all, but Littlewoods' application. They are not the occupying tenants for whom the Act, as its long title shows, was intended to provide. Indeed when considering the new tenancy under s. 33 and s. 35, to which I have referred, I think that the court might well conclude that a new tenancy should only last for so short a time as would make it unacceptable. I agree that the appeal should be dismissed. E F G

Appeal dismissed. Leave to appeal to the House of Lords refused.

Solicitors: *H. Davis & Co.* (for the tenant); *Forsythe, Kerman & Phillips* (for the landlords).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

A

GRACE RYMER INVESTMENTS, LTD. v. WAITE AND OTHERS.

[COURT OF APPEAL (Lord Evershed, M.R., Romer and Ormerod, L.JJ.), June 26, 27, 30, July 1, 1958.]

B

Mortgage—Possession of mortgaged property—Mortgagor not in occupation—Registered land—Oral tenancy agreed and completed by tenant's entry before mortgagor has completed purchase of property—Purchase completed and mortgage granted on same day—Whether mortgagee entitled to possession as against tenant—Land Registration Act, 1925 (15 & 16 Geo. 5 c. 21), s. 20 (1), s. 27 (3), s. 70 (1) (g)—Law of Property Act, 1925 (15 & 16 Geo. 5 c. 20), s. 55 (c).

C

Rent Restriction—Premium—Rent paid for three years in advance—Whether payment constituted a premium—Whether tenancy rendered invalid by payment of premium—Landlord and Tenant (Rent Control) Act, 1949 (12 & 13 Geo. 6 c. 40), s. 2.

Land Registration—Charge—Date of vesting of legal estate—Land Registration Act, 1925 (15 & 16 Geo. 5 c. 21), s. 20 (1), s. 27 (3).

D

W. agreed to let to H. at a weekly rent of £2 0s. 6d. a flat in property of which W. intended to acquire the freehold. H. paid to W. £315 18s. and received a receipt for that sum being 156 weeks' advance rent. By a contract dated Nov. 28, 1955, W. agreed to purchase the freehold from G.S. for £2,300 of which part was to be left on mortgage. H. entered into occupation of the flat on Dec. 27, 1955. The weekly rent was the amount recoverable as rent under the Rent Restrictions Acts. On Dec. 30, 1955, W.'s purchase of the freehold property, the title to which was registered, was completed by execution of a transfer, and on the same day the property was mortgaged by W. by registered charge in favour of the plaintiff. On Jan. 9, 1956, the transfer and the charge were registered under the Land Registration Act, 1925, s. 19 and s. 26. The registered charge did not exclude or limit a mortgagor's power of leasing. In July, 1956, instalments of the charge being in arrear, the plaintiff took proceedings against W. and H. for possession.

E

F

Held: the plaintiff was not entitled to possession for the following reasons—

G

(i) assuming that the payment of the rent in advance was a premium unlawfully demanded within the Landlord and Tenant (Rent Control) Act, 1949, s. 2, H. was not debarred by participating in that illegal act from asserting any right which she might have under a contract of tenancy.

(ii) the £315 18s. paid by H. did not (by reason of its payment as one sum) lose its character as rent and become a mere premium so as to enable the plaintiff to argue that no rent had been paid.

H

Dictum of PARKE, B., in *Braythwayte v. Hitchcock* ((1842), 10 M. & W. at p. 497) considered.

(iii) H. acquired "an interest in land by virtue of taking possession" within the Law of Property Act, 1925, s. 55 (c), and, there being a moment of time on Dec. 30, 1955, when W. was the absolute beneficial owner of the property, W. was estopped from denying H.'s right as W.'s tenant to remain in occupation for the period for which H. had paid rent.

I

(iv) the plaintiff was in no better position than W. because the Land Registration Act, 1925, s. 27 (3)*, did not render the plaintiff's legal charge effective from the date of its execution so as to override H.'s interest, which was an overriding interest (within s. 70 (1)* (g) of the Act of 1925) to which the plaintiff's charge was made subject by s. 20 (1)*.

* The terms of s. 20 (1), s. 70 (1) and s. 27 (3) are printed at p. 782, letter I, and p. 783, letters B and F, post.

Decision of DANCKWERTS, J. ([1958] 1 All E.R. 138) affirmed.

[As to what is a premium, see 23 HALSBURY'S LAWS (3rd Edn.) 804, para. 1583; and as to overriding interests within the Land Registration Act, 1925, see *ibid.*, p. 182, para. 348; and as to the time when a charge takes effect, see *ibid.*, pp. 251, 252, para. 558.

For the Land Registration Act, 1925, s. 20, s. 27 and s. 70 (1) (g), see 20 HALSBURY'S STATUTES (2nd Edn.) 962, 970, 1002.

For the Law of Property Act, 1925, s. 55, see 20 HALSBURY'S STATUTES (2nd Edn.) 553, 554.

For the Landlord and Tenant (Rent Control) Act, 1949, s. 2, see 13 HALSBURY'S STATUTES (2nd Edn.) 1097.]

Cases referred to:

- (1) *Hughes v. Waite*, [1957] 1 All E.R. 603; 3rd Digest Supp.
- (2) *Woods v. Wise*, [1955] 1 All E.R. 767; [1955] 2 Q.B. 29; 119 J.P. 254; 3rd Digest Supp.
- (3) *Hitchcock v. Waite*, (1957, May 29), *The Times*, May 30.
- (4) *Gray v. Southouse*, [1949] 2 All E.R. 1019; 31 Digest (Repl.) 689, 7804.
- (5) *Braythwaite v. Hitchcock*, (1842), 10 M. & W. 494; 152 E.R. 565; sub nom. *Braithwaite v. Hitchcock*, 12 L.J.Ex. 38; 30 Digest (Repl.) 413, 569.
- (6) *Green v. Rheinberg*, (1911), 104 L.T. 149; 35 Digest 405, 1463.
- (7) *Hunt v. Luck*, [1902] 1 Ch. 428; 71 L.J.Ch. 239; 86 L.T. 68; 35 Digest 469, 2044.

Appeal.

This was an appeal by the plaintiff, the mortgagee of a dwelling-house, from an order of DANCKWERTS, J., dated Dec. 16, 1957, and reported [1958] 1 All E.R. 138, dismissing a claim for possession against the mortgagors of premises and those in occupation who claimed to be tenants of the mortgagors.

Harold Christie, Q.C., and *P. R. Oliver* for the mortgagee.

Geoffrey Cross, Q.C., and *N. F. Stogdon* for the tenants.

LORD EVERSHERD, M.R.: In this case I have come to the conclusion, with all respect to the forceful arguments for the appellant, the mortgagee, put to us by Mr. Christie, that DANCKWERTS, J., rightly concluded the matter as he did.

The case, as counsel for the mortgagee observed, arose, as some other cases have arisen, out of the somewhat nefarious transactions of three persons called Waite, also calling themselves (with what justification I know not) estate agents. They, taking advantage of the great demand for living accommodation, succeeded in extracting sums of money from persons whom they put into occupation of houses to which they, as often as not, had no title whatever at the material date. They then acquired some title to the premises, but subjected them to mortgages. In the result conflicts have arisen between two sets of persons equally innocent, namely, the mortgagees, who are no parties to the malpractices of the Waites, and the tenants who were the victims of those malpractices; and this is another such case.

It is perhaps convenient, having regard to that prelude, for me to say that in 1957 there came before HARMAN, J., another such case under the name of *Hughes v. Waite* (1) ([1957] 1 All E.R. 603). The general procedure followed that which I have very briefly described, but in *Hughes v. Waite* (1) the tenant did not in fact go into possession or occupation of any part of the premises until a date later than the date of the mortgage which the Waites executed of the property itself. In this case that vital fact is otherwise. It is a feature of this case that the three tenants, the three respondents in this court, all went into occupation at a date before the Waites executed their mortgage in favour

A of the present appellant, and that circumstance has given rise to the somewhat special points which have been debated before us.

The facts in regard to the three tenants were found by the learned judge in the course of his very full and careful judgment. I shall not recite them all again but for simplicity I shall take the case of one of these tenants, Mrs. Hitchen. She, it appeared, first came into contact with the Waites in October, 1955.

B She then arranged with the Waites that she should get a tenancy of one floor, viz., the top floor in premises at No. 8, Church Road, Forest Hill. The learned judge heard the witnesses. Mrs. Hitchen herself was called so as to be available for cross-examination on her affidavit. The substance of the matter, as the judge found, was that a somewhat loose arrangement or bargain was made at the date I have mentioned that she should have a tenancy of this top floor

C flat as a weekly tenant at a weekly rent of £2 0s. 6d. which should be inclusive of rates. It was, however, an essential part of the bargain, and one on which the Waites insisted as being essential to their machinations, that she should pay three years', i.e., 156 weeks', rent in advance; and that she did. She was given a receipt which states on the face of it that the Waites had received £315 18s. being 156 weeks' or three years' advance rent for the flat to which I

D have referred. The date in October which that receipt bears is one on which the Waites in fact had no interest in the premises No. 8, Church Road, nor did Mrs. Hitchen then go into possession. But on Nov. 28, 1955, the Waites entered into a contract to purchase the whole house (including the top flat) from Colonel Sinclair for the sum of £2,300. The completion date was stated in the contract as Dec. 19, but completion in fact took place on Dec. 30, 1955. In the mean-

E time, however, a vital and important event occurred. On Dec. 27, three days before completion, Mrs. Hitchen, who had been sent the key of the flat by post, went into occupation. On Dec. 30 the contract for sale was completed in the sense that a transfer of the property, which was registered property, was duly executed in favour of the Waites by Colonel Sinclair. On the same date, the Waites executed a mortgage by way of legal charge in favour of the present

F plaintiff for a sum of somewhat less than the purchase price. The registration, both of the transfer and the legal charge, occurred on Jan. 9, 1956.

Let me repeat and emphasise the significance of the dates. First, there was the oral bargain under which the Waites promised to give Mrs. Hitchen the right of occupying the top flat at No. 8, Church Road as a weekly tenant at £2 0s. 6d. a week, providing she paid three years of that rent in advance. Next there was

G the contract by the Waites for the purchase of the property including the flat. Next Mrs. Hitchen, in pursuance of the arrangement with the Waites, went into possession, the Waites at that time having under the contract an equitable right to the property subject to defeasance in the event of non-completion. Next, there was the completion on Dec. 30, which had the effect of making the legal owner a trustee of the legal estate absolutely for the Waites; but immediately afterwards there was an effective charge in favour of the mortgagee, and

H finally, the registration on Jan. 9.

I need not (and do not propose to) refer to the other cases of Spurling and Neill because in essentials the facts are the same and in neither case is there any fact less favourable to the plaintiff than in the Hitchen case.

On those facts, as I have briefly stated them, counsel for the mortgagee has

I argued that Mrs. Hitchen took no interest in the premises notwithstanding her occupation from Dec. 27: first, because the bargain was incapable of being made effectively by parol, and further because, as he has contended, the sum paid of £315 18s. was not rent, and, accordingly, when she did go into possession, she could never say that she was there on the terms of payment of rent. She paid no rent thereafter, and, as I have said, according to that argument, she paid no rent at any time. Counsel says that at best she had some kind of contract with the Waites, but not such as was ever sufficient for, or could have been

the subject of, a decree for specific performance. The result of that is, counsel says, that Mrs. Hitchen never acquired an effective right even against the Waites to remain in occupation, and, therefore, a fortiori, she never got any right whatever which was effective against the mortgagees for whom he appears.

He has argued two further points. First, he says that, whatever else may have been the position, whatever other might have been the situation, if this had not been registered land, the fact that it is registered land entitles the mortgagee to rely on s. 27 (3) of the Land Registration Act, 1925, which, he argued, makes the legal charge granted to the mortgagee effective from its own date, notwithstanding that it was not registered until Jan. 9, and so, according to the terms of s. 27 (3), would override any equitable or contractual or other interest which Mrs. Hitchen might have had. Second and last, counsel for the mortgagee has contended that, whether or no the sum of £315 18s. might be called rent for any purposes, it certainly amounted to a premium unlawfully required under the rent restrictions legislation, that the Waites committed a criminal offence in demanding it, and that Mrs. Hitchen was particeps criminis in paying it and cannot in the circumstances rely on the bargain which put her in occupation of which this illegal transaction was a part. Those were his contentions and as I have indicated DANCKWERTS, J., rejected them.

In my judgment, the vital matter to determine in this case is what were the rights of Mrs. Hitchen, if any, as against the Waites when she went into possession, and, particularly, thereafter at the point of time on Dec. 30 when the Waites' contract to purchase was completed. But since the illegality point, if I may so describe it, is in a sense fundamental to the whole issue, it is perhaps convenient to dispose of that first. If the truth is that the bargain was so tainted with illegality that Mrs. Hitchen cannot rely on it, that would be a conclusion of the whole matter. In my judgment, it clearly was not. The essential section is s. 2 of the Landlord and Tenant (Rent Control) Act, 1949. By s. 2 (6) it is enacted that

"A person requiring any premium in contravention of this section shall be liable on summary conviction to a fine",

indicating, of course, that it is a criminal offence so to require. The fact that it is illegal to require rather than accept the payment was considered fully by this court in *Woods v. Wise* (2) ([1955] 1 All E.R. 767). In the course of that case, ROMER, L.J., expressed the view that the payment of a sum by way of satisfaction and in advance of the rent was a premium within the Rent Restrictions legislation. BIRKETT, L.J., and I, the other members of the court, expressed no view on that matter, and I think that in the present case it is equally unnecessary to express a view whether the £315 18s. was "a premium" within the Rent Restrictions Acts; but, assuming for the purposes of the argument that it was a premium, undoubtedly the Waites committed a criminal act in requiring the payment of £315 18s. as a condition of the grant of the rights of occupation which they promised. It does not, however, follow, in my judgment, that Mrs. Hitchen by paying it was so tainted with the criminality of the Waites as to disable her from setting up her bargain in any form at all. There have been suggestions that by paying such a premium a tenant might be tainted, and one such case is *Hitchcock v. Waite* (3) (The Times, May 30, 1957), before VAISEY, J., a case also concerned with the same characters in the shape of these estate agents, the Waites. There is no authority with regard to the matter in this court, but there is a decision of DEVLIN, J., in *Gray v. Southouse* (4) ([1949] 2 All E.R. 1019), which was cited to and relied on by DANCKWERTS, J., for the view that a tenant who had been prevailed on to submit to a demand for payment of rent in advance ought not to be treated as disabled from having any rights under the contract for that reason. I agree with that view and I think also that the proviso to s. 2 (5) of the Act of 1949 would strongly support the same view. The proviso

- A relates to the case of a demand of a premium made after Mar. 25, 1949, but before the commencement of the Act of 1949—during a period, therefore, when to demand it would, apart from the Act of 1949, have been perfectly lawful. The Act of 1949 in this respect takes effect as regards all agreements made after Mar. 25, 1949, subject to the proviso. Therefore, without the proviso, the result might be that a bargain, at the time it was entered into being perfectly
- B lawful, would result in rights against the landlord which arose exclusively out of the later legislation. It was therefore thought obviously proper that such an agreement—that is an agreement made since Mar. 25, 1949, but before the commencement of the Act of 1949—should be voidable at the suit of either party. This court has held that it is only voidable when it is executory. If the premium has already been paid then neither the landlord nor the tenant can rely on
- C the proviso and say that the executed agreement is voidable. If the argument as to illegality is right, viz., if a landlord who demanded a premium after the coming into operation of the Act of 1949 when he could not deny that it was quite illegal, should be able to turn round and deny to the tenant his rights which the contract purported to give him, then it seems to me to lead to a very strange result, for he would be in a stronger position than the innocent landlord who had
- D made his bargain at a time when it was not illegal to do so. Therefore, I reject, as did the learned judge, the proposition that Mrs. Hitchen is debarred by participating in a criminal act from asserting any right which she may have under her contract of tenancy.

- I have referred for the purposes of the Landlord and Tenant (Rent Control) Act, 1949, to the effect of the payment of this sum of £315 18s., but counsel for
- E the mortgagee has contended that for the purposes of the Law of Property Act, 1925, and the general law, the £315 18s. equally lost all the characteristics of rent and was a mere premium. He relied on *Braythwayte v. Hitchcock* (5) (1842). 10 M. & W. 494), as showing that Mrs. Hitchen, though she went into occupation, had no rights against the landlord because no rent was paid by her. PARKE, B., in that case said (*ibid.*, at p. 497):

- F “Although the law is clearly settled, that where there has been an agreement for a lease, and an occupation without payment of rent, the occupier is a mere tenant at will; yet it has been held that if he subsequently pays rent under that agreement, he thereby becomes tenant from year to year.”

- G So it is contended that, according to the ordinary law, Mrs. Hitchen never got any better right than a pure licensee or a tenant at will. I am unable to agree with that view, nor do I think that the statement of PARKE, B., leads to that result. He was dealing only with a case where one having made an agreement providing for the payment of rent has gone into possession but has failed to pay at the relevant date any rent at all. It seems to me that, on the facts of this case, when Mrs. Hitchen went in she must be treated as having paid the rent
- H for a period; and the terms of the receipt clearly support that view. So, when I come to look at the Law of Property Act, 1925, s. 54, which is relied on, I am far from saying that (in so far as s. 54 (2) might otherwise apply) this is a case in which all that happened was that there had been a sum of money taken but no rent paid. In this respect the case may I think be reasonably said to be likened to *Green v. Rheinberg* (6) ((1911), 104 L.T. 149). In that case there
- I had been a lease executed in favour of a lessee, which, on the face of it, showed that the rent was payable periodically in the ordinary way, but by a collateral arrangement the landlord had taken a lump sum in satisfaction of the rent over a period of years. Unfortunately for him, the mortgagee there had notice of the counterpart lease which he had seen, but had omitted to make any further inquiry and assumed that the parties were regulating their conduct according to its terms. The mortgagee was held to be bound by the rights which the lessee had as against his landlord, not according to the terms of the counterpart of

the lease, but according to the facts which were that he had paid the rent in advance and therefore no further rent was payable until the period had elapsed. It will be observed that the lessee was not in that case disentitled to his rights because he had so paid his rent in advance. So in this case it would appear to me that Mrs. Hitchen when she was let into possession could say: "I am a weekly tenant at £2 0s. 6d. and I have paid a sum which the landlord has accepted in satisfaction of my obligation to pay rent for a period of three years". In fact the period was 156 weeks which, if it is relevant, is slightly less (by four days) than three years. It seems to me also right to say (if it be necessary) that her rights, if they are in other respects available to her, would be limited to three years' occupation and would not involve, as was the result in one of the other cases, a promise of occupation for three years plus one week.

I come now to consider what her rights were against the Waites. It seems to me that she was and is entitled, as against them, to say, under the provisions of the Law of Property Act, 1925, s. 55 (c), that she acquired "an interest in land by virtue of taking possession". The bargain which she had made was as I have stated it. She had gone into possession and she was there under the terms of the agreement; and it seems to me, as this court has laid down, that there was a moment of time on Dec. 30, 1955, when the Waites were absolute beneficial owners of the property and therefore would be estopped as against her from denying her rights as their tenant to remain in occupation for the period for which she had paid rent. Whether that interest was an interest which equity would specifically enforce, or whether it was a mere contractual right, seems to me irrelevant. Mrs. Hitchen having gone into occupation and acquired that right against the Waites, they could not and would not have been allowed by the court to assert against Mrs. Hitchen that they could evict her.

That still leaves the question: Is the present appellant, the mortgagee, in any different position? That brings me to a point which has been much pressed on us arising under the Land Registration Act, 1925, to which I have already briefly referred. The argument, as I have indicated, depends on the true interpretation of s. 27 (3). By s. 19 (1) it is provided that transfers of registered estates in land shall be completed by the registrar

"entering on the register the transferee as the proprietor of the estate transferred, but until such entry is made the transferor shall be deemed to remain proprietor of the registered estate . . ."

Section 19 (2) provides:

"All interests transferred or created by dispositions by the proprietor, other than a transfer of the registered estate in the land, or part thereof, shall, subject to the provisions relating to mortgages, be completed by registration in the same manner and with the same effect as provided by this Act with respect to transfers of registered estates . . ."

Section 20 (1) provides:

"In the case of a freehold estate registered with an absolute title, a disposition of the registered land or of a legal estate therein, including a lease thereof, for valuable consideration shall, when registered, confer on the transferee or grantee an estate in fee simple . . . or other legal estate expressed to be created in the land dealt with, together with all rights . . . subject . . . (b) . . . to the overriding interests, if any, affecting the estate transferred or created, but free from all other estates and interests whatsoever . . ."

Reference must also be made to s. 26 in relation to charges, but I need only point out that by that section charges by way of legal mortgage shall be completed by the registrar entering on the register the person in whose favour the charge is

A made. Apart from s. 27 (3), it would appear, therefore, to be tolerably clear that the title of the purchaser or of the mortgagee as the case may be in the case of registered land is not perfected until registration, and that when registration takes effect it is subject to overriding interests which are anticipated by s. 20 but more precisely defined by s. 70. Section 70 (1) provides:

B “All registered land shall . . . be deemed to be subject to such of the following overriding interests as may be for the time being subsisting in reference thereto . . .”

Then para. (g) covers the rights of every person in actual occupation of land

C “save where inquiry is made of such person and the rights are not disclosed.”

As I say, apart from s. 27 (3) I agree with counsel for the tenants that the effect of s. 70 (1) (g) is to make the case of registered land analogous to the case of non-registered land, and to apply to the former the same kind of principle as is found in the well-known case of *Hunt v. Luck* (7) ([1902] 1 Ch. 428) and exemplified in *Green v. Rheinberg* (6).

D Turning to s. 27, it is to be observed that the section is directed, at any rate at first sight, to procedure and form. It provides:

“ (1) A registered charge shall, unless made or taking effect by demise or sub-demise . . . take effect as a charge by way of legal mortgage.

E “ (2) Subject to the provisions of the Law of Property Act, 1925, a registered charge may contain in the case of freehold land, an express demise, and in the case of leasehold land an express sub-demise of the land to the creditor for a term of years absolute, subject to a proviso for cesser on redemption.

F “ (3) Any such demise or sub-demise or charge by way of legal mortgage shall take effect from the date of the delivery of the deed containing the same, but subject to the estate or interest of any person (other than the proprietor of the land) whose estate or interest (whenever created) is registered or noted on the register before the date of registration of the charge.”

G The argument, as I follow it, appears to be (i) that the time from which the mortgage shall take full effect must be treated as being the moment of the execution of the legal charge which would put the legal estate in the chargee from that date, and (ii) that the legal estate overrides all interests save those of persons whose estates or interests are registered or noted on the register. It seems to me that that cannot be right. If so, it would be inconsistent, so far as I can see, with the purpose and intention of the earlier sections to which I have already alluded, and which provide that until registration (in the case of a sale) the vendor remains the proprietor of the legal estate. I am unable to accept that if the registered proprietor is to be treated as remaining the proprietor of the legal estate, a legal estate at the same time can also be created in favour of somebody else not on the register at all and not deriving title from someone on the register, although the earlier s. 19, s. 20 and s. 26 indicate that a charge is only completed by entry on the register. I think further that the words

H “shall take effect” would be a very inept and oblique way of providing for the creation, retrospectively, of some legal interest. After all, the words “shall take effect” are found in s. 27 (1) which provides: “A registered charge shall . . . take effect as a charge by way of legal mortgage.”

I In my judgment, DANCKWERTS, J., was quite right in the view which he formed that the purpose of this provision is to negative the suggestion that, pending registration, the charge is wholly ineffective, because otherwise, being only by the terms of the earlier sections capable of being completed by registration, it

might never be effective at all since at its date *ex concessis* the person granting the legal charge might not himself be on the register. The learned judge pointed out that the point was a new one. The section indeed is a new section not re-enacted from any earlier statute. As the judge pointed out, the argument was a novel one not previously taken, and he did not think it was sound. He said ([1958] 1 All E.R. at p. 142):

"I do not think that the sub-section is dealing with the matter of legal estates or interests, but with the form of a registered charge, and is simply designed to secure that the demise or sub-demise (or the equivalent rights in the case of a charge by way of legal mortgage) begin from the date when the charge is executed. In any case, the tenancies of the defendants in possession began prior to the date of the execution of the charge and so would, if not invalid, be effective against the plaintiff under s. 20 (1) of the Act."

I agree also with that. It would seem to me that it would be contrary to the whole tenor of the Act and indeed to general principle if by reason of the reference in s. 27 to estates or interests which are registered or noted on the register one could produce the result that the mortgagee could defeat the interests of a tenant of which he had notice when he took possession. According to general principles (and indeed it has not been contested) the mortgagee had or must be treated as having had notice of the occupation of Mrs. Hitchen and her companions since there they were in occupation for all to see.

In the result it seems to me that the position of the mortgagee can be no better than the position of the Waites as against the tenants. I further concur with the learned judge in the view that the tenants had as against the Waites at the relevant date a right founded in contract, and that that was an interest in land which they were able to assert against the Waites and which entitled them to remain in occupation during the period in respect of which they had paid the stipulated rent in advance. I should say that it is not in doubt that the £2 0s. 6d. was in truth the standard rent under the Rent Restrictions Acts and therefore the maximum charge by way of rent which they could make and there is here no discount of the rent by the payment in advance. I have stated that the £315 18s. represents in fact 156 weekly payments. I have said that as against the tenants the Waites would have been estopped from saying that they were mere licensees, and, therefore, I think the same conclusion affects the mortgagee. That result, in my opinion, is neither affected by the terms of the Land Registration Act, 1925, nor by any alleged illegality under the Act of 1949. As a consequence I think that the learned judge rightly concluded the matter and this appeal should be dismissed.

ROMER, L.J.: I am in full agreement with the judgment which LORD EVERSHED, M.R., has delivered and I do not desire to add anything of my own.

ORMEROD, L.J.: I also agree.

Appeal dismissed. Leave to appeal to the House of Lords refused.

Solicitors: *A. Kramer & Co.* (for the mortgagee); *Humphrey Razzall & Co.* (for the tenants).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

A

PRACTICE DIRECTION.

Practice—Payment out of court—Affidavit of no settlement no longer required.

The judges of the Chancery Division have directed that it shall no longer be necessary to require from a widow or a married woman and her husband an

B

“affidavit of no settlement” before making an order for payment out to her of a fund in court.

July 16, 1958.

MAURICE WILLMOTT,
Chief Master, Chancery Division.

C

PYE-SMITH AND ANOTHER *v.* INLAND REVENUE
COMMISSIONERS.

[CHANCERY DIVISION (Danckwerts, J.), July 7, 8, 1958.]

D

Estate Duty—Determination of life interest—Allotment of fully paid shares—Life tenant releasing life interest in the shares in favour of remaindermen—Trustees renouncing shares in favour of remaindermen—Death of life tenant within five years—Liability to duty—Finance Act, 1940 (3 & 4 Geo. 6 c. 29), s. 43 (1) (a), as amended by Finance Act, 1950 (14 Geo. 6 c. 15), s. 43.

E

By a settlement dated Dec. 16, 1904, a fund was directed to be held for Mrs. R. for her life and (in the event which happened) on her death for the benefit of her issue as she should appoint and subject thereto for her children who attained the age of twenty-one years, or being female married, equally. Mrs. R. had two children both of whom were at all material times over

F

twenty-one years of age. The trust fund included seven thousand £1 ordinary shares in S.O., Ltd. At an extraordinary general meeting of S.O., Ltd. held on July 30, 1952, it was resolved to sub-divide each of the ordinary shares into two ordinary shares of 10s. each, to increase the capital of the company by the creation of a large number of new ordinary shares of 10s. each to rank *pari passu* with existing ordinary shares, to capitalise

G

reserves and apply them in paying up in full new ordinary shares, and that such ordinary shares be allotted and distributed to members in the proportion of one new share for each one held. Pursuant to the company's articles of association one person entered, on behalf of all the members holding ordinary shares, into an agreement (dated July 30, 1952) with the company providing for the allotment to them respectively of any shares

H

to which they might be entitled on such capitalisation. The names of persons to whom the shares were to be allotted were specified in a schedule to the said agreement and included the names of the trustees of the settlement of 1904. On July 30, 1952, a letter of allotment was sent to the trustees, which was received by them on Aug. 1, 1952, informing them that they had been allotted fourteen thousand ordinary shares of 10s. each

I

credited as fully paid up, and that the right to all or any of the shares comprised in the allotment letter might be renounced in favour of one or more persons. A form of letter of renunciation was enclosed. By a release dated July 31, 1952, Mrs. R. released her power of appointment in favour of her issue under the settlement of 1904 and surrendered “all that her life interest in ten thousand new fully paid ordinary shares of 10s. each in [S.O., Ltd.] which but for the provisions of this deed would become subject to the trusts of the settlement to the intent that such life interest may be merged in the capital of such shares and that the trustees shall

forthwith stand possessed of such shares in trust for " Mrs. R.'s two children equally. The court found that the earliest date on which the release could in fact have been effectively delivered and have become operative was Aug. 9, 1952. The trustees' letter of renunciation of the ten thousand shares in favour of the children was dated Aug. 11, 1952. On Mar. 2, 1956, Mrs. R. died and estate duty was claimed by virtue of the Finance Act, 1940, s. 43, as amended by the Finance Act, 1950, s. 43, in respect of the ten thousand 10s. ordinary shares in the company which were the subject of the release of July 31, 1952.

Held: estate duty was exigible by virtue of s. 43 of the Act of 1940 (as amended) because

(i) there was a binding agreement between the company and the shareholders (the trustees) for the allotment of shares to the trustees with an option to renounce shares in favour of other persons; and

(ii) although the trustees had power to renounce shares, unless and until they did so they were the owners in equity of those shares, and Mrs. R. became entitled to an equitable interest in them at the latest by Aug. 1, 1952 (the date of the allotment letter being received by the trustees); and

(iii) therefore by the release, which became operative on Aug. 9, 1952, Mrs. R. disposed of and determined an interest in the shares limited to cease on her death, and, if there had been no such disposition or determination, the shares would have passed on her death under the Finance Act, 1894, s. 1.

[As to liability for estate duty where there has been a disposition or determination of a limited interest, see 15 HALSBURY'S LAWS (3rd Edn.) 15, 16, para. 25.]

For s. 43 of the Finance Act, 1940, as amended by s. 43 of the Finance Act, 1950, see 29 HALSBURY'S STATUTES (2nd Edn.) 174, 183.]

Adjourned Summons.

The plaintiffs, as trustees of a marriage settlement dated Dec. 16, 1904, applied by originating summons for the determination under the Administration of Justice (Miscellaneous Provisions) Act, 1933, s. 3, of the question whether on the true construction of the marriage settlement and of a release dated July 31, 1952, and of the Finance Act, 1894, and amending Acts and in particular of the Finance Act, 1940, s. 43, as amended by the Finance Act, 1950, s. 43, and in the events which had happened, estate duty became payable on the death on Mar. 2, 1956, of Winifred Caroline Ramage (the intended wife under the marriage settlement) in respect of ten thousand fully paid ordinary shares of 10s. each of Samuel Osborn & Co., Ltd., or in respect of any other and if so what property comprised or affected by the release.

Denys B. Buckley for the plaintiffs, the trustees of the settlement.

E. Blanshard Stamp for the defendants, the Inland Revenue Commissioners.

DANCKWERTS, J.: The question is whether estate duty is payable in respect of the death of Mrs. Ramage, who died on Mar. 2, 1956, by reason of a transaction which took place within five years of her death.

The relevant section of the taxing Acts is the Finance Act, 1940, s. 43, as amended by the Finance Act, 1950, s. 43. The Finance Act, 1940, s. 43 (1), as amended, provides:

" Subject to the provisions of this section, where an interest limited to cease on a death has been disposed of or has determined, whether by surrender, assurance, divesting, forfeiture or in any other manner (except by the expiration of a fixed period at the expiration of which the interest was limited to cease), whether wholly or partly, and whether for value or not, after becoming an interest in possession, and the disposition or determination (or any of them if there are more than one) is not excepted by sub-s. (2) of

A this section, then—(a) if, had there been no disposition or determination as aforesaid of that interest and no disposition of any interest expectant upon or subject to that interest, the property in which the interest subsisted would have passed on the death under s. 1 of the Finance Act, 1894, that property shall be deemed by virtue of this section to be included as to the whole thereof in the property passing on the death; . . .”

B Paragraph (b) deals with cases in which property is deemed to pass under the Finance Act, 1894, s. 2 (1) (b).

The question is whether Mrs. Ramage had at the material time an interest in possession to cease on her death in respect of shares in a limited company, and whether, if there had been no disposition or determination at the time it was executed, the property in which the interest subsisted would have passed on her death, under the Finance Act, 1894, s. 1.

C The matter arises under a settlement dated Dec. 16, 1904. Mrs. Ramage was the wife in respect of that marriage settlement and we are only concerned with the trusts of the wife's fund. They were of an extremely ordinary kind. She took a life interest, and after her death a life interest went to her husband, who pre-deceased her; then there were the usual powers of appointment in favour of issue, and in default of appointment the property became divisible among the children of the marriage who attained twenty-one or, in the case of females, married. There were two children of the marriage, and at all material times they have been over twenty-one and, consequently, there is no question that they had attained a vested interest under the settlement, subject to divesting by the exercise of the power of appointment. The sequence of events is this. The trustees under the settlement had among the investments subject to the trusts seven thousand £1 ordinary shares in the capital of a company called Samuel Osborn & Co., Ltd. The company subsequently sub-divided those shares into fourteen thousand shares of 10s. each, and then carried out a transaction under which it capitalised certain moneys which it had, and issued new shares fully paid-up by the appropriation of those moneys to those shares, on the footing that each holder of the ordinary 10s. shares became entitled to a bonus share also of 10s.

F It is desirable to refer first to the relevant articles of the company's articles of association. They are arts. 133 and 134, which have the cross-heading “Capitalisation of Profits”. Article 133 is as follows:

G “The company in general meeting may, upon the recommendation of the directors, resolve that it is desirable to capitalise any undivided profits of the company not required for paying the fixed dividends on any preference shares (including profits carried and standing to any reserve or reserves or other special account), and accordingly that the directors be authorised and directed to appropriate the profits resolved to be capitalised to the members holding ordinary shares in proportion to the amounts paid upon the issued ordinary shares held by them respectively, and to apply such profits on their behalf, either in or towards paying up the amounts, if any, for the time being unpaid on any shares held by such members respectively, or in paying up in full unissued shares or debentures of the company of a nominal amount equal to such profits, such shares or debentures to be allotted and distributed, credited as fully paid up, to and amongst such members in the proportion aforesaid, or partly in one way and partly in the other. Provided that a share premium account and a capital redemption reserve fund may, for the purpose of this regulation, only be applied in the paying up of unissued shares to be issued to members of the company as fully paid bonus shares.”

Article 134 is as follows:

"Whenever such a resolution as aforesaid shall have been passed, the directors shall make all appropriations and applications of the undivided profits resolved to be capitalised thereby, and all allotments and issues of fully paid shares or debentures, if any, and generally shall do all acts and things required to give effect thereto, with full power to the directors to make such provision by the issue of fractional certificates or by payment in cash or otherwise as they think fit for the case of shares or debentures becoming distributable in fractions and also to authorise any person to enter on behalf of all the members holding ordinary shares into an agreement with the company providing for the allotment to them respectively, credited as fully paid up, of any further shares or debentures to which they may be entitled upon such capitalisation, or (as the case may require) for the payment up by the company on their behalf, by the application thereto of their respective proportions of the profits resolved to be capitalised, of the amounts or any part of the amounts remaining unpaid on their existing shares, and any agreement made under such authority shall be effective and binding on all such members."

The passage in art. 134 beginning "and also to authorise" is an important passage.

On July 30, 1952, an extraordinary general meeting of the company was held, and the following resolutions were passed:

"1.—That each of the 430,600 ordinary shares of £1 each in the capital of the company be sub-divided into two ordinary shares of 10s. each.
 2.—That the capital of the company be increased to £1,500,000 by the creation of 1,800,000 new shares of 10s. each of which (a) four hundred thousand shall be designated ordinary shares ranking *pari passu* in all respects with the existing ordinary shares of the company and so as to form one uniform class therewith and (b) the remaining 1,400,000 of the said new shares shall for the time being be unclassified. 3.—That it is desirable to capitalise the sum of £293,014 being as to £215 16s. 7d. the amount standing to the credit of 'capital reserve' and representing excess profits tax post war refund and as to £292,798 3s. 5d. part of the undivided profits of the company standing to the credit of general revenue reserve and accordingly that the directors be and they are hereby authorised and directed to appropriate the said sum of £293,014 to the members holding ordinary shares at the time of the passing of this resolution in proportion to the amounts paid up on the issued ordinary shares then held by them respectively and to apply the said sum of £293,014 on their behalf in paying up in full 586,028 ordinary shares of 10s. each in the capital of the company and that such 586,028 ordinary shares be allotted and distributed credited as fully paid up to and amongst such members in the proportions aforesaid i.e. one of such ordinary shares for every ordinary share then held by such persons respectively, and the ordinary shares to be so allotted and distributed shall rank for all dividends which may be declared hereafter in respect of the financial year of the company to July 31, 1952, and shall be treated for all purposes as an increase of the nominal amount of the capital of the company held by each such member and not as income."

Then there are certain alterations of the articles, to which I need not refer. On the same day there was a directors' meeting of the company's board, and the minute states this: "The chairman reported the result of" the meeting which I have just referred to, and that is set out. Then:

"It was resolved that, pursuant to the said resolution (c) the sum of £293,014 . . . be appropriated to the members holding ordinary shares at the time of the passing of such resolution in proportion to the amounts paid up on the issued ordinary shares then held by them respectively, and be

A applied on their behalf in paying up in full 586,028 ordinary shares of 10s. each, and that, in accordance with the said resolution, 586,028 of such ordinary shares be allotted and distributed, credited as fully paid up, to and amongst such members in the proportions aforesaid and that, pursuant to the articles of association, Frank Arnold Hurst be and he is hereby authorised on behalf of the holders of the ordinary shares in the company's capital at

B the time of the passing of the said resolution (c) to enter into an agreement with the company providing for the said allotment, and that the draft of the said agreement submitted to this meeting be approved, and that the seal of the company be affixed to such agreement and duplicate thereof as and when the same shall have been signed by the said Frank Arnold Hurst. The said agreement, in duplicate, was thereupon signed by the said Frank

C Arnold Hurst, and the common seal was affixed thereto, it being dated July 30, 1952. It was also resolved that 586,028 ordinary shares of 10s. each in the capital of the company be allotted in accordance with the provisions of the said agreement and that the letters of allotment thereof, with forms of renunciation thereon, submitted to this meeting be sent out to the registered holders on July 30, 1952."

D Then there is a provision for payment free from deduction of income tax. The secretary was authorised to sign a return of allotments in respect of the above-mentioned 586,028 ordinary shares allotted at this meeting, such return of allotments, together with the agreement above-mentioned dated July 30, 1952, to be filed with the registrar of companies.

E Accordingly, an agreement dated July 30, 1952, and expressed to be made between Samuel Osborn & Co., Ltd., and Frank Arnold Hurst was executed by Mr. Hurst and the company's seal was duly fixed. The operative parts are as follows:

"1. The company shall allot and issue to each of the persons named in the schedule hereto or their nominees the number of new ordinary shares of 10s. each set opposite his or her name in the second column of the said schedule and where in such schedule several persons are bracketed as joint holders they shall be considered as one person for the purposes of this agreement.

"2. The said shares shall be credited as fully paid up and shall be accepted in satisfaction of the said capitalised sum."

G The schedule, which included the names of persons to be allotted shares, includes among others Mr. Arnold Stanley Pye-Smith and Mr. Talbot Edward Baines Pye-Smith, who are the trustees of the settlement and the plaintiffs in this action.

H The next event in order of time was that on the same day, July 30, 1952, the letter of allotment was sent out by the company's secretary and was received on Aug. 1 by the trustees. It referred to the issue of the shares, and so on, and contains these words:

"Last day for Splitting—Sept. 3, 1952. Last day for registration of renunciations—Sept. 10, 1952. Share certificates available on and after—Oct. 31, 1952."

I It was addressed to the trustees and it said:

"Dear Sir (or Madam), 1. I have to inform you that, pursuant to the terms of the resolution passed today, you have been allotted fourteen thousand ordinary shares of 10s. each credited as fully paid up, subject to the memorandum and articles of association of the company, in respect of your holding of ordinary shares at the time of the passing of the resolution, in the proportion of one new share for each ordinary share of 10s. held.

2. The right to all or any of the shares comprised in this allotment letter may, if you wish, be renounced in favour of one or more persons. Instructions covering the various alternatives open to you are printed on p. 3 overleaf and should be carefully followed. 3. The ordinary shares comprising this issue will rank *pari passu* with the existing ordinary shares for all dividends hereafter declared on the ordinary shares in respect of the financial year of the company to July 31, 1952."

Then there is a provision about the signatures of letters of renunciation being conclusive evidence, and a provision about definitive share certificates. The last paragraph is:

"6. Pending the issue of share certificates, transfers will be certified by the company against surrender of allotment letters."

Inside, there was a form of letter of renunciation and also a form of registration application intended for the nominee. The letter of renunciation was, apparently, not filled in and signed by the plaintiffs until Aug. 11, 1952, and it was, of course, a letter renouncing their right to the within-mentioned shares allotted to them, in favour of the party or parties signing the registration form "Y" below. That is dated Aug. 11, 1952.

Meanwhile a document had been executed by Mrs. Ramage which bears the date July 31, 1952. That date is plainly not the date when the document took effect. It was expressed to be made between Mrs. Winifred Caroline Ramage of the first part, the trustees of the second part, and the two children of the marriage who I have mentioned, Hugh Pye-Smith Ramage and Alice Pye-Smith Ramage of the third part. It recites that the deed is supplemental to the settlement. It recites that the husband never exercised and the wife never exercised the joint power of appointment given to them by the settlement. The husband died on Apr. 16, 1938. It recites the issue of the marriage, the two children. It refers to the number of shares in the company, eventually reduced to seven thousand, and the extraordinary general meeting of shareholders on July 30, 1952. Recital (7) is in these terms:

"Mrs. Ramage desires to disclaim all interest to which she would be entitled by virtue of the settlement in ten thousand of the said new ordinary shares of Samuel Osborn & Co., Ltd., to the intent that her two children Hugh Ramage the younger and Alice Ramage shall become immediately entitled thereto in possession and for this purpose has requested the trustees to renounce ten thousand of such new ordinary shares as to five thousand thereof in favour of Hugh Ramage the younger and as to the remaining five thousand thereof in favour of Alice Ramage which the trustees have agreed to do on the execution of such release surrender and indemnities as are hereinafter contained."

Coming to the operative parts, by cl. 1 the power of appointment is released. That meant that the interests of the children under the settlement ceased to be defeasible by exercise of the power. Clause 2 provides:

"Mrs. Ramage hereby surrenders unto the trustees all that her life interest in ten thousand new fully paid ordinary shares of 10s. each in Samuel Osborn & Co., Ltd., which but for the provisions of this deed would become subject to the trusts of the settlement to the intent that such life interest may be merged in the capital of such shares and that the trustees shall forthwith stand possessed of such shares in trust for Hugh Ramage the younger and Alice Ramage in equal shares absolutely."

- A In cl. 3 there is a covenant of indemnity by the two children and Mrs. Ramage to indemnify the trustees in respect of the transaction.

- B That document was executed at various dates between Aug. 2 and Aug. 9, 1952, and, quite plainly, could not take effect from July 31. At the earliest, I think it would not really have been effectively delivered and become operative until Aug. 9, 1952. The intention of the transaction was that four thousand of the fourteen thousand new shares were to be retained by the trustees of the settlement; the trustees should renounce as regards the other ten thousand new shares and those shares would be divided equally between the two children. It is to be observed that under the arrangements made by the company, it was impossible for the shareholders to claim to have the cash in place of the shares.
- C They could take nothing else but the shares; but they could, if they wished, renounce their right to the shares and transfer the benefit to persons whom they nominated, in accordance with the provisions of the transaction. The third thing to notice is that the transaction in favour of the children was not for any consideration whatever. It was something which would plainly have been a breach of trust if the trustees had not been indemnified by all the beneficiaries
- D who were together interested in the whole of the equitable interest under the settlement. The value of the shares was, no doubt, quite substantial. At the date of the death of Mrs. Ramage, each 10s. share, it is to be observed, was valued at between 54s. and 56s.

- E At the date of this transaction nobody had been registered as the owner of the shares on the company's register, but, on the other hand, the interest which the document dated July 31, 1952, was dealing with (as indeed, were all the interests that Mrs. Ramage and the children had) was necessarily equitable. It was the trustees who held the shares in respect of which the bonus shares were issued, and it is, therefore, only an equitable interest with which the case is concerned. Applications were duly made by the two children, Hugh Ramage
- F and Alice Ramage, on the appropriate forms. Hugh Ramage's and his sister's were both made on Aug. 21, 1952. They were, of course, nominees of the trustees to whom the fourteen thousand shares had been allotted by the allotment letter of July 30, 1952.

- G That is the position, and it is contended on behalf of the plaintiffs that Mrs. Ramage was never the owner of those shares and never had an actual life interest in those new shares and, consequently, they would not have passed on her death if that deed of release had never been executed. The argument comes down to this, that all that the trustees had was a right to these shares and that they could not be compelled to take the shares themselves and they had a right to nominate somebody else. Therefore, it is said, Mrs. Ramage cannot be treated
- H as having had an equitable interest in the shares because the trustees could not have obtained specific performance against the company and the company could not have obtained specific performance against the trustees until that final date when it was known to whom the shares were eventually to be allotted.

- I That seems to me to be wrong. It is plain that the release was executed on the footing that Mrs. Ramage had an actual interest for her life in these shares. It is true there is a rather odd passage in cl. 2 of the deed of release, where it is provided:

"Mrs. Ramage hereby surrenders unto the trustees all that her life interest in ten thousand new fully paid ordinary shares . . . which but for the provisions of this deed would become subject to the trusts of the settlement";

thereby suggesting that they might not become subject to the trusts of the

settlement owing to the operation of the deed; but, on the other hand, the clause continues:

“to the intent that such life interest may be merged in the capital of such shares and that the trustees shall forthwith stand possessed of such shares in trust for Hugh Ramage the younger and Alice Ramage in equal shares absolutely.”

To my mind, that clause was drafted entirely on the footing that the shares in fact formed part of the trust funds and, therefore, Mrs. Ramage was surrendering her life interest to the intent that, under the trusts of the trust fund, the two children become absolutely entitled. Moreover, it seems to me that, as a result of the resolutions passed by the company and the board of directors, and the agreement signed by Mr. Hurst on behalf of the ordinary shareholders, there was a binding agreement between the company and the ordinary shareholders for the allotment of the shares to the existing shareholders, though it is perfectly true that an option was given to the ordinary shareholders to renounce their rights to have the shares paid to themselves and instead to require them to be transferred to a nominee. Further, on July 30, 1952, it was by virtue of the allotment letter of that date that there was an allotment of fourteen thousand ordinary shares to the trustees, which included the ten thousand shares which are the subject of this case. Though it is true that the trustees were given a power to avoid the effect of the allotment in favour of somebody else, yet unless and until they did so, they were, by virtue of all these contractual obligations, the owners in equity of the fourteen thousand shares allotted to them in pursuance of these arrangements; therefore, Mrs. Ramage had in fact got an equitable interest by the latest on Aug. 1, 1952, in the ten thousand shares which are the subject of the present application. It is not necessary to refer to authorities to reach that result. It seems to me to be the effect of the documents and the transaction which was carried out.

Therefore, I am forced to the conclusion that, in the terms of the Finance Act, 1940, s. 43, as amended, an interest limited to cease on the death of Mrs. Ramage was disposed of and determined by the document in question, and if there had been no disposition or determination as aforesaid of that interest, the property (i.e., the ten thousand shares) in which the interest subsisted would have passed on her death under s. 1 of the Finance Act, 1894.

Order accordingly.

Solicitors: *Preston, Lane Claypon & O'Kelly*, agents for *Pye-Smith & Pepler*, Bath (for the plaintiffs); *Solicitor of Inland Revenue* (for the defendants).

[*Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.*]

